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By
GEORGE F. LONGSDORF
Editor New York Cyclopedic Digest, Illinois Cyclopedic Digest, Ohio Notes, etc.

VOLUME IV
FRATERNAL BENEFICIARY ASSOCIATIONS TO INFAMOUS CRIMES

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VOLUME IV

FRATERNAL BENEFICIARY ASSOCIATIONS.

TREATS of fraternal associations having as an incident of their purpose and membership rights the mutual insurance of members or the provision of benefits and reliefs by mutual contributions of dues and assessments for that purpose, also of the benefit contract between the association and the members and their agreed and designated beneficiaries. It excludes the general law of Insurance, which see, including mutual insurance where there is no fraternity of association, and also excludes the general law of associations unconnected with mutual benefit or insurance (see Associations; Corporations).

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¶ 1. Sections 7607-7617, 2 Comp. Laws 1897 authorizing the incorporation of a fraternal society composed of a supreme lodge and subordinate lodges, provide for more than one corporation, hence are not in conflict with Const. 1850, art. 15, § 1, prohibiting the creation of corporations by special act. —People v. Wilson, 157 Mich. 659.

¶ 2. The general statute authorizes the amendment of articles of association of a fraternal benefit association under Comp. L. 1897, § 8533.—Great Hive, Ladies of the Maccabees v. Supreme Hive, Ladies of the Maccabees, 129 Mich. 324.

¶ 3. A fraternal benefit society organized pursuant to How. St., §§ 3949-3955, amendatory of Pub. Acts 1869, No. 104, has no power to issue certificates providing for endowments payable at a fixed time.—Calkins v. Bump, 120 Mich. 335.

¶ 4. By virtue of section 10025, 3 Comp. Laws (Act No. 175, Pub. Acts 1907), benefit orders organized under 2 Comp. Laws 1897, chap. 212, may sue and be sued.—Golden Star Lodge No. 1 v. Watterson, 158 Mich. 696.

§ 2. Constitution and by-laws.

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Amendments to charter or articles of incorporation binding on members and beneficiaries, see Pub. Acts 1917, No. 256, chap. IV, § 8.

¶ 4a. The clear provisions of the constitution of the Schiller Bund of the City of Detroit, which is a mutual insurance society are its fundamental law and if provisions of its by-laws conflict therewith the fundamental law must govern.—Roulo v. Schiller Bund, 172 Mich. 557.

§ 3. ——Changes or amendments.

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Burden of proof as to amendments, see post § 72.
Power to amend constitution and by-laws, see Pub. Acts 1917, No. 256, chap. IV, §§ 12, 13.

¶ 5. Amendments to the constitution of a society, in order to be valid, must be adopted in substantial accordance with the provisions of the constitution relative thereto and in force at the time.—Dick v. General Assembly Order of the Amaranth, 150 Mich. 215.

§ 4. Ritual and name.

Construction of contract to sell ritual and abstain from use of same, see Contracts ¶ 889.
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Names of corporations in general, see Corporations, III.
Similarities in corporate names and infringements, see Corporations § 18.
Corporate name in articles of association, see Pub. Acts 1917, No. 256, chap. IV, § 12.

¶ 6. As against a participating member the New Era Association of Grand Rapids is a fraternal beneficiary society and as such

is entitled to the general exemptions provided for in its organic act, Comp. L. 1897, chap. 212, though it has no lodge or ritualistic work; even if Pub. Acts 1901, No. 226, which contains a proviso exempting such association from ritualistic work, is pro tanto invalid as class legislation. The member could not assail it for that.—Monger v. New Era Ass'n, 145 Mich. 683.

¶ 7. While members withdrawing from a fraternal society are not at liberty to associate themselves under a name so like the name of the parent order as to be calculated to deceive ordinary persons proceeding with ordinary care, they may, subject to this limitation, use any derivative of such name that they may see fit to employ.—Supreme Lodge K. of P. v. Improved Order K. of P., 113 Mich. 133.

¶ 8. In a bill by one secret benevolent society originally organized for operation in this state only, against another secret benevolent society of like name organized for operation in all states except Michigan, the only material difference being the number of assessments made by each, to restrain interference with a proposed extension of complainant's business into the territory occupied by defendant, complainant was enjoined from competing with defendant in the field occupied by it, by using substantially the same ritual, secret work, badges, etc., used by defendant, where it appeared that complainant not only permitted but encouraged defendant to make use of its original ritual, secret work, badges, etc., and that defendant expended very large sums of money in establishing its business on the foundation of such ritual, etc.—Great Hive L. O. T. M. of Michigan v. Supreme Hive of L. O. T. M. of the World, 135 Mich. 392.

§ 5. Officers and agents.

Local officers of subordinate lodge as agents in receiving dues and assessments, see post ¶ 78.

Ratification of act of officer in giving notice of assessment, see post ¶ 73.

Authority of officer or agent to waive provisions as to remedies within the society, see post § 65.

Officers and agents of corporations generally, see Corporations, XVII.

Form of remedy, law or equity, against officers for misdoing or default, see also Corporations § 176.

Provisions in articles of association as to names and residences of officers and directors, see Pub. Acts 1917, No. 256, chap. IV, § 12.

Personal liability of officers and agents, see Pub. Acts 1917, No. 256, chap. IV, § 19.

Penalties against officers and agents, see Pub. Acts 1917, No. 256, chap. IV, § 31.

¶ 9. Where the prothonotary or secretary of a fraternal society has broad powers of management and promotion, it is within his apparent authority to make contracts to pay commissions out of the general fund of the society to agents appointed to organize local bodies, and such appointments are ratified when known to, and acquiesced in, by the premier, or head of the society.—Duford v. Parliament of the Prudent Patricians of Pompeii, 152 Mich. 151.

¶ 10. Where the laws of the Ancient Order of Foresters, an unincorporated association, provide that the funds shall be placed in the treasurer's hands, and that no money shall be drawn except by an order of the executive council, signed by certain officials, no provision being made for turning over funds to a successor, an action for the funds will not lie against a retiring treasurer merely because he refuses to pay money in accordance with a resolution, no order being drawn or signed.—Smith v. Pinney, 86 Mich. 484.

¶ 11. Whether the board of control of the Odd Fellows Home acts as agent of the Grand Lodge so as to bind it for materials furnished a contractor, held, under the evidence, to be a question for the jury.—Lake-Ulricksen Co. v. Grand Lodge I. O. O. F., 182 Mich. 653.

§ 6. ——Commissions and compensation.

Compensation and reimbursement of agents generally, see Agency § 100.

¶ 12. Where there is evidence that an agent of a fraternal society is entitled to commissions on members secured at the end of the year, and on June 30, and where a witness has made a statement as to the number, it is a question for the jury to decide.—Duford v. Parliament of the Prudent Patricians of Pompeii, 152 Mich. 151.

¶ 13. In a suit for commissions for gaining members by a plaintiff appointed as agent to promote a fraternal society, the official report of membership of the society is admissible to show members secured by the plaintiff, despite the fact that such report might include certain honorary members.—Duford v. Parliament of the Prudent Patricians of Pompeii, 152 Mich. 151.

§ 7. Membership in general.

Liability for injury to member during initiation ceremonies, see post § 14.

Certificate of membership, see post § 16.

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Effect of statutes as to membership enacted subsequent to organization of the corporation or making of the insurance contract, see post ¶ 64.

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Burden of proof as to number of members, see post ¶ 252.

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Qualifications for membership, see Pub. Acts 1917, No. 256, chap. IV, § 7.
When society may begin to solicit members, see Pub. Acts 1917, No. 256, chap. IV, § 12.
Examination of applicants for membership, see Pub. Acts 1917, No. 256, chap. IV, § 12.
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Personal liability of members, see Pub. Acts 1917, No. 256, chap. IV, § 19.
Reports to members of the condition of the society, see Pub. Acts 1917, No. 256, chap. IV, § 23.

¶ 14. It is contrary to the general legal rules to allow membership in a corporation to depend on the will or action of an unincorporated outside society.—Allnutt v. Subsidiary High Court of A. O. F., 62 Mich. 110.

¶ 15. A member in good standing of a mutual benefit order will be presumed to have continued such unless the contrary is made to appear.—Petherick v. Order of Amaranth, 114 Mich. 420.

§ 8. Discipline, fines, expulsion, and suspension.

Expulsion for breach of by-law defining membership qualifications, see post § 8.
Forfeiture, suspension or cancellation of benefit or insurance contract, see post, V.
Loss of membership as affecting insurance contract, see post § 51.
Right of withdrawing members to use name of parent order, see ante ¶ 7.
Reinstatement of member, see post § 56.
Expulsion of members from nonbenefit associations, see Associations § 4.

¶ 16. A rule that a member may be disciplined for a libel of another member can only apply where the libel is without just cause. The mere fact of defamation of another member is no ground of discipline, and no one can be called on to meet vague and uncertain charges.—Allnutt v. Subsidiary High Court of A. O. F., 62 Mich. 110.

¶ 17. In the absence of direct provisions to the contrary, power to give an alternative sentence in disciplining a member does not authorize a double one.—Allnutt v. Subsidiary High Court of A. O. F., 62 Mich. 110.

¶ 18. A fine cannot be imposed upon a member of a benevolent corporation, nor can he be suspended for nonpayment of such fine, where there is no provision in the constitution or by-laws defining his offense or providing for the infliction of a pecuniary penalty therefor.—Erd v. Bavarian Nat. Aid & Relief Ass'n, 67 Mich. 233.

¶ 19. Tender of payment of a fine to avoid expulsion from a fraternal beneficiary society is not shown by evidence that the delinquent went to the lodge to pay it and, being refused the password on the ground that he was already expelled, could not get in to make payment to the secretary.—Simek v. Lodge No. 86, Bohemian Slavonian Benevolent Soc., 118 Mich. 81.

¶ 20. Ratification by a fraternal benevolent society of the action of its president in imposing a fine on a member is shown where the society ratified expulsion of the member for nonpayment of the fine.—Simek v. Lodge No. 86, Bohemian Slavonian Benevolent Soc., 118 Mich. 81.

¶ 21. Under Comp. L. 1897, § 8258, giving to voluntary benevolent societies power to make rules governing their affairs and to decide as to the qualifications of members, a by-law excluding from membership any member of any society not approved by the Roman Catholic Church is not unreasonable, and a member may be expelled upon refusal to resign from another society disapproved by the pastor of the local church acting under his power of guidance given by such by-law.—Mazurkiewicz v. St. Adelbertus Aid Society, 127 Mich. 145.

¶ 22. A provision in the constitution of a fraternal society that a member may be expelled for the "offense" of not having "paid all of his dues and fines at the monthly meeting" covers the offense of not paying a fine of one dollar specifically imposed by a by-law for not preserving order during a meeting and not obeying the warning of the chairman, where the record shows such disobedience, the imposition of the prescribed fine, the recordation of it in a book for that purpose, a notification of the member to pay it given in writing, and a vote of expulsion at the next meeting for having failed to pay it; and the constitution also commits to by-laws of the subordinate lodges "the fines and reprimands by the president."—Simek v. Lodge No. 86, Bohemian Slavonian Benevolent Soc., 118 Mich. 81.

¶ 23. A suspended member of a fraternal benefit association has no rights or standing in the society until actually reinstated.—Edgerly v. Ladies of Modern Maccabees, 185 Mich. 148.

§ 9. ——Procedure within the lodge or fraternity.

Procedure to vacate order of grand lodge revoking charter of subordinate lodge, see post § 13.
Proceedings to effectuate forfeiture of contract, see post § 55.
Proceedings for benefits or to determine rights thereto, see post § 67.

¶ 24. A member of a benevolent corporation, unless he has waived or forfeited the right, is always entitled to a copy of the charges preferred against him, and to an opportunity to give testimony in his own behalf.—Erd v. Bavarian Nat. Aid & Relief Ass'n, 67 Mich. 233.

¶ 25. When the constitution of an incorporated voluntary society makes "slander against the society" by a member an offense for which he may be fined or expelled, it will be held to intend an offense somewhat analogous to the common-law offense of slander as applicable to indiviuals. In a proceeding to enforce such a provision it cannot be known whether there is any jurisdiction to make the inquiry unless the words charged to be slanderous are set forth; and as corporations are bound to keep records, the proceedings necessary to authorize action against an accused member must appear of record. A written charge upon the records of the society showing an offense within the meaning of the constitutional provision is necessary to sustain the jurisdiction to proceed upon it.—People ex rel. Roehler v. Mechanics' Aid Soc., 22 Mich. 86.

¶ 26. Under a by-law of a voluntary benevolent society providing that its members cannot belong to any society not approved by the Roman Catholic Church, an expulsion is legal where the pastor of the church acting under his power of guidance, given by by-law, requests all members who are also members of a certain other society, to leave a meeting and subsequently those remaining adopt a resolution requiring the expelled members to renounce membership in the other society within three months or stand dismissed and afterwards the dues of the expelled members were refused and they were excluded from the rooms of the society.—Mazurkiewicz v. St. Adelbertus Aid Society, 127 Mich. 145.

§ 10. Property and funds and application thereof.

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Transfer of funds between societies, see Pub. Acts 1917, No. 256, chap. IV, § 14.
Report required to be filed with Commissioner of Insurance, see Pub. Acts 1917, No. 256, chap. IV, § 23.

¶ 27. Where an aid society organized under Comp. Laws 1897, sections 8258-8263, concerning the incorporation of benevolent societies, deeds certain rights worth $500 in lands to all its members in consideration of one dollar, the word "benevolent" as used in such act permitting a conveyance for benevolent purposes will be construed to mean a benefit conferred on a member in need as distinguished from a charitable purpose, and hence the express consideration cannot be aided by construing the deed to be a conveyance for benevolent purposes, and it is so inadequate as to justify the setting aside of the conveyance on a cross-bill by the society on a suit of the grantee of the members to quiet the title.—German Corporation v. Negaunee German Aid Society, 172 Mich. 650.

¶ 28. In determining whether the object of a deed given to its members by an aid society organized under Comp. Laws 1897, sections 8258-8263, concerning the incorporation of benevolent societies, was a "benevolent" purpose within the charter powers, the court may not stop upon recourse to a dictionary, but must go to the statute and determine from the context whether its meaning is narrowed down to "charitable."—German Corporation v. Negaunee German Aid Society, 172 Mich. 650.

¶ 29. Where members of a mutual benefit society have put money into a fund the purpose of which is found to be illegal, the fund becomes a trust fund in which each member who has contributed is beneficially interested pro rata according to his contribution.—Calkins v. Bump, 120 Mich. 335.

¶ 29a. A bank deposit belonging to the "sick fund" of a subordinate lodge but no part of the general fund cannot be claimed by the parent organization after the sick fund association secedes and allies itself with another organization where the by-laws of the parent organization in prescribing the funds to which it is entitled do not include sick benefit.—Detroit Sav. Bank v. Haines, 128 Mich. 38.

¶ 30. Where a fraternal society provides by its rules that 50 per cent of the dues from the local orders should go into its general fund, in the absence of a state body, it is held that the society has authority to make contracts to pay commissions from this fund to agents appointed to organize local bodies.—Duford v. Parliament of the Prudent Patricians of Pompeii, 152 Mich. 151.

¶ 31. A trustee for holders of certificates in a beneficial society to whom a sum of money has been paid by the society for distribution among the certificate holders cannot be held liable for diverting a trust fund in an action by the receiver, on the theory that such payments were not authorized by the law of the company's organization, where the trustee had no knowledge of the insolvent condition of the society before distributing the fund.—Calkins v. Beekman, 127 Mich. 249.

§ 11. Dissolution and winding up.

Winding up assessments upon dissolution, see post § 28.

Dissolution and winding up noninsurance associations, see Associations § 12.

Mode of voluntary dissolution, see Corporations § 248.

Right of receiver of insolvent association to recover sums paid out to insured, see also Corporations § 241.

Remedy to require rendition of assets to receiver of foreign association, see also Foreign Corporations ¶ 78.

Suit in state court on certificate pending foreign receivership of insurer, see Abatement ¶ 51.

Proceedings to dissolve and wind up the association, see Pub. Acts 1917, No. 256, chap. IV, §§ 24, 25.

Test of solvency of society, see Pub. Acts 1917, No. 256, chap. IV, § 23.

Merger with other society, see Pub. Acts 1917, No. 256, chap. IV, § 14.

§ 12. Public regulation; applicability of statutes.

Applicability of after enacted statutes in respect to membership and beneficiaries, see post ¶ 64.

[Note. The general subject of insurance has been regulated by Pub. Acts 1917, No. 256, with a special chapter, IV, devoted to fraternal benefit associations and insurance by them. For its details see that statute.]

Exemption of fraternal associations from general insurance law, see Pub. Acts 1917, No. 256, chap. IV, § 4.

¶ 32. Fraternal beneficiary societies are under Act No. 119, Pub. Acts 1893, exempt from the provisions of the insurance laws of the state.—Knights of Modern Maccabees v. Commissioner of Insurance, 155 Mich. 693.

¶ 32a. The words "such business," used in Laws 1893, Act No. 119, § 3, entitled "An act to define what shall constitute fraternal beneficiary societies," etc., and which provides that all associations coming within the description as set forth in § 1 of the act, organized under the laws of this or any other state, and now doing business in this state, may continue "such business," provided they comply with the provisions of the act regulating annual reports, etc., mean such business as was legally authorized under the act under which the association was incorporated.—Walker v. Commissioner of Insurance, 103 Mich. 344.

§ 13. Grand and local lodges and their charters.

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Suspension of subordinate tent as suspending membership, see post ¶ 187.

Rights of bona fide purchaser of property standing in name of member of local lodge and sold by him, see Notice and Record of Title, I, C.

Lodge system and form of government, defined, see Pub. Acts 1917, No. 256, chap. IV, §§ 2, 3.

Right to hold meetings in state or district of subordinate lodge, see Pub. Acts 1917, No. 256, chap. IV, § 18.

¶ 33. A local society of a mutual benefit association cannot withdraw from the state society of which it is a member and assume the payment of the benefit certificates issued to its members by the state society where such action impairs the obligation of the contract entered into by the society with its members.—Kern v. Arbeiter Unterstuetzungs Verein, 139 Mich. 233.

¶ 34. A provision in the constitution of a state mutual benefit society that, "This union cannot be dissolved as long as fifteen associations belong to it, and each association which steps out of it * * * gives up all claim, to" its property, when read in connection with a further provision that local societies may be suspended or dropped for failure to pay its pledges, does not authorize a local society to drop out at its pleasure and assume the payment of the certificates issued to its members by the state society.—Kern v. Arbeiter Unterstuetzungs Verein, 139 Mich. 233.

¶ 35. Where a subordinate lodge is given no right of appeal to the grand lodge, and such appeal is given only to a member, it may apply directly to the courts to have an order of the grand lodge revoking its charter vacated without attempting further to exhaust the remedies given to individual members within the lodge.—Golden Star Lodge No. 1 v. Watterson, 158 Mich. 696.

¶ 36. Relator, a local lodge, brought mandamus to compel the respondent, an officer of the grand lodge, to vacate an order revoking relator's charter. The constitution of the grand lodge provided that its grand mistress might revoke the charter of a local lodge for misconduct. One Amy Downing, a member of relator, had been treasurer of the grand lodge and had been convicted by it of embezzlement of its funds. The local lodge acquitted her of the charge, and some one without its authority published its finding. The respondent revoked the charter

of relator for this alleged offense. Held, the writ should be granted, since no ground existed for such revocation.—Golden Star Lodge No. 1 v. Watterson, 158 Mich. 696.

§ 14. Relative rights and liabilities.

Liability of local lodge for dues and assessments not transmitted to home office, see post ¶ 78.

¶ 37. A subordinate lodge which secedes from the head lodge and joins another lodge is entitled to retain receipts for initiation fees and dues which have been raised by voluntary contribution and placed in a general fund to pay sick and funeral benefits, salaries of officers, etc., where the revenue of the head lodge is obtained from other sources, although the constitution governing all the lodges provides that any lodge may be dissolved for bad conduct and any money belonging to such subordinate lodge shall be forfeited to the head lodge and placed in its sick and funeral fund.—Grand Court Michigan Foresters v. Court Germania No. 1, German-American Foresters, 192 Mich. 380.

¶ 38. Where an applicant for membership in a fraternal lodge is injured during initiation ceremonies into a local lodge the grand lodge cannot be held liable therefor where it appears that plaintiff as an applicant for membership agreed to be bound by the laws and rules of the grand lodge, and these rules provide that the local or subordinate lodge and its officers shall be the agent of the applicant and that the grand lodge shall not be liable for any fault or negligence on the part of the local lodge or any of its officers, it being further provided that the local lodge shall decide whether an application must be initiated, shall select the men and paraphernalia for the initiation, there being nothing in the ritual suggesting an intention that the ceremony shall be conducted in such a way as to do physical hurt to the candidate.—Kaminski v. Great Camp Knights of the Modern Maccabees, 146 Mich. 16.

¶ 39. A local benefit society voted to withdraw from the state society and suit was brought by some of its members to restrain its officers from paying out of its funds a death claim under a certificate issued by the state society. No request had been made to the officers of the local society relative to action in the matter, but it was alleged that it was their duty when notified of the death of a member to give notice thereof to the state society, which they had neglected to do but had instead passed a resolution to pay it out of the local funds. Held that no request was necessary before suit might be begun.—Kern v. Arbeiter Unterstuetzungs Verein, 139 Mich. 233.

¶ 39a. The title to the reserve fund retained by the local branches of the Order of the Iron Hall is in the supreme sitting; the twenty per cent of the assessment retained by each local branch differs from the eighty per cent transmitted to the supreme sitting mainly in this, that the possession and supervision of it, subject to the laws of the order, remain with the local branches; and the reserve fund is essentially a part of the benefit fund, although it may be in the nature of a safety fund to insure payment of maturing certificates.—Baldwin v. Wayne Circuit Judge, 101 Mich. 119.

§ 15. Foreign associations and domestic affiliations.

Control over membership of domestic society, see ante § 7.

Injunction to prevent use of same name, ritual, badges, etc., by foreign society, see ante ¶ 8.

Conclusiveness of judicial construction of foreign association's charter, see post ¶ 65.

Effect of failure to pay assessments made by foreign lodge, see post ¶ 160.

Foreign corporations generally, see Foreign Corporations.

Refusal to turn assets over to ancillary receiver as contempt, see also Foreign Corporations ¶ 78.

Admission of foreign society, see Pub. Acts 1917, No. 256, chap. IV, § 16.

Necessity of providing a mortuary fund before doing business in the state, see Pub. Acts 1917, No. 256, chap. IV, § 9, subd. 1.

Investment of funds of foreign societies, see Pub. Acts 1917, No. 256, chap. IV, § 10.

Examination of foreign societies by Commissioner of Insurance, see Pub. Acts 1917, No. 256, chap. IV, § 26.

Revocation of license of foreign society, see Pub. Acts 1917, No. 256, chap. IV, § 28.

¶ 40. A society organized under a Michigan incorporation act cannot subject itself or its members to the jurisdiction of an authority existing outside of the state and beyond the control of the Michigan laws.—Lamphere v. Grand Lodge of United Workmen, 47 Mich. 429.

¶ 41. A grand lodge of the Ancient Order of United Workmen, incorporated under Comp. L. 1871, chap. 94 (How. St., chap. 118), cannot compel its members to pay assessments made under the orders of a supreme lodge incorporated under the laws of Kentucky and not subject to Michigan courts. Nor can it suspend members from their privileges as such for refusing to pay such an assessment.—Lamphere v. Grand Lodge of United Workmen, 47 Mich. 429.

¶ 42. A fraternal secret order affiliated with an Illinois corporation, and which cultivates social relations among its members, and furnishes aid by voluntary subscription to such members as are sick or disabled, but which requires no annual dues or premiums, is within the exception of How. St., § 3960*e*4, and has a right to do business

in this state uncontrolled by the Commissioner of Insurance.—Rensenhouse v. Seeley, 72 Mich. 603.

II. BENEFIT OR INSURANCE CONTRACT AND INSURED RISKS OR CAUSES.

Validity of restriction against membership in other societies, see also Contracts § 88.

§ 16. In general; making and requisites of contract.

Withdrawal of local society from the state society as impairing the obligation of the contract, see ante § 13.
Application for certificate as part of contract, see post § 19.
Obligation to pay dues and assessments as contract, see post ¶ 69.
Increase in number of assessments as violating the contract, see post § 25.
Waiver of and estoppel to urge provisions of contract, see post § 54.
Beneficiary in contract, see post IV.
Forfeiture and cancellation of contract, see post V.
Actions and proceedings on the certificate or contract, see post VIII.
Insurance contracts generally, see Insurance, V.
Power and duty to provide for benefits, see Pub. Acts 1917, No. 256, chap. IV, § 5.
Increase in rates of assessments, see Pub. Acts 1917, No. 256, chap. IV, § 23-A.

¶ 43. The issuance of a certificate of membership by a beneficial association and forwarding it to the local lodge for delivery to the member completes the contract of insurance.—Wagner v. Supreme Lodge Knights and Ladies of Honor, 128 Mich. 660.

¶ 44. Under Act No. 119, Pub. Acts 1893, fraternal beneficiary societies are expressly made exempt from the provisions of the insurance laws of this state, therefore Act No. 180, Pub. Acts 1907, providing that every policy of insurance issued by any company within the state shall contain the entire contract between the parties has no application to policies or certificates issued by such societies.—Knights of Modern Maccabees v. Commissioner of Insurance, 155 Mich. 693. (Grant, C. J., and Hooker and Moore, JJ., dissenting.)

¶ 44a. A beneficiary society incorporated under Laws of 1869, Act No. 104 (How. St., chap. 118), which provides only for the payment by the society of a certain sum in case of death and for periodical payments in case of the sickness or other disability of the member, is not authorized to conduct the business of endowment insurance; that is, insurance payable on the expiration of a fixed period should the insured live so long.—Walker v. Commissioner of Insurance, 103 Mich. 344.

¶ 44b. Where in a suit to enjoin the prosecution of an action at law upon a fraternal benefit insurance certificate, it appeared that the insured passed a medical examination, was initiated and paid his dues, but was stricken with general paresis before the certificate was delivered to him. Held, there was no valid contract of insurance.—Court of Honor v. Hering, 178 Mich. 377.

§ 17. Constitution, charter and by-laws as part of contract.

See also post ¶ 138.
Constitution and by-laws in general, see ante § 2.
Provisions as to remedy within lodge to recover benefits, see post § 64.
Judicial construction of charter as conclusive in subsequent action, see post ¶ 65.

¶ 45. One who participated in the organization and in drafting the constitution of a mutual benefit society is deemed to have notice of a provision in the constitution forbidding its members from belonging to any other sick benefit society, so as to prevent recovery of benefits where he was a member of another society at the time of joining the one in question.—Bretzlaff v. Evangelical Lutheran St. John's Sick Benefit Society, 125 Mich. 39.

¶ 46. A by-law of a mutual benefit society that is reasonable and valid, not oppressive or against public policy forms part of the contract between a member and the other members of the society, and binds each member by its terms.—Van Poucke v. Netherland St. Vincent De Paul Soc., 63 Mich. 378.

¶ 47. Where a contract of mutual benefit insurance is made with the great camp, and the insured subscribes to the by-laws of the order, he is bound by a by-law providing that a local camp may not waive a provision relative to who may be a beneficiary under the certificate.—Sowiczki v. Modern Woodmen of America, 192 Mich. 265.

¶ 48. One who was a charter member of a mutual benefit association, and had his attention called to the constitution and laws thereof, and especially to a section prohibiting payment of benefits in cases of suicide, and who had some weeks afterwards a certificate conditioned upon his complying with all laws, etc., issued to him, is bound by the section relating to suicide which was a part of the contract between him and the association.—Sabin v. Senate of National Union, 90 Mich. 177.

¶ 48a. Rules made regulating the manner of doing business between the subordinate and the superior lodge of a benefit association, in which rules the applicant does not participate, cannot be made to take away the rights of a beneficiary.—Lorscher v. Supreme Lodge Knights of Honor, 72 Mich. 316.

¶ 48b. A rule of fraternal benefit association requiring medical examiners to reject women applicants unless they signed a waiver in case of pregnancy held binding though not in writing nor promulgated, the application being made subject to all laws, rules and regulations governing the association.—Clark v. North American Union, 179 Mich. 131.

¶ 48c. Where the foreign statute under which a mutual benefit association is organized, and its articles of incorporation, entitle its members to devise the death benefit fund to any person, although not of any of the classes named as beneficiaries, a provision of the constitution of the association which attempts to restrict members in their choice of devisees cannot be sustained. —Wolf v. District Grand Lodge No. 6, I. O. B. B., 102 Mich. 23.

§ 18. ——Amendments after insurance contract.

See also post ¶ 146.
Amendment of by-laws in respect to amount of benefits, see post ¶ 196.
By-laws requiring resort to society tribunals to settle disputed claims, see post § 64.
Burden of proof as to amendments, see post § 72.
Amendments of constitution and by-laws, see Pub. Acts 1917, No. 256, chap. IV, § 22.
Amendments binding on members and beneficiaries, see Pub. Acts 1917, No. 256, chap. IV, § 8.

¶ 49. Parties to a mutual benefit certificate may expressly agree to be bound by after-enacted by-laws.—Wineland v. Knights of the Maccabees of the World, 148 Mich. 608.

¶ 50. An agreement by one becoming a member of a mutual benefit association to be bound by all subsequent amendments to the constitution and the by-laws of the order, especially those relating to the rates of assessment, is not against public policy, and does not infringe any vested rights.—DeGraw v. Supreme Court, I. O. F., 182 Mich. 366.

¶ 51. At the time insured became a member of the defendant beneficial association he was not engaged in the sale of liquor. He afterwards became engaged in the sale of liquor, which was a prohibited occupation, and at the time of insured's admission to the order it was provided that in case a member should after admission engage in such occupation, he might be suspended by the executive committee of the order. Subsequently the by-law was amended so as to make the prohibition self-executing. Held, that such by-law was binding on the member and operated to forfeit his insurance.—Brown v. Great Camp Knights of Modern Maccabees, 167 Mich. 123.

¶ 51a. Where a certificate in a fraternal benefit order provides that it shall be subject to subsequently enacted laws of the order, and a law of the order forbidding a beneficiary to sue in the courts on a claim is passed, the prohibition contained in such law is valid even though the law is passed after the issuing of the certificate.—Monger v. New Era Ass'n, 171 Mich. 614.

¶ 52. Though a member of a benefit society agrees to be bound by by-laws subsequently made, no such by-law is effective against him which infringes his vested rights. —Monger v. New Era Ass'n, 156 Mich. 645.

¶ 53. A mutual benefit society which issues a certificate to a member providing for payment in case of total disability resulting from a specified cause cannot, without his express consent, change his contract by the adoption of a by-law excluding such cause of disability, although the member has agreed in his certificate to observe "all the laws, rules, and regulations of the society." —Starling v. Supreme Council Royal Templars of Temperance, 108 Mich. 440.

¶ 54. The adoption of by-laws by a mutual benefit association, prohibiting the assignment of certificates, and giving the association ninety days after maturity in which to make payment thereof, cannot affect the rights of members as to certificates previously issued, unless they expressly assent thereto.—Wheeler v. Supreme Sitting of Order of Iron Hall, 110 Mich. 437.

¶ 55. Where a member of a beneficial society agreed to be bound by and conform to by-laws to be from time to time made by the governing body, such member cannot claim the right to a disability benefit payable yearly after attaining a certain age, as provided by an amendment to the by-laws since repealed, where his certificate contains no such provision and the whole matter of assessments was one of management to be from time to time amended as the experience and necessities of the society demanded.— Wineland v. Knights of Maccabees of the World, 148 Mich. 608.

¶ 56. A by-law passed by a benefit society, requiring beneficiaries to resort to a tribunal established within the order to settle disputed death claims, may apply to members entering the order before its passage where the intent to have it so apply is clearly indicated.—Monger v. New Era Ass'n, 156 Mich. 645.

¶ 57. The articles of association of a mutual benefit society provided that the benefits to which members were entitled should be paid "at such times" as might be provided by the laws governing such payment, or in the certificate of membership. After the issue of a certificate which provided that if the member to whom it was issued should for seven years pay his assessments punctually, and maintain himself in good stand-

ing in the order, he should be entitled to a sum not exceeding the principal amount named in the certificate, less the amount which he might have already received as benefits, etc., a by-law was adopted providing that final benefits should, when found correct, be adjusted within ninety days from the date of the expiration of the certificate. Held, that the by-law applied only to such certificates as, by their terms, made the benefit payable at the time fixed by the by-law and not to the certificate held by plaintiff.—Cohen v. Supreme Sitting of Order of Iron Hall, 105 Mich. 283.

¶ 58. Where parties to a mutual benefit certificate have agreed to be bound by after enacted by-laws, after the lapse of ten years it is too late for one who was a member when reincorporation took place to insist that the certificates then in existence shall be treated as if they had been issued by the defendant before such reincorporation, especially when the member is insisting that a provision of his contract, ultra vires under the laws before reincorporation, is binding upon the society because of increased powers given by the laws under the reincorporation.—Wineland v. Knights of the Maccabees of the World, 148 Mich. 608.

¶ 59. Where there was a provision in the benefit certificate of a member for paying him a benefit upon his reaching the age of 70 and there were amendments to the laws in 1899 and 1901 whereby the old age benefit feature was eliminated unless there was total disability arising from old age and the member was 70 years old, the fact that a member continued his membership without protesting and paid his assessments after these two changes in the law, did not operate as a waiver of his right to protest in 1904 against the entire elimination of the old age benefit from his certificate, where this last law contains the first demand upon him to agree that the society's construction of the effect of its earlier action shall bind him; for the amendment of 1899 applied to existing contracts.—Wineland v. Knights of Maccabees of the World, 148 Mich. 608.

¶ 60. The defendant benefit order, four years after the disappearance of the insured, and while his policy was in force, adopted a by-law providing that absence should create no presumption of death. 1 Comp. Laws 1897, § 1225, creates such a presumption. Held, that the insured, in agreeing to abide by by-laws to be adopted, did not contemplate the enactment of one in direct derogation of a statute, and the plaintiff, his wife, in a suit to recover the insurance, was entitled to the statutory presumption.—Samberg v. Knights of Modern Maccabees, 158 Mich. 568.

¶ 61. Where a member insured in a benefit society designates as beneficiary one having no insurable interest, and later a by-law is passed forbidding such a beneficiary, it is held that the by-law has no application so as to invalidate the previous transaction in the absence of an expressed intent so to apply.—Dolan v. Supreme Council Cath. Mut. Ben. Ass'n, 152 Mich. 266.

§ 19. Application and certificate.

Power to issue certificates for endowments payable at a fixed time, see ante ¶ 3.
Application for and issuance of certificate, see ante § 19.
Application for reinstatement, see post § 56.
Beneficiaries in the certificate, see post IV.
Trustee of certificate for others, see post § 32.
Provisions in certificate as to change of beneficiary, see post § 36.
Vested rights in certificate arising from payment of assessments, see post §§ 34, 35.
Surrender of certificate upon change of beneficiary, see post § 38.
Issuance of new certificate upon change of beneficiary, see post § 40.
Surrender and reissuance of certificate to designate beneficiary made eligible by change in statutes, see post ¶ 85.
Effect of misrepresentation in application, see post § 49.
Burden of proving fraud in the application, see post § 72.
Presumptions in respect to questions and answers in application, see post § 72.
Presumption of payment of assessment from delivery of certificate, see post ¶ 79.
Effect of improper or defective designation of beneficiary, see post § 46.
Production of certificate on trial of action for benefits, see post § 73.
Evidentiary value of certificate in action for benefits, see post § 75.
Certificate as evidence of member's good standing, see post ¶ 243.
Sufficiency of evidence to prove issuance of certificate, see post ¶ 201.
Insurance policies generally and application therefor, see Insurance, V.
When society may begin to issue benefit certificates, see Pub. Acts 1917, No. 256, chap. IV, § 12.
Scope and contents of certificate, see Pub. Acts 1917, No. 256, chap. IV, § 8.

¶ 62. The issuance of a certificate of membership either estops a beneficial association from denying that the application for membership was filed or shows that such application was in fact filed.—Wagner v. Supreme Lodge Knights and Ladies of Honor, 128 Mich. 660.

¶ 63. Where the certificate of a benefit society makes no reference to the application for membership, nor does the constitution, except to provide that an applicant must sign the application prescribed by the supreme council, and where the members agree in the application to comply with the laws and rules of the society, the application is, nevertheless, a part of the contract of in-

surance.—Williams v. Supreme Council Cath. Mut. Ben. Ass'n, 152 Mich. 1.

¶ 64. How. St. § 3960*d*5, providing that certificates of membership issued upon the lives of persons more than sixty-five years old, or upon any life in which the beneficiary has not an insurable interest, "shall be void as to the beneficiary therein named, but the amount thereof shall in case of death be payable to the heirs of the member," does not apply to corporations not organized under Laws 1887, Act No. 187, or to insurance contracts made prior to its enactment.—Smith v. Pinch, 80 Mich. 332.

§ 20. Construction of the contract.

See also post ¶ 211.

Time to act on benefit claims, see post § 67.

Construction of word "may" in charter provision permitting change of beneficiary, see post ¶ 109.

Interpretation of contracts generally, see Contracts, VI.

¶ 65. Where a contract of a foreign beneficiary society is in terms made subject to the terms of its charter, the construction of such charter by the highest court of the state in which the society is organized is conclusive, in an action to determine the distribution of the proceeds of benefits in Michigan.—Knights of Columbus v. McInerney, 153 Mich. 574.

¶ 66. Courts will not read into a fraternal insurance contract a promise not contained in the contract itself, to pay an assessment, where it expressly provides a penalty of forfeiture of insurance for a default in the payment without action of the society for its enforcement.—Faurot v. Swan, 155 Mich. 284.

¶ 66a. When the constitution of a mutual benefit association contains two inconsistent provisions, that most favorable to the insured will be adopted.—Wolf v. District Grand Lodge, No. 6, I. O. B. B., 102 Mich. 23.

§ 21. Risk and causes insured against.

Enforcement of restriction against membership in other societies, see ante § 9.

Forfeiture of contract for crime, suicide and other voluntary acts, see post § 52.

Accrual and amount of benefits, see post VI.

Burden of proof as to suicide, see post ¶ 251.

In life and accident insurance generally, see Insurance, VII.

¶ 67. A provision in a certificate of insurance of a beneficial association that the insurance shall not cover injuries, sickness or death resulting from surgical operations not necessitated by injury does not bar recovery of sick benefit for illness subsequent to an operation for appendicitis performed after the insured had been ill for ten days.—Lord v. National Protective Society, 129 Mich. 335.

§ 22. Conditions precedent and restrictions.

Waiver of conditions and restrictions, see also post § 54.

Conditions precedent to reinstatement, see post § 56.

Instruction as to what constitutes intoxication, see post § 79.

¶ 68. A provision of the by-laws of a beneficial association requiring a member to be initiated before being entitled to the benefits is waived by the issuance of a certificate without such initiation.—Wagner v. Supreme Lodge Knights and Ladies of Honor, 128 Mich. 660.

¶ 68a. A membership certificate issued by a fraternal benefit society never became a binding contract where it was issued to a person who waived all rights to any benefit until initiation, and it is undisputed that she was never initiated, as required by a rule of the society before delivery of the certificate should be made; and was not in sound health after the date of the application, so that she could have been initiated.—Kolosinski v. Modern Brotherhood of America, 175 Mich. 684.

III. DUES AND ASSESSMENTS.

§ 23. In general.

Fines imposed upon members, see ante § 8.

Right of seceding subordinate lodge to retain receipts for fees and dues, see ante § 14.

Liability of members of domestic association for assessments made under orders of foreign association, see ante § 15.

Forfeiture and suspension for failure to pay dues and assessments, see post § 50.

Amendments of constitution and by-laws as to dues and assessments, see ante § 18.

Certificate fee upon changing beneficiary, see post § 39.

Assessments in life and accident insurance companies, see Insurance, VI.

Amount and collection of initial dues, see Pub. Acts 1917, No. 256, chap. IV, § 12.

Necessity of providing for dues and assessments, see Pub. Acts 1917, No. 256, chap. IV, § 9.

Assessments to meet deficiencies in benefit and other funds required by law, see Pub. Acts 1917, No. 256, chap. IV, § 23.

Designating purpose and use of dues and assessments, see Pub. Acts 1917, No. 256, chap. IV, § 11.

Annual report of officers to Commissioner of Insurance, see Pub. Acts 1917, No. 256, chap. IV, § 23.

¶ 69. The obligation of a member of a mutual benefit society to pay assessments rests, if it exists at all, in contract relations, express or implied, or is imposed by the statute incorporating the society.—Faurot v. Swan, 155 Mich. 284.

¶ 70. One who joins a mutual benefit society and agrees to pay all assessments levied upon him, is liable for all assessments made while he is a member although his rights have since been forfeited; but he is not liable for assessments made after his membership has expired.—Faurot v. Swan, 155 Mich. 284.

§ 24. Levy and notice of assessments.

¶ 71. A member of a beneficial association is not shown to have waived his right to personal service of notice of assessment so as to make it error to refuse to so instruct where the messenger serving the notice testifies that if the insured was present he handed the notice to him and if not he left it with the clerk in the insured's store without stating how many notices he left with the clerk and is unable to say to whom he gave the notice in controversy.—Wallace v. Fraternal Mystic Circle, 127 Mich. 387.

¶ 72. The requirements of the constitution of an unincorporated voluntary insurance association that, upon the death of a member, an assessment shall be ordered in writing by the president addressed to the financial secretary as a basis for the latter's action, are not met where the secretary, upon the death of a member, acting on his own initiative, gives notice of an assessment, and such assessment is consequently invalid.—Zender v. Detroit Lodge No. 1, Knights of Royal Ark, 198 Mich. 624.

¶ 73. Ratification of the unauthorized action of the financial secretary of an unincorporated voluntary insurance association in giving notice of an assessment upon the death of a member without an order of assessment having been previously given by the president is not established by proof of an entry in the minutes of a subsequent meeting of the lodge which makes no reference to an assessment theretofore made, and which simply gives the name of the deceased member, the date of his death, and the amount of the benefit.—Zender v. Detroit Lodge No. 1, Knights of Royal Ark, 190 Mich. 624.

§ 25. Increase or change of amount.

¶ 74. Where a mutual benefit society has the right to increase the number of its assessments it is lawful, and not violative of contract rights, to increase the number of assessments to meet the demands arising from the death of members. Fewer assessments at a greater rate may be levied so long as the increase in rates is proportional, young and old members alike contributing. Whether such action be a mere detail in management, aimed at procuring for distribution the same sum of money in a different way, or intended to actually increase the contributions and accumulate a fund, it may be so long as it is proportional and reasonable, supported as against a protesting member, by his agreement in his application to conform to and be governed by laws to be from time to time enacted by the governing body of the association.—Wineland v. Knights of Maccabees of the World, 148 Mich. 608.

¶ 75. Plaintiff, a member of a benefit society, agreed in his application for membership to subscribe to the laws and rules of the society in force or afterwards to be enacted. A law of the society provided that members should be assessed at a certain rate according to age, which rate was not to be increased. The certificate made no reference to the application, nor did the constitution, except to provide that applicant must sign the application prescribed by the supreme council. The council by amendment of the laws and rules increased plaintiff's rate of assessment. Held, that the increase was valid.—Williams v. Supreme Council Cath. Mut. Ben. Ass'n, 152 Mich. 1.

§ 26. Payment or tender.

Tender of payment of fine, see ante ¶ 19.
Construction of terms of the contract or certificate in respect to payment of assessments, see ante § 20.
Right of one paying assessments to protest change of beneficiary, see post §§ 34, 35.
Payment of fees upon change of beneficiary, see post § 39.
Payment of assessments as entitling to benefits, see post § 45.
Forfeiture or cancellation for failure to pay dues and assessments, see post § 50.
Waiver of payment of assessments, see post § 54.
Acceptance of dues and assessments as waiver of cause of forfeiture, see post § 54.
Deducting unpaid assessments from payments to beneficiary, see post § 63.
Presumptions as to payment, see post § 72.
Province of judge and jury as to payment of dues, assessments, see post § 76.
General law of payment and tender, see Payment.

¶ 76. A legal tender of assessments of a member of a beneficial association is not necessary where a tender of assessments for a previous month has been refused on the ground that the person is not a member.—Wagner v. Supreme Lodge Knights and Ladies of Honor, 128 Mich. 660.

¶ 77. One who was a member of an order which is social as well as beneficiary, until his lodge broke up for want of members, and whose transfer card is refused by another local lodge, is not bound, in order to retain the benefits conferred by his certificate of membership, to unite with a foreign lodge, but by sending his assessments direct to the supreme body continues his membership.—Starling v. Supreme Council Royal Templars of Temperance, 108 Mich. 440.

¶ 78. A by-law of a beneficial association to the effect that the local officers of the subordinate lodge are the agents of the mem-

bers in receiving dues and assessments is not binding upon the members and will not operate to excuse the association from liability for moneys paid but not transmitted to the home office.—Wagner v. Supreme Lodge Knights and Ladies of Honor, 128 Mich. 660.

¶ 79. Presumption of payment of the first assessment referred to in a benefit certificate, arises from the delivery of the policy. —Taylor v. Supreme Lodge of Columbian League, 135 Mich. 231.

§ 27. ——Extension of time for payment.

Instructions as to waiver of prompt payments, see post ¶ 293.

¶ 80. The action of a lodge in directing the financial secretary to give notice of an assessment, of which notice had previously been given upon the death of a member, operates as an extension of the time within which the assessment may be paid, so that a tender of payment within the time provided by the constitution after the ordering of an assessment prevents a default.—Zender v. Detroit Lodge No. 1, Knights of Royal Ark, 190 Mich. 624.

¶ 81. The home office of a fraternal benefit association may waive its requirement that the dues be paid on the first of each month, and evidence that the dues were accepted by the local agent and subsequently sent to the home office and retained by it and that both the solicitor taking the application and the local agent had stated to the insured that the dues could be paid later in the month, is sufficient to show a waiver of such a provision notwithstanding a notice of suspension received by the insured two days after he had paid his dues where the dues for several months subsequent were retained and the association had never enforced a suspension for failure to pay on time against any of its members.—Lord v. National Protective Society, 129 Mich. 335.

§ 28. Winding up assessments.

Dissolution and winding up of the association, see ante § 11.

Charging receiver with amount of assessments not collected, see Receivers, V.

¶ 82. Under Comp. L. 1897, § 5718, providing that receivers for mutual benefit associations may continue the business by order of court for the purpose of paying all death claims which have accrued at the time of their appointment, the receiver may be compelled to levy an assessment to pay a death claim accruing after a petition for the voluntary dissolution of the association but prior to an adjudication and the appointment of the receiver.—Taft v. Kent Circuit Judge, 129 Mich. 312.

IV. BENEFICIARY, CHANGE OF BENEFICIARY, AND RIGHT TO BENEFITS.

§ 29. In general.

Benefit or insurance contract, see ante II.

Effect of after enacted by-law requiring insurable interest, see ante ¶ 61.

Effect of after enacted statutes as to beneficiaries, see ante ¶ 64.

Change of beneficiary, see post § 33.

Validity and efficacy of change of beneficiary, see post § 42.

Effect of improper or defective designation of beneficiary, see post § 46.

Failure to designate beneficiary, see post § 47.

Accrual and amount of benefits, see post § 57.

Beneficiary and change of beneficiary in life and accident policies, see Insurance, IX.

Estoppel of beneficiary to urge want of insurable interest to defeat liability based on insurance, see Contracts § 95, ¶ 376.

Who may be beneficiary, see Pub. Acts 1917, No. 256, chap. IV, § 6.

Right of member to designate beneficiary, see Pub. Acts 1917, No. 256, chap. IV, § 6.

§ 30. Eligibility, interest and relationship to insured.

[Note. What constitutes an insurable interest in the life of another does not ordinarily involve anything but what is common to all life insurance, and on that subject the topic Insurance, IV, should be consulted.]

Public policy as to certificate to persons in supposed but not in legal marriage relation, see Contracts § 64, ¶ 264.

¶ 83. No person not of the class for whose benefit a mutual benefit association is authorized can be a beneficiary.—Wolf v. District Grand Lodge No. 6, I. O. B. B., 102 Mich. 23; Supreme Lodge Order of Mutual Protection v. Dewey, 142 Mich. 666.

¶ 84. Where the by-laws of a mutual benefit society provide that "a benefit may be made payable to any one or more persons of any one of the following classes only" and enumerates in the first grade twelve classes, the laws authorize a member to select his beneficiaries from any one of the twelve grades regardless of the existence of members of the preceding grades, and the enumeration in the twelfth grade of "members next of kin who would be distributees of the personal estate of such member upon his death intestate" the words "next of kin" mean those who would be next of kin on the failure of the eleven preceding grades.—Mathewson v. Supreme Council Royal Arcanum, 146 Mich. 671, per Blair and McAlvay, JJ., concurring.

¶ 85. A member of a mutual benefit association organized under a statute which was later amended by adding classes of persons

as beneficiaries, and which statute provided that no corporation organized under the original statute need reincorporate but could continue to exercise all powers not inconsistent with the amended act, could designate a member of the added class by surrendering his original certificate and having a new one issued even though the beneficiaries named were not those provided for by the by-laws, and the society had not changed its by-laws to conform to the amended statute.—Mathewson v. Supreme Council Royal Arcanum, 146 Mich. 671.

¶ 86. The fact that the proceeds of a beneficial certificate are to be put into the hands of a trustee who is not a blood relative, for the use of the trustee for life and the remainder to the grandsons of the insured, does not preclude the grandsons from being proper beneficiaries under a by-law limiting such beneficiaries to blood relatives.—Grand Lodge of Ancient Order of United Workmen v. Fisk, 126 Mich. 356.

¶ 87. The word "heirs" as used in a statute authorizing fraternal societies to issue certificates payable to members' heirs has reference to those who would be entitled to the member's property were he to die intestate.—Hosmer v. Welch, 107 Mich. 470.

¶ 88. Where the insured himself rather than the insurer designates as beneficiary one having no insurable interest, the policy is not void as being a wagering contract.—Dolan v. Supreme Council Cath. Mut. Ben. Ass'n, 152 Mich. 266.

§ 31. ——"Family and dependents."

Eligibility of one who cohabits with her supposed husband, see post ¶ 137.

¶ 89. Where the laws of another state under which a mutual benefit society is organized forbid such corporations from paying benefits to any but the member's family or dependents, persons who are not actual relations or standing in the place of relations in some permanent way, or in some actual dependence on the member, cannot become beneficiaries.—Supreme Lodge Knights of Honor v. Nairn, 60 Mich. 44.

¶ 90. A. is not a member of B.'s "family"—so as to entitle him (A.) to be named as beneficiary in a certificate issued to B.—merely by reason of army comradeship, intimate friendship, and living for some time in B.'s house.—Supreme Lodge Knights of Honor v. Nairn, 60 Mich. 44.

¶ 91. One who separates from his wife without divorce, and thereafter lives with a sister, paying no board and being cared for by her as one of the family, may procure a valid certificate upon his life for the benefit of the sister, in a fraternal society authorized by statute to issue certificates payable to a member of the "family" of the insured.—Hosmer v. Welch, 107 Mich. 470.

¶ 92. The term "family" in statutes providing for death indemnities for members of beneficial societies is a term of great flexibility, and may apply to blood relatives, even though living apart from the applicant and having families of their own. It may apply to those who are neither relatives by consanguinity or affinity, provided they are of the household of the applicant and maintaining the relations usual in families united by ties of blood.—Supreme Lodge Order of Mutual Protection v. Dewey, 142 Mich. 666.

¶ 93. No person who is not of the class for whose benefit a beneficial society was authorized can be a beneficiary, and therefore a stepfather not being a member of his stepdaughter's household at the time of her death, although he had previously boarded with her, is not a member of her "family" within Hurd's Rev. Stat. of Illinois, 1903, chap. 73, § 1, and within the by-laws of the fraternity, and he cannot be her beneficiary.—Supreme Lodge Order of Mutual Protection v. Dewey, 142 Mich. 666.

¶ 94. A relative by marriage does not become a member of one's "family" when not a member of the household nor maintaining the usual family relation under statutes providing for death indemnities of benefit societies.—Supreme Lodge Order of Mutual Protection v. Dewey, 142 Mich. 666.

¶ 95. On a bill by a fraternal beneficial association to interplead the claimants of the proceeds of a certificate and to determine the title to the proceeds, where the by-laws limited the beneficiary to one or more "members of the family," held that a foster son of deceased, who had never been legally adopted, who had his own home, separate from that of the deceased, was not a member of the family and that his designation as a beneficiary was invalid under the by-laws of the order.—Grand Lodge of Ancient Order of United Workmen v. McKay, 149 Mich. 90.

§ 32. Trustee of certificate for others.

¶ 96. One who has been made the trustee of a benefit certificate under a trust to pay all but $100 thereof to a named aunt of the insured, she being incapable of becoming a beneficiary under the certificate and the trust being expressly for the purpose of compensating the aunt for care bestowed on insured during his last sickness, is not estopped to assert that the aunt has otherwise been fully paid and thereupon to claim the entire proceeds of the certificate; since under the trust her only interest is that of compensation.—Knights of Modern Maccabees v. Grice, 148 Mich. 422.

¶ 97. A person who is made a beneficiary of a fraternal benefit certificate under an arrangement whereby she is a trustee of the proceeds for certain purposes, cannot, upon a second certificate being issued to her in

substitution for the first, repudiate the trust on the ground that she was wrongfully designated as a beneficiary when the first certificate was issued, not at that time having sustained the proper relation to the member to become a beneficiary.—Grand Lodge Ancient Order United Workmen of State of Michigan v. Beath, 150 Mich. 657. (Ostrander and McAlvay, JJ., dissenting.)

§ 33. Change of beneficiary.

Modification of contracts generally, see Contracts, VIII.

Assignment and transfer of insurance policies, see Insurance, XI.

Member's right to change beneficiary, see Pub. Acts 1917, No. 256, chap. IV, § 6.

¶ 98. The holder of a mutual benefit certificate has the right to change his beneficiary at pleasure, and such right will not be denied unless it is plain that the beneficiary named in the certificate has by contract and by performance acquired a vested interest in the certificate and funds.—Modern Brotherhood of America v. Hudson, 194 Mich. 124.

¶ 99. A member of a mutual benefit association who accepted a certificate naming his sister as beneficiary, and limiting his right thereafter to name other beneficiaries to such person or persons as the rules and regulations of such association should determine, and agreeing to comply with all regulations of the society thereafter to be enacted, could not substitute a creditor and strangers for his sister as beneficiaries, after such association had so amended its constitution and by-laws, under the statute, as to limit beneficiaries under a certificate of membership to relatives of or persons dependent upon the member; since the right of such member thereafter to nominate another beneficiary was not a vested right, but subject to the reasonable action of such association.—Brinen v. Supreme Council, Catholic Mut. Ben. Ass'n, 140 Mich. 220.

¶ 100. After the death of a member, a beneficiary society has no power to change the disposition of a benefit fund from the beneficiaries in whom it vested at the time of the member's death.—Knights of Columbus v. McInerney, 153 Mich. 574.

§ 34. ——Consent of existing beneficiary.

¶ 101. The fact that a benefit certificate was in possession of the insured's wife, who was the beneficiary, and that she paid the assessments for a time, did not give her the right to protest against a change of beneficiary and particularly so where the new beneficiary under similar circumstances kept up the payments.—Grand Lodge A. O. U. W. v. McGrath, 133 Mich. 626.

¶ 102. Under a by-law of a mutual benefit association permitting the changing of a beneficiary upon the signing of a waiver of the original certificate and paying a certificate fee, the insured, upon complying with such requirements as to waiver and payment, may change the beneficiary at any time, and obtain a new policy without the consent of the beneficiary.—New Era Ass'n v. Kuyat, 191 Mich. 646.

§ 35. ——Contract with beneficiary or others preventing change.

¶ 103. The mutual promises of a father and mother, who each hold the certificate of a beneficial association in which the other is named as beneficiary, never to change the beneficiaries so named, create no legal or equitable interest of the children in the fund derived on the death of the surviving parent, although, if no such change had been made, they would have been the legal beneficiaries, and although the mutual promises of the parents contemplated that in such case they should be the legal beneficiaries.—Knights of Modern Maccabees v. Sharp, 163 Mich. 449.

¶ 104. A husband and wife took out benefit certificates in each other's favor, with their children as contingent beneficiaries, and agreed that no change of beneficiaries should be made by either of them so as to exclude the children. Held, the husband nevertheless upon the death of the wife might substitute his second wife as beneficiary, since there being no reserve values on the certificate the children acquired no vested interest.—Knights of Modern Maccabees v. Sharp, 163 Mich. 449.

¶ 105. A husband and wife each took out benefit certificates in favor of each other, their children to be the contingent beneficiaries. Held, that in determining whether they contracted with each other that the beneficiary in the certificates should not be changed from the children to some other person, the fact of such a contract could not be established merely by the testimony of friends that they had heard the husband and wife make remarks indicating the existence of such a contract.—Knights of Modern Maccabees v. Sharp, 163 Mich. 449.

¶ 106. An agreement by a married woman named as beneficiary in a certificate of fraternal insurance on the life of her husband, with the latter to pay from her own earnings subsequent assessments thereon, is not based on a sufficient consideration, although performed by her for a number of years, to give her a vested interest in the certificate which will prevent the insured making a subsequent change of beneficiary under the by-laws of the society, without her consent.—Schiller-Bund v. Knack, 184 Mich. 95.

¶ 107. Where a membership in a mutual benefit association can be had only by payment of both assessments and dues, the consideration moving to the insurer from the insured for the benefit promised by the cer-

tificate and the laws of the association is the payment of both dues and assessments, and consequently a promise of a third person to pay assessments and dues and the payment of them is insufficient to create in such third person a vested interest in the certificate and funds, and does not limit the right of the insured to change the beneficiary at his pleasure.—Modern Brotherhood of America v. Hudson, 194 Mich. 124.

§ 36. Manner and mode of changing.

Validity and efficacy of change, see post § 42.

Application, surrender, payment of fees, and issue of new certificate, see post §§ 37-40.

¶ 108. The beneficiary named in a certificate of membership issued by a mutual benefit society can be changed only in the manner prescribed by the laws of the association and the certificate's terms.—Supreme Lodge Knights of Honor v. Nairn, 60 Mich. 44.

¶ 109. "May" as used in the charter of a benefit society providing that a member "may" change his beneficiaries in a prescribed manner is construed "must," where the context reads that he "shall" do so in a manner pointed out.—Grand Lodge of Ancient Order of United Workmen v. Fisk, 126 Mich. 356.

¶ 110. Under the rules of a mutual benefit association providing that a member may change his beneficiary by indorsement upon his certificate and surrender of the same for reissue, such change may be effected by will, where the certificate was delivered for safe keeping only to the beneficiary named therein, who afterwards refused to surrender it, and the local body declined to permit the change to be made without its production.—Grand Lodge A. O. U. W. v. Kohler, 106 Mich. 121.

¶ 111. A will made after the death of the beneficiary leaving all the personal property to another, does not change the beneficiary under a certificate where the constitution of the association provides that the change may be made by surrendering the certificate and the issuance of a new one, and where no obstacle to such proceedings on the part of the insured is shown to have existed.—Grand Lodge of Ancient Order of United Workmen v. Fisk, 126 Mich. 356.

¶ 112. Where the by-laws of a mutual benefit insurance association provide that any person desiring any change of beneficiary in a certificate must forward a certain fee to the state secretary with an application for the same and that death benefits shall be paid to such persons as the deceased member shall ordain, otherwise to the administrator or executor of the estate of such person, such by-laws must be complied with, and the marriage of the member and the birth of issue does not constitute a revocation of designation of beneficiaries.—Ladies' Auxiliary, A. O. H. v. Flanigan, 190 Mich. 675.

§ 37. ——Application for change.

¶ 113. The widow of a member of a mutual benefit society is not entitled to a policy of insurance taken out by her deceased husband before marriage in favor of his mother, on a bill to determine the rightful ownership thereof, where the by-laws and rules of such society provide among other things, that no change of beneficiary named in the certificate shall be binding upon the order, unless application therefor is made in writing by the member together with the delivery of his certificate; where it appears that the deceased never requested such society to transfer the insurance to his wife; even though the complainant made some payments of such policy, relying upon a statement of her husband that he would give or assign or will the certificate of insurance to her.—Coston v. Coston, 145 Mich. 390.

¶ 114. It is immaterial that there was no valid request for the change of a beneficiary in compliance with the by-laws of a mutual benefit association, because such application was not personally signed where a new certificate is in fact issued and the insured ratifies the change by personally signing his name on the bottom of such certificate as required.—New Era Ass'n v. Kuyat, 191 Mich. 646.

§ 38. ——Surrender of certificate.

See also ante ¶ 102.

Effect of refusal of depositary of certificate to surrender, see also ante ¶ 110.

¶ 115. While it is possible that when a member of a mutual benefit society has executed and delivered to the proper officer his attested surrender, in favor of a competent beneficiary, such member's death, before a new certificate is rendered, may leave his power of designation so far executed as to enable a court of equity to relieve against the accident, yet a surrender not meant to be made until after the member's death is of no force.—Supreme Lodge Knights of Honor v. Nairn, 60 Mich. 44.

¶ 116. Where a change of beneficiaries is required to be made by the member surrendering his certificate, and receiving a new one payable as he shall have directed, said surrender and direction to be signed and attested, a conditional surrender not to take effect until after the member's death, and not attested, is of no force.—Supreme Lodge Knights of Honor v. Nairn, 60 Mich. 44.

¶ 117. A member of a mutual benefit society caused his certificate to be made payable to his betrothed. She married another, and the member made application to the society, stating the loss of the certificate and asking that his son be substituted as the

beneficiary. This was denied on the ground that the first certificate was not surrendered, as the rules required on changing the beneficiary, to which rules he had bound himself. He thereupon gave a power of attorney to another to collect the amount that should accrue under the certificate. This was done on suggestion of his lodge officers. Held, on bill of interpleader, that the son was entitled to the fund.—Grand Lodge A. O. U. W. v. Child, 70 Mich. 163.

¶ 118. Where a member of a beneficiary society requests that the beneficiary in his certificate be changed but does not present for surrender his old certificate as required by the constitution of the society because it is in the hands of the beneficiary who refuses to give it up, and the society issues a new certificate naming the new beneficiary as requested, the latter may recover thereon, since the surrender was waived by the society and the old certificate became void.—Allgemeiner Arbeiter Bund v. Adamson, 132 Mich. 86.

¶ 118a. When permitted by the by-laws of a fraternal insurance society a member may change the beneficiary named in his certificate as often as he chooses, notwithstanding that the certificate may be in possession of a prior beneficiary who may have paid assessments thereon.—Schiller-Bund v. Knack, 184 Mich. 95.

§ 39. ——Payment of fees.

See also ante ¶ 102.

¶ 119. The constitution of a benefit order provided that a member desiring to change the beneficiary of his policy should make a written request therefor and deliver same with the certificate fee of twenty-five cents to the secretary of the local lodge, to be forwarded to the supreme secretary, who should thereupon, if the requested change should be within the rules of the order, issue a new certificate. An insured member made out such a request and delivered the same to the local secretary, who promptly forwarded it to the supreme secretary, but said member did not pay the fee. Said member died before the request was forwarded by the local secretary. Held, no change of beneficiary was effected.—Ancient Order of Gleaners v. Bury, 165 Mich. 1.

§ 40. ——Issuance and delivery of new certificate.

¶ 120. The issuance of a new certificate and its retention by an officer of a beneficial association under an agreement as custodian for the member is sufficient delivery to change the beneficiary.—Supreme Court, Order of Patricians v. Davis, 129 Mich. 318.

§ 41. Unexecuted intention to change.

¶ 121. A mere purpose on the part of a decedent to change the beneficiary in an insurance policy will not give the intended new beneficiary any claim to the fund.—Franken v. Supreme Court Independent Order of Foresters, 152 Mich. 502.

¶ 122. An unexecuted intention to change the beneficiaries in a mutual benefit insurance policy will not deprive the designated beneficiaries of their rights to the proceeds of the policy upon the member's death where the by-laws of the association provide that beneficiaries may be changed upon fulfilling certain requirements.—Ladies' Auxiliary, A. O. H. v. Flanigan, 190 Mich. 675.

§ 42. Validity and efficacy of change.

As to mental competency of insured to substitute a new beneficiary, see also Insane Persons, I.

¶ 123. Where an attempt to change the beneficiary in a benefit certificate is made and fails because of the want of mental capacity on the part of the insured, the original designation remains in force.—Grand Lodge A. O. U. W. v. Frank, 133 Mich. 232.

§ 43. ——Who may question change.

¶ 124. A beneficiary in a benefit certificate, had such an inchoate interest in such certificate, as entitled her in a bill of interpleader, to raise the question of the mental incompetency of the insured at the time of the change of beneficiaries.—Grand Lodge A. O. U. W. v. McGrath, 133 Mich. 626.

¶ 125. Although the beneficiary in a benefit certificate had no vested interest in the certificate, she had a contingent interest which enabled her to raise the question of the mental capacity of the insured, in a bill of interpleader to determine the right to the certificate in question which had been issued in lieu of the former.—Grand Lodge A. O. U. W. v. Frank, 133 Mich. 232.

¶ 126. Where a husband takes out a benefit certificate making his wife beneficiary and his children contingent beneficiaries, and after the death of the wife he makes his second wife beneficiary, the children, in a suit to determine the right to the proceeds of the insurance, may prove that the father was mentally incompetent to make said change.—Knights of Modern Maccabees v. Sharp, 163 Mich. 449.

¶ 127. The insured changed the beneficiary of his policy from his wife to his brothers and sisters. The society admitted its liability and interpleaded between them. Held, that the society could raise the question whether its by-laws had been so amended as to permit the said change of beneficiary, but not the original beneficiary.—Grand Lodge Ancient Order United Workmen v. Brown, 160 Mich. 437.

¶ 128. Under a policy in a benefit order persons removed by the insured as benefi-

ciaries cannot complain that the substitution of beneficiaries was not made in strict compliance with the rules and by-laws of the order, since such objection is open only to the insurer.—Ladies of Modern Maccabees v. Daley, 166 Mich. 542.

§ 44. ——Waiver of irregularities.

¶ 129. The arrangement for insurance between a beneficial association and a member is a contract between the parties, and it is unnecessary for the member to comply with the letter of the by-laws as to a change of beneficiary if the company accepts the change and issues the new certificate.—Supreme Court, Order of Patricians v. Davis, 129 Mich. 318.

§ 45. Person entitled to benefit payments or share therein.

Waiver of provision that member be initiated to be entitled to benefits, see ante ¶ 68.

Right of trustee of certificate to claim proceeds thereof, see ante § 32.

Rights as between beneficiaries under old and new certificates, see ante ¶ 118.

Rights of intended new beneficiary where change not effectuated, see ante §§ 41, 42.

Power of society to change disposition of benefit after insured's death, see ante ¶ 100.

Interpleader to determine rights to benefits, see ante ¶ 95, § 43.

Effect of forfeiture, suspension or cancellation of the contract, see post, V.

Accrual and amount of benefits, see post, VI.

Exemption of insurance benefits from levy, see Exemptions § 25.

Immunity of benefit from attachment, see Pub. Acts 1917, No. 256, chap. IV, § 21.

¶ 130. The fact that under a mistake of fact as to whom a beneficiary certificate was payable, the assessments were paid by a daughter of the supposed beneficiary, will not entitle such beneficiary to the proceeds as against the widow and children of the deceased member.—Knights of Columbus v. McInerney, 153 Mich. 574.

¶ 131. Where the amount of a benefit certificate remains in the hands of the beneficiary society, a release by the person legally entitled to such fund, executed to the society, will not affect her rights to subsequently claim such fund, where other claimants of the fund assumed no rights and lost nothing by the release, and the society did not act upon it, and makes no claim under it.—Knights of Columbus v. McInerney, 153 Mich. 574.

¶ 132. A change of the beneficiary of insurance certificates from the wife of the insured to his sister is to be regarded as for security and not as a gift excluding the wife, where it appears that at the time he was sick, dispirited, deeply in debt, and that the raising of money was proposed by his sister as a way out of his difficulties, and where after he died she offered a compromise and on trial testified that she intended to reimburse herself and turn over the surplus for the benefit of the daughter of insured, and where there was other testimony corroborative of an intent to give security only, though the sister claimed an outright gift and offered evidence that he desired to cut off his wife.—Great Camp Knights of the Modern Maccabees v. Deem, 143 Mich. 652.

¶ 133. A person insured in a benefit society may, unless prohibited by the terms of his certificate or the rules of the society, charge the beneficiary by will with the payment of a debt out of the proceeds of the insurance, and make the debt a lien on the proceeds.—Woodruff v. Tilman, 112 Mich. 188.

¶ 134. One who without gaining any beneficial interest in a certificate voluntarily pays sums of money for dues and assessments for a member in a mutual benefit association is, upon the death of the member, entitled to reimbursement at most on being interpleaded with another who was the nominal beneficiary.—Modern Brotherhood of America v. Hudson, 194 Mich. 124.

¶ 135. A beneficiary fund payable on the death of a member of an association to persons named by him is not to be treated as part of his estate, subject to his debts, and does not go to the administrator, but should be paid directly to the beneficiaries or to their guardians.—Catholic Mut. Ben. Ass'n v. Priest, 46 Mich. 429; Catholic Mut. Ben. Ass'n v. Firnane, 50 Mich. 82.

¶ 136. Where a mutual benefit association is organized for the purpose of providing a benefaction for the member's family or dependents, the fund cannot be appropriated to the payment of his debts.—Supreme Lodge Knights of Honor v. Nairn, 60 Mich. 44.

§ 46. ——Improper or defective designation.

¶ 137. A woman who entered into a contract of marriage under the belief that she was divorced from her former husband, and who in good faith lives and cohabits with her supposed husband, may take under a benefit certificate naming her as beneficiary, in a fraternal benefit society whose by-laws provide for payment to wife, husband, mother, etc., as against the mother of insured who had for 18 years treated the parties as husband and wife.—Supreme Tent Knights of the Maccabees v. McAllister, 132 Mich. 69.

¶ 138. Where a policy in a beneficial association provided that the rights of the beneficiary shall be determined by the laws of the order in force on the date of the death of the member, and the law provided among

other things that should a member die without designating a beneficiary or the beneficiary designated prove to be an unlawful one the wife or husband shall be recognized as the first claimant for the benefit, the by-law is a part of the insurance contract; and the husband of a deceased member is entitled to the amount of the policy in case a stepfather named as beneficiary was decided not to be a member of the deceased's household, even though the association was willing to pay the amount to the designated beneficiary.—Supreme Lodge Order of Mutual Protection v. Dewey, 142 Mich. 666.

¶ 139. Where the charter of a beneficiary society provides that beneficiaries must be such person or persons of the immediate family of the member as are designated by him, or, in default of such family, such blood relative or relatives of such member as are designated by him, and the certificate provides that the beneficiary must be the lawful beneficiary of the member at the time of his death, the mother of the member, who is named in the certificate, cannot claim the proceeds thereof as against his wife and children by a subsequent marriage.—Knights of Columbus v. McInerney, 153 Mich. 574.

§ 47. ——Lack of designation or death of designated beneficiary.

¶ 140. Where a certificate of death, under the endowment laws (Art. 1, § 6) and the constitution (Art. 2, § 4) of the Great Camp of Knights of Maccabees, runs to the member and he dies without any direction as to its payment, it can be collected by his legal heirs, especially where such heirs belong to the classes of persons to whom he might have directed it to be made payable. —Peet v. Great Camp of Knights of Maccabees, 83 Mich. 92.

¶ 141. Where a member of a mutual benefit association fails to designate a beneficiary, and dies intestate, his heirs will take the death benefit.—Wolf v. District Grand Lodge No. 6, I. O. B. B., 102 Mich. 23.

¶ 142. Where a by-law of a fraternal insurance association provided that benefits should only be paid or certificates transferred to certain persons named in such by-law, held that, where the beneficiary named in a certificate was not living at the time the insured died, the benefits should be paid to the persons named in the by-law in the order given therein, although the by-law did not so provide.—Switchmen's Union of North America v. Gillerman, 196 Mich. 141.

§ 48. ——Effect of divorce.

Adjustment of property rights upon divorce, see Divorce, X.

¶ 143. Under section 7740, Comp. Laws 1897, How. St., 2nd Ed., § 9022, a decree of divorce terminates a wife's interest as beneficiary in a certificate of fraternal insurance on the life of her husband, except where she has a vested interest therein.—Schiller-Bund v. Knack, 184 Mich. 95.

¶ 144. Where the by-laws of a mutual benefit association provide that divorce will ipso facto annul a designation in a benefit certificate in favor of the wife, and where a member of such association has, after obtaining a divorce, revoked the directions in his certificate making his wife the beneficiary, the divorced wife cannot recover the insurance under the statute (section 1, Act No. 119, Pub. Acts 1893), providing that payment of death benefits shall be made only to the widow or other near relatives of the insured, since a divorced wife is not the widow of her former husband after his death.—Dahlin v. Knights of the Modern Maccabees for Michigan, 151 Mich. 644.

¶ 145. The payment by the beneficiary, a divorced wife of the member of a mutual benefit society, of the assessments on a certificate of insurance, held not to give her a vested interest in the proceeds of the certificate.—Knights of Maccabees of the World v. Brown, 186 Mich. 284.

¶ 146. A by-law of a mutual benefit society prohibiting a divorced beneficiary from taking under a certificate, held applicable, although not in force when the certificate was issued, where the by-law was adopted previously to the reinstatement of the insured under an application declaring that his contract with the society was subject to the constitution and by-laws then in force. —Knights of Maccabees of the World v. Brown, 186 Mich. 284.

V. FORFEITURE, SUSPENSION, AVOIDANCE, OR CANCELLATION OF CONTRACT.

§ 49. In general; misrepresentation or breach of warranty.

Discipline, fines and expulsion of members, see ante § 8.

Benefit or insurance contract, see ante II.

Construction of provisions in contract as to forfeiture, see ante § 20.

Failure to observe after enacted by-laws, see ante § 18.

Forfeiture for engaging in sale of intoxicating liquors, see ante § 18.

Defense of fraud set up by the general issue and notice thereunder, see post § 71.

Burden of proving fraud in application, see post § 72.

[Note. The general doctrine, that a material falsity or a breach of warranty or condition in the policy or the contract of insurance will defeat recovery on it, is a part of the general insurance law. For further cases on the subject, see Insurance, XII.]

Fraud and deceit in general, see Fraud.
Fraud vitiating contracts, see Contracts, III, D.

¶ 147. A life insurance policy is void because of false statements in the application where the applicant stated to the examining physician that he did not know whether he had been rejected by any other company, when in fact he knew that he had been rejected.—Genrow v. Modern Woodmen of America, 151 Mich. 250.

¶ 148. The representation as to age in an application for membership in a benefit association is a material warranty where the person's age determines the risk and measures the membership dues, and where misrepresentation is made a ground of forfeiture.—Hunt v. Supreme Council of the Order of Chosen Friends, 64 Mich. 671.

¶ 149. The by-laws of defendant benefit order provided that no insurance should be paid on a member following the trade of metal polisher. The plaintiff's insured stated in his preliminary application to defendant's local lodge that he was a polisher. A local committee investigated his standing and he was duly elected to membership. In his formal application he stated that he was working as a dirt hauler and that he had no regular employment, which statement was true at that time. The insured after becoming a member followed the occupation of metal polisher. Held, defendant could not on these facts maintain its contention that it was not liable for the insurance on the ground that the insured had practiced fraud upon it.—Lessnau v. Catholic Order of Foresters, 163 Mich. 111.

¶ 150. An answer in the application that applicant never had asthma or spitting of blood and had not been rejected by any other medical examiner is not materially false, so as to vitiate the insurance, as matter of law, where the fact was that about eleven years before that insured had been sick of an illness which temporarily caused blood spitting, and had intended to apply for insurance but desisted on being told by the examiner that it would be useless because he had asthma and no examination was made to ascertain the fact, and where all these facts were disclosed to the medical examiner of insurer, who wrote the answers accordingly.—Pudritzky v. Supreme Lodge Knights of Honor, 76 Mich. 428.

¶ 151. Where a mutual benefit insurance certificate provides that such certificate shall be void in case of untruthfulness of any answer, and the insured makes a false answer in his application for a new certificate as to whether he had ever been married, whether he had within the last 7 years consulted any physician with regard to his health, and as to whether he had ever been treated for certain diseases, the beneficiary may not recover on such certificate.—Sowiczki v. Modern Woodmen of America, 192 Mich. 265.

¶ 152. A mere rumor as to the use of liquor and drugs by an applicant for mutual benefit insurance which is communicated by a local officer of the society to a deputy supreme oracle of the head camp after the application is signed and before the policy is signed is not such knowledge as can be made the basis of an estoppel of the insurer to claim fraud in the making of false statements in the application as to the use of liquor and drugs.—Cameron v. Royal Neighbors of America, 197 Mich. 173.

¶ 153. To the question in an application for membership in a mutual benefit society, "Has any examining physician for a life insurance company or order declined to recommend your application?" the applicant answered, "No." The answer was untrue. The application in terms and emphatically made the truth of each answer a condition precedent to the validity of the certificate of insurance issued thereon, and neither the company nor its agent was advised of the falsity of the statement at the time the risk was accepted. Held, that the certificate was void.—Finch v. Modern Woodmen, 113 Mich. 646.

¶ 154. Where the medical examiner of an insurance company, acting as its agent, assumes to write out answers to questions upon his own knowledge of the facts, rather than from the answers of the applicant, the company is not in a position to claim that such answers were untrue and annul the contract.—Pudritzky v. Supreme Lodge Knights of Honor, 76 Mich. 428.

¶ 155. A question in an application for fraternal insurance, whether any member of the applicant's household had been affected with consumption within the previous two years is not limited to living members only, but includes as well such as may have died within that time from such cause.—O'Brien v. Brotherhood of American Yeomen, 183 Mich. 86.

¶ 156. The right of a member of a benefit society to sick benefits, or to sue for them, cannot be evaded by expelling the member upon the theory that his claim is fraudulent.—Wuerthner v. Workingmen's Benevolent Soc., 121 Mich. 90.

§ 50. Failure to pay dues and assessments.

Dues and assessments, see ante, III.
Failure to pay assessments made under order of foreign association, see ante ¶ 41.

¶ 157. The constitution of a mutual benefit society provided that "each member shall pay the amount due, on the notice of the financial secretary, on or before the following 28th day of the month in which he receives the notice. The financial secretary shall notify the president when a member has

failed to pay the amount assessed in the required time, and the president shall announce the fact to the assembly, and the member shall stand suspended from the order and all benefits thereof. It shall be the duty of the subordinate secretary to notify the general secretary of such suspension, and also notify the member suspended." The constitution of the local chapter provided that "any member failing to pay his dues * * * within the first month of the quarter shall be declared in arrears, * * * and, if his dues for the quarter are not paid on or before the last meeting night of said quarter, the fact shall be announced by the financial secretary in open assembly, and, if the dues are not paid on or before the next meeting, he shall be declared by the assembly suspended from all benefits of the order." It was further provided by the general constitution that "if a member is delinquent for one or more assessments already called to the benefit fund, or three months or more in arrears for dues, at the time of death, * * * the beneficiary * * * shall not be entitled to benefits from said fund." Held, that the mere failure to pay assessments and dues did not, ipso facto, work a forfeiture of the benefit certificate.—Petherick v. General Assembly of Order of Amaranth, 114 Mich. 420.

¶ 158. Where the by-laws of a fraternal benefit society provide that nonpayment of monthly dues shall defeat recovery, it cannot be urged that such failure should not defeat recovery from a fund which was not derived from monthly dues.—Houle v. Societe St. Jean Baptiste, 153 Mich. 357.

¶ 159. Where a son, charged with a duty to pay the dues of his father in a mutual benefit society, was informed by the secretary of the society that the dues for certain months were paid, such fact will not justify a failure to pay dues for subsequent months.—Houle v. Societe St. Jean Baptiste, 153 Mich. 357.

¶ 160. A grand lodge of the Ancient Order of United Workmen, incorporated under How. St., chap. 118, cannot compel its members to pay assessments made under the orders of a supreme lodge incorporated under the laws of Kentucky and not subject to Michigan courts. Nor can it suspend members from their privileges as such for refusing to pay such assessment.—Lamphere v. Grand Lodge A. O. U. W., 47 Mich. 429.

§ 51. Loss of membership or local charter.

¶ 161. The due suspension of a subordinate tent of the Knights of the Maccabees, though without fault on the part of a particular member and without any notice to him, operates as a suspension, and as a forfeiture of his rights, unless within thirty days he applies for a special certificate.—Peet v. Great Camp of Knights of Maccabees, 83 Mich. 92.

¶ 162. Where a member of a benefit order is suspended, and neither he nor his beneficiary prosecutes an appeal as provided by the by-laws, the beneficiary cannot recover the insurance money.—Conley v. Supreme Court Independent Order of Foresters, 158 Mich. 190.

§ 52. Voluntary act, suicide or crime by insured.

Effect of crimes on civil and property rights, see Crimes, I, F.

¶ 163. The right of a member of a benefit society to sick benefits cannot be defeated on the ground that the sickness was caused by the member's violation of the laws of health, and his own vice and immorality, where the by-laws of the society provide broadly for the payment of sick benefits, and do not prohibit payment when the illness is due to indiscretion or vice.—Wuerthner v. Workingmen's Benevolent Soc., 121 Mich. 91.

¶ 164. Under a benefit policy containing a provision against self-destruction or suicide, death of the insured by taking carbolic acid, not with the intent of causing death, but to frighten his wife into giving him money, was covered and the beneficiary was not precluded from recovery.—Courtemanche v. Supreme Court, I. O. F., 136 Mich. 30.

¶ 165. The mere fact that an insured procured an abortion upon herself is not conclusive as a defense to a life insurance policy making such policy void for violation of the criminal laws of the state, as the word in its primary meaning is equivalent to miscarriage, and the causing or procuring the same, under Comp. Laws 1897, §§ 11502, 11503, How. 2nd Ed., §§ 14555, 14556, may under certain circumstances be innocent, and even necessary to preserve life.—Gilchrist v. Mystic Workers of the World, 196 Mich. 247.

§ 53. Who may question validity.

¶ 166. Where a fraternal society sees fit to recognize the validity of a policy by payment to the beneficiary, an heir of the insured cannot maintain an action against such beneficiary to recover the money so paid, on the ground that the latter had no insurable interest in the life of the deceased, and that the policy was therefore void. Whether the rule is the same in a case where the beneficiary named in a mutual benefit certificate, though a legal beneficiary at common law, is not competent to take under the statute, quære.—Hosmer v. Welch, 107 Mich. 470.

§ 54. Waiver and estoppel.

See also post ¶ 194.

Waiver of proofs of loss, see post § 60.

Failure to instruct as to waiver of forfeiture, see post § 79.

¶ 167. Where a contract of fraternal insurance is made with the general camp of

the society, the local camp of which assured is a member cannot waive provisions of the contract on behalf of the society, but such waiver must be by the general camp.—Showalter v. Modern Woodmen of America, 156 Mich. 390.

¶ 168. Forfeiture of fraternal benefit insurance certificates is not favored by law, and if evidence of a beneficiary shows that officers of a lodge, by a long continued course of conduct waived strict compliance with rules and regulations as to the payment of assessments, a forfeiture would be inequitable and unjust.—Wallace v. Fraternal Mystic Circle, 121 Mich. 263.

¶ 169. Knowledge by a local officer whose duty it is to collect and remit assessments, that insured is engaged in a prohibited occupation does not work a waiver of forfeiture. —Brown v. Great Camp Knights of Modern Maccabees, 167 Mich. 123.

¶ 170. A beneficial society cannot be held to have waived the defense of forfeiture of the policy through the fact that the member has engaged in the prohibited occupation by reason of the fact that it has failed to return the assessments paid, where an offer to return has been made conditioned that it should be in full of the certificate, the amount thereof to be determined.—Brown v. Great Camp Knights of Modern Maccabees, 167 Mich. 123.

¶ 171. Where a fraternal insurance policy excepted the risk of death resulting from engaging in certain prohibited occupations, but left the policy in force as to death occurring from other causes while insured was so engaged, the acceptance of assessments from one engaged in a prohibited occupation does not constitute a waiver of the exemption from liability, as the society may assume that such payments are made to continue the policy in force according to its terms.—Showalter v. Modern Woodmen of America, 156 Mich. 390.

¶ 172. Failure of the officers of a fraternal insurance society to return the amount of an assessment to the representative of assured, upon learning of the fact of his death while engaged in a prohibited employment, does not amount to a ratification of a waiver by the local body of assured's act in engaging in such business, where no demand for such return was ever made upon such officers.—Showalter v. Modern Woodmen of America, 156 Mich. 390.

¶ 173. A benefit association which by a by-law prohibits members from belonging to a society not approved by the Catholic Church, waives such provision by accepting dues from a member known by its officers to belong to an unapproved society.—Dorff v. St. Adalbert's Aid Society, 157 Mich. 516.

¶ 174. The collection of an assessment from a member of a mutual benefit society does not constitute a waiver by the society of a provision in the benefit certificate that it should be void if the statements contained in the application for membership were untrue, where the officers were not aware of any false statements when they accepted payment.—Finch v. Modern Woodmen, 113 Mich. 646.

¶ 175. The acceptance of a past due assessment and the continued receipt of dues by a local agent of a beneficial association and his subsequent forwarding them to the association, is held to constitute a waiver of the condition in the policy that the membership would be terminated and reinstated only if the member were in good health and that no waiver could be claimed unless specifically authorized in writing.—Lord v. National Protective Soc., 134 Mich. 357.

¶ 176. The right to expel or suspend a member of a mutual fraternal society for nonpayment of assessments, held waived, where for many years he had been habitually slow in making payments, without action for his expulsion or suspension being taken by the local body, and at the time of his death, the amount of his arrearage had been paid by that body to the grand lodge.—Homann v. Allgemeiner Arbeiter Bund of Michigan, 184 Mich. 417.

¶ 177. The dues of the insured in defendant benefit society had not been paid for January and February. The defendant had printed a supply of cards to be sent by the local secretaries to delinquent members. On March 13th the local secretary sent one of these cards to the insured, who immediately paid the dues to the secretary. Held, the act of the company in supplying these cards did not amount to holding out on its part that it would waive delinquencies in payments so as to excuse the insured for the aforesaid delayed payment. — Koehler v. Modern Brotherhood of America, 160 Mich. 180.

¶ 178. A statement by a member of a mutual benefit society to some of his fellow members, to the effect that he is unable to keep up the assessments, and will be compelled to drop the insurance, will not bar him or the beneficiary named in the membership certificate from asserting a claim for death benefits, where the general constitution and the constitution of the local chapter provide for formal proceedings before suspension and forfeiture can be declared.—Petherick v. General Assembly of Order of Amaranth, 114 Mich. 420.

¶ 179. Where a mutual benefit association, with full knowledge that a deceased charter member had at the instance of an organizer misstated his age in his application for membership, bases its refusal to pay the death benefit solely upon the failure of the member to designate a beneficiary, the associa-

tion is estopped, in a suit afterwards brought to recover said death benefit, from asserting such misstatement as to age as a defense.—Wolf v. District Grand Lodge No. 6 I. O. B. B., 102 Mich. 23.

¶ 180. The refusal of a benefit society to pay a death claim on the distinct ground that the assured had never paid an assessment, waived the defense that the assured made false statements in relation to prior illness in his application; where the society knew of such misstatements at the time of said refusal to pay.—Taylor v. Supreme Lodge Columbian League, 135 Mich. 231.

¶ 181. The defense that insured was pregnant when she applied for membership and had stated in her application that she was not, is not waived by the failure of the officers of the association to attend at the appointed time and place for hearing an appeal after inferior officers had totally denied the claim for death benefits.—Clark v. North American Union, 179 Mich. 131.

¶ 182. Letters from an insurance company to a beneficiary under a certificate of fraternal insurance, relating only to proofs of loss necessary to present the claim, do not amount to a waiver of the defense of misrepresentation by the insured as to the state of her health.—O'Brien v. Brotherhood of American Yeomen, 183 Mich. 86.

¶ 183. A fraternal insurance society is not estopped from contesting the payment of a claim on the ground that an expense has been incurred in preparing proofs of loss, where on furnishing blank proofs it expressly states that it denies liability and in furnishing the blanks waives no rights to deny such liability.—Showalter v. Modern Woodmen of America, 156 Mich. 390.

¶ 183a. It cannot be urged that the grand lodge of a fraternal benefit society waives the provision that no certificate shall be issued to an applicant until he has been initiated where dues of a person not initiated are received and retained by the lodge under the mistaken belief that such person is a member and are tendered back upon discovery of the mistake.—Kolosinski v. Modern Brotherhood of America, 175 Mich. 684.

¶ 183b. Where a by-law of a fraternal benefit society states that officers do not possess the power to waive by-laws, a provision that a benefit certificate shall not be delivered to an applicant until he has been initiated, is not waived though an officer issues a certificate to one who has not been initiated.—Kolosinski v. Modern Brotherhood of America, 175 Mich. 684.

§ 55. Proceedings or acts to effectuate forfeiture or suspension.

See also ante ¶¶ 178, 181.
Proceedings to discipline, fine or suspend member, see ante § 9.
Proceedings for benefits, see post § 67.
Conclusiveness of internal proceedings and decision in respect to benefits, see post § 68.

¶ 184. The provision in the constitution of the Order of the Amaranth to the effect that a failure to pay assessments and dues on a mutual benefit certificate issued by such order works a forfeiture of the certificate, is of no force by itself; some affirmative action is necessary to work such forfeiture.—Dick v. General Assembly Order of the Amaranth, 150 Mich. 215.

¶ 185. A provision that a member shall be suspended in the event he engages in the sale of spirituous or malt liquors as a beverage, does not make the engaging in the prohibited occupation ipso facto a forfeiture of rights under the contract.—Brown v. Great Camp Knights of Modern Maccabees, 167 Mich. 123.

¶ 186. Where the by-laws of a fraternal benefit society provide that no member can pretend to the benefits of the society if he has neglected for three months to pay his monthly dues, a member cannot contend that, until the society has taken action suspending him, or until his name has been erased from the registry, he is entitled to benefits.—Houle v. Societe St. Jean Baptiste, 153 Mich. 357.

¶ 187. The laws of a fraternal mutual benefit society at the time when plaintiff's intestate joined it provided that the suspension of a subordinate tent by the great camp should also suspend the members of the tent unless within thirty days they should apply to the great camp for a special certificate. Subsequently the great camp adopted a resolution that it should in no event be liable for any default or negligence on the part of a subordinate tent in serving notices of assessments or suspensions. Held, that as the laws of the order when deceased became a member did not require any notice to him of the suspension of his tent, the resolution as far as it applied to notices of suspension did not impose upon him any additional burden or new forfeiture, but only made clear what was manifestly the intent of the laws of the order.—Peet v. Great Camp Knights of Maccabees, 83 Mich. 92.

¶ 188. A letter notifying a member of a fraternal benevolent society of his expulsion from the society which was received and acted upon by him, although not registered as required by the by-laws of the society, was sufficient to warrant expulsion.—Simek v. Lodge No. 86, Bohemian Slavonian Benevolent Soc., 118 Mich. 81.

¶ 189. The objection that a bill to cancel a benefit certificate for fraud is unnecessary because the bill alleges that the society assumed to cancel and annul the certificate, is

unavailing where the binding force of the attempt at cancellation is denied.—Mactavish v. Kent Circuit Judge, 122 Mich. 242.

¶ 189a. Where the constitution of a mutual insurance association provides that members forfeit their rights to benefits by failure to pay assessments, and that notice of delinquency must be given by the secretary within a certain time after which a specified time for payment is allowed, a positive duty is imposed on the society to give such notice and in the absence thereof the member's rights are not forfeited.—Roulo v. Schiller Bund, 172 Mich. 557.

¶ 189b. Where the constitution of a mutual insurance association provides that it is the duty of the secretary to notify members of delinquency in the payment of assessments before a certain time and the by-laws which closely follow another article of the constitution specify that dues must be paid within a certain time or the member loses all benefits but such article further provides that members delinquent in the payment of dues and assessments are to be treated alike before rights are forfeited, the by-laws and the constitution may be construed to be in harmony and notice by the secretary must be given as required in case of delinquency in either the payment of dues or assessments before the rights of the member to benefits are forfeited.—Roulo v. Schiller Bund, 172 Mich. 557.

§ 56. Reinstatement.

Suspension or expulsion of member, see ante § 8.

Mandamus to compel reinstatement, see Mandamus.

¶ 190. A suspended member of a fraternal benefit association can be reinstated only in strict conformity with the laws of the order.—Edgerly v. Ladies of Modern Maccabees, 185 Mich. 148.

¶ 191. A suspended member of a fraternal benefit association has only such rights to reinstatement as exist at the time of his application therefor; and he cannot complain of changes that may have occurred in the order during the time of his suspension.—Edgerly v. Ladies of Modern Maccabees, 185 Mich. 148.

¶ 192. A member of a fraternal benefit association who voluntarily and deliberately drops out of the order, and who receives notice of suspension for nonpayment of dues, does not, in the absence of a law of the society, automatically acquire any rights under a special dispensation issued during his suspension, relating to the reinstatement of suspended members; and he may be reinstated only by making application to the local body of which he is a member, in the manner required by such dispensation.—Edgerly v. Ladies of Modern Maccabees, 185 Mich. 148.

¶ 193. Failure of a member of a fraternal insurance association, who has been suspended for nonpayment of dues, to furnish a certificate of good health at the time of reinstatement, as the laws of the society required, renders the reinstatement nugatory.—Edgerly v. Ladies of Modern Maccabees, 185 Mich. 148.

¶ 194. The dues of the insured in defendant benefit society had not been paid for January and February. By the by-laws, his policy was void for lapse. On March 14th the local secretary, in ignorance of the fatal illness of the insured, received the premium. The by-laws provided that good health was a prerequisite to reinstatement. Held, even if the local secretary might waive the lapse, he could not do so while in ignorance of the illness of the deceased.—Koehler v. Modern Brotherhood of America, 160 Mich. 180.

VI. ACCRUAL AND AMOUNT OF BENEFITS.

Risks and causes insured against, see ante § 21.

§ 57. Accrual and maturity.

Instruction as to what constitutes total disability, see post ¶ 292.

¶ 195. The beneficiary named in a certificate issued by a benefit association has no present interest, during the member's life, either in the certificate or in the fund from which payment is to be made.—Lorscher v. Supreme Lodge Knights of Honor, 72 Mich. 316.

§ 58. Amount payable and changes of amount.

¶ 196. Authority conferred upon trustees of a mutual benefit association to change its by-laws at pleasure (Comp. L. 1871, § 3038), extends to changes necessary for the well government of the affairs of the company, but it does not authorize such trustees to arbitrarily reduce the amount due beneficiaries under contracts made before new by-laws are passed. Thus, by-laws entitling a member to all money received by an assessment upon surviving members, cannot be changed so that the beneficiary is entitled only to a portion of such assessment, the remainder being placed in a general fund to be used for sick benefits, especially where a large number of members protest against such change.—Pokrefky v. Detroit Firemen's Fund Ass'n, 121 Mich. 456.

VII. NOTICE PROOFS AND ADJUSTMENT; PAYMENT AND DISCHARGE.

§ 59. In general.

Presumptions as to proof of death, see post § 72.

Admissibility in evidence of certificate of death, see post § 74.

Questions of law and fact as to cause of death, see post § 77.

Notices generally, see Notices.
Notice and proofs of loss in life and accident insurance, see Insurance, XV.

¶ 197. The constitution of a benefit society provided that further proofs of death might be required if deemed necessary by the supreme commander, who might prescribe a form therefor. After proofs had been furnished, the treasurer of the society demanded further proofs, and the payment of the death benefit was resisted on the ground that such demand was not complied with. It did not appear that the supreme commander ever acted upon the subject. Held, that the constitution only justified the society in demanding further proofs when deemed necessary by the supreme commander, and that this discretion could not be transferred by that officer or vested in another.—Tessman v. Supreme Commandery of United Friends, 103 Mich. 185.

¶ 197a. It is competent for a mutual benefit association to provide a by-law to which all parties assent, which makes a finding of liability by the duly constituted committees of the order a condition precedent to a right to receive benefits.—Hembeau v. Great Camp of Knights of Maccabees, 101 Mich. 161.

§ 60. Waiver of proofs of loss.

See also post ¶ 216.
Waiver by making proofs of loss, see post ¶ 210.

¶ 198. A benefit society which denies all liability, thereby waives proof of loss and limitation of time for bringing action provided in the certificate to run from time of proofs.—Phillips v. U. S. Benevolent Society, 120 Mich. 142.

¶ 199. Where a mutual benefit association has expressly waived the right to require that the beneficiary in the certificate of insurance shall submit proofs of death in the form prescribed by the regulations of the association, it cannot subsequently demand that formal proofs be furnished as a prerequisite to a consideration of the claim.—Fillmore v. Great Camp Knights of Maccabees, 109 Mich. 13.

§ 61. Sick or accident benefits.

¶ 200. A member of a mutual benefit society can only recover sick benefits according to the provisions of the by-laws.—Van Poucke v. Netherland St. Vincent De Paul Soc., 63 Mich. 378.

¶ 201. It is reasonable that the sick committee of a mutual benefit society should be vested with authority to determine whether a member claiming to be sick is entitled to the benefit provided by the by-law, and also when such benefit should cease.—Van Poucke v. Netherland St. Vincent De Paul Soc., 63 Mich. 378.

§ 62. Payment of loss.

Injunction to restrain local lodge from paying claims on certificate of the state society, see ante § 14.
Right of local lodge, after withdrawal, to pay certificates issued by state society, see ante ¶ 34.
At what period of its organization the society may begin to pay benefits, see Pub. Acts 1917, No. 256, chap. IV, § 12.
Funds from which to pay benefits, see Pub. Acts 1917, No. 256, chap. IV, § 9.
Nature of liability arising upon deferred payments of claims, see Pub. Acts 1917, No. 256, chap. IV, § 9, subd. 2.
Personal liability of officers and members for disability or death benefits, see Pub. Acts 1917, No. 256, chap. IV, § 20.

¶ 202. A provision in the constitution of a local mutual benefit society authorizing it to provide for the widows and orphans of deceased members does not authorize it to pay a benefit certificate issued to one of its members by the state society of which the local was a member.—Kern v. Arbeiter Unterstuetzungs Verein, 139 Mich. 233.

§ 63. Deduction for unpaid assessments.

¶ 203. On the nonpayment by a member of a mutual benefit association of an increased rate of assessment, the amount thereof may be deducted from a payment made the beneficiary on the death of such member.—DeGraw v. Supreme Court, I. O. F., 182 Mich. 366.

VIII. ACTIONS AND PROCEEDINGS FOR BENEFITS OR TO DETERMINE RIGHTS THEREIN.

Requisites of award by arbitrators, unanimity of action, see Arbitration § 10.

§ 64. In general; primary remedy within the lodge.

Exhausting remedies within the lodge to have vacated an order of the grand lodge revoking the charter of a subordinate lodge, see ante § 13.
Notice and proofs of loss, see ante, VII.
Waiver of right to sue by further pursuit of internal remedies, see post § 66.
Actions on life and accident policy, see Insurance, XX.

¶ 204. The beneficiary in a benefit certificate was bound by the contract made by the insured in relation to the trial of claims before a tribunal provided by the articles of association and by-laws.—Derry v. Great Hive L. O. T. M. M., 135 Mich. 494.

¶ 205. Plaintiff in joining a benefit society agreed to abide by by-laws subsequently made. The society passed a by-law requiring beneficiaries to apply to a tribunal established within the order to settle disputed death claims before resorting to the

courts. Held, such a by-law was reasonable. —Monger v. New Era Ass'n, 156 Mich. 645.

¶ 206. Plaintiff in joining a benefit society agreed to abide by by-laws subsequently made. The society passed a by-law requiring beneficiaries to apply to a tribunal within the society to settle disputed claims before resorting to the courts. The said by-law did not in any way repudiate plaintiff's contract. Held, it was not invalid as infringing a vested right.—Monger v. New Era Ass'n, 156 Mich. 645.

¶ 207. Where the by-laws of a benefit order specify that a beneficiary shall exhaust all steps provided in the by-laws to obtain the insurance money before bringing suit, recovery cannot be had until such steps are taken.—Conley v. Supreme Court Independent Order of Foresters, 158 Mich. 190.

¶ 208. Where a by-law of a benefit society requires beneficiaries to apply to a tribunal within the order to settle disputed death claims, such a course must be pursued to the end before resort may be had to the courts.—Monger v. New Era Ass'n, 156 Mich. 645.

¶ 209. The certificate in a benefit order contained a provision that no suit could be brought on the policy until the claim had been submitted to and passed upon by the board of directors of the order. Held, no suit could be maintained until this provision had been complied with.—Larkin v. Modern Woodmen of America, 163 Mich. 670.

¶ 210. A claimant against a beneficial association not satisfied with a denial of liability but insisting upon making proofs of loss, waives any claim of fraud in the denial of the claim occurring before the submission of proofs and the hearing before the trustees, and may not sue until such hearing has been had as stipulated.—Hoag v. Supreme Lodge of International Congress, 134 Mich. 87.

¶ 211. Constitutional provisions or by-laws of benefit societies rendering the determination of questions, such as the right to sick benefits, final, and prohibiting recourse to courts of law, should be strictly construed, as they abridge common-law rights. In the absence of such provisions, it will not be held that a member is precluded from resorting to the courts.—Wuerthner v. Workingmen's Benevolent Soc., 121 Mich. 90.

¶ 211a. An action on a matured relief-fund certificate will not be dismissed upon the objection, raised for the first time at the trial, that the suit is prematurely brought, because the association is entitled to time within which to levy an assessment for the purpose of raising money to meet the claim, where it does not also appear to support such defense that the funds on hand are insufficient to pay the same, or that an assessment is necessary.—Wheeler v. Supreme Sitting of Order of Iron Hall, 110 Mich. 437.

¶ 211b. The constitution of a mutual insurance society furnished a forum to determine the rights of disputed claims. The attorney for a beneficiary under a death certificate attended a meeting, but did not present any proof or make avail of a subsequent invitation to take the matter up with the supreme council, and the administrator of the beneficiary took no steps to present the claim to the council. Held, there was no fraud or oppression practiced by the society, the remedy of their forum was not exhausted and a verdict should have been directed.—O'Neill v. Ancient Order of Gleaners, 176 Mich. 628.

¶ 211c. The beneficiary in a certificate of insurance issued by a mutual benefit association must, in the absence of fraud or oppression on the part of the association and its officers, exhaust the remedy prescribed by the charter and by-laws, before resort can be had, if at all, to the courts.—Fillmore v. Great Camp of Knights of Maccabees, 109 Mich. 13.

§ 65. Excuses for not pursuing internal remedies; waiver.

¶ 212. Where a beneficiary in a fraternal insurance organization is denied the remedy by appeal provided for by the association, he may maintain a suit at law.—Rose v. Supreme Court, Order of Patricians, 126 Mich. 577.

¶ 213. A decision by local lodges and officers that the purchase of brewery stock was an engagement in the manufacture or sale of malt liquors, when made in an honest belief that it was correct, and a rejection of a death claim accordingly, does not show fraud which will allow the certificate holder to resort to the courts in the first instance without submitting to the decision of the ultimate tribunal within the society as provided in the by-laws binding on the member. —Fillmore v. Great Camp of Knights of Maccabees, 103 Mich. 437.

¶ 214. Resort to the ultimate tribunal within the society is not excused on the ground that the case had been prejudged without a hearing, where the primary tribunal, an executive committee empowered thereto, had decided that a certificate was forfeited by purchase of brewery stock by insured—supposed by the committee to have constituted an engagement in the manufacture or sale of malt liquors—and no appeal was taken to the ultimate tribunal, the "Great Camp," but one of the Great Camp's officers had previously advised the executive committee on its request that the certificate was invalid.—Fillmore v. Great Camp Knights of Maccabees, 103 Mich. 437.

¶ 215. Under articles of association providing that a claimant must take his case to a supreme tribunal of a beneficial association, the fact that this tribunal postpones hearing because the claimant or her attorney is not present, will not justify legal action before the next meeting.—Hoag v. Supreme Lodge of International Congress, 134 Mich. 87.

¶ 216. Plaintiff, a beneficiary under a benefit society certificate, notified the society by letter of the death of the insured, and asked for proof of death blanks. The society replied, inclosing the preliminary death notice, directed plaintiff to fill in the same, and stated that it would upon receiving it back, send a full set of blanks. Plaintiff sent in the notice, and defendant replied, declining to send the blanks, and assigning as a reason that the insured had ceased to be a member before his death. Held, this conduct of the society did not relieve plaintiff from the obligation to submit further proofs and appeal to the tribunal established by the by-laws, within the society, for settling disputed claims before resorting to the courts.—Monger v. New Era Ass'n, 156 Mich. 645.

¶ 217. The by-laws of defendant benefit order provided that the clerks of local camps should be agents of the local camp, and not of the head camp, and also that no local officer should have authority to waive conditions in the membership contract. Held, the clerk of a local camp had no power to release a beneficiary from the duty of exhausting his remedies within the order before bringing suit on a certificate of insurance.—Larkin v. Modern Woodmen of America, 163 Mich. 670.

¶ 218. An agent of a benefit order told a beneficiary claiming insurance that if she would pay a part of the insurance money to her daughter-in-law, the order would pay the claim. The beneficiary did not act on this suggestion, nor incur any expense in reliance upon it, but in fact declined it. Held, the language did not amount to a waiver of provisions requiring the beneficiary to exhaust remedies within the order before bringing suit.—Larkin v. Modern Woodmen of America, 163 Mich. 670.

§ 66. Waiver of right to sue by further pursuit of internal remedies.

¶ 219. Where a beneficiary of an insurance policy in a benefit order fails to appeal to the tribunals of the society because of an omission of its officers to notify him of the decision of his case, the fact that he thereafter seeks to have the higher courts of the order voluntarily hear his case does not prevent his resorting to the law courts.—Ruterbusch v. Supreme Court Independent Order of Foresters, 162 Mich. 213.

§ 67. Time, manner and sufficiency of proceedings within association.

¶ 220. Where a clause in a certificate in a benefit order provides that no suit shall be brought thereon until the claim shall have been filed and passed upon by the board of directors, but fixes no time within which they must act, they are required to act within a reasonable time.—Larkin v. Modern Woodmen of America, 163 Mich. 670.

¶ 221. The board of directors of a benefit order investigated a claim on an insurance certificate and had good reason to suspect that the insured had violated the by-laws and invalidated his insurance by over-indulgence in intoxicating liquors. They delayed nine months in passing on the claim. Held, the delay was not so unreasonable as to relieve the beneficiary from the duty of waiting until such claim was passed on before bringing suit, as required by the by-laws.—Larkin v. Modern Woodmen of America, 163 Mich. 670.

¶ 222. A beneficiary in a fraternal insurance organization is entitled to a full hearing on a benefit claim before the board, provided by the association for that purpose, and a preliminary investigation with ex parte affidavits against the claim and without any opportunity by the beneficiary to examine the affiants at the hearing is not a bona fide hearing.—Rose v. Supreme Court, Order of Patricians, 126 Mich. 577.

¶ 223. Where by the by-laws of a fraternal insurance organization the beneficiary must take an appeal to the supreme court of that organization, he is entitled to a hearing before the entire supreme court and a hearing before a committee of the supreme court is not in compliance with this provision.—Rose v. Supreme Court, Order of Patricians, 126 Mich. 577.

¶ 224. A beneficiary in a benefit certificate was not denied the hearing to which he was entitled upon an appeal to the great hive, because the affidavits and other proofs were not read to the delegates, where the claimant was represented by counsel and the affidavits were not in fact read, but where the hearing proceeded upon the assumption that the affidavits and an unverified physician's certificate which indicated the invalidity of the claim, constituted the record and were referred to as such in argument.—Barker v. Great Hive L. O. T. M. M., 135 Mich. 499.

¶ 225. Delegates of the "great hive" of a benefit association, who heard the appeal from a benefit claim, complied with their duty to acquaint themselves with the case before them, either by reading the affidavits or by listening to counsel's statements; it also being the duty of counsel to present the case.—Barker v. Great Hive L. O. T. M. M., 135 Mich. 499.

¶ 226. A beneficiary in a benefit certificate, who upon the hearing of an appeal to the great hive, asked the delegates to consider his evidence upon ex parte affidavits, could

not object to the consideration of opposing evidence of like character.—Barker v. Great Hive L. O. T. M. M., 135 Mich. 499.

¶ 227. Where the rules of an insurance lodge provide that an injured person must appeal from a decision by the supreme executive as to his claim within twenty days after the decision is rendered, and that the parties interested shall be notified at once whenever a decision is made, a party not duly notified until more than the twenty days have passed, is deprived of any opportunity to comply with the rules, and has exhausted all the remedies of the order before bringing suit at law, according to a further requirement of the rules of the lodge, though he made no appeal after the decision was finally made known to him.—Steiner v. Supreme Court Independent Order Foresters, 149 Mich. 567.

¶ 228. Where no notice is given to a beneficiary of a certificate of a decision adverse to him by the supreme chief ranger, the by-law requiring an appeal to be taken within twenty days is waived.—Ruterbusch v. Supreme Court Independent Order of Foresters, 162 Mich. 213.

¶ 228a. An objection by a beneficiary to reception of a physician's privileged statements in an investigation by the insurance society's own tribunal is not waived by non-appearance on an appeal to a higher tribunal of the society after being told that appearance there was not required. The appellate tribunal could not presume a waiver under the circumstances.—Dick v. Supreme Body of the International Congress, 138 Mich. 372.

§ 68. Conclusiveness of internal proceedings and decision.

Conclusiveness of decisions of quasi-judicial bodies, see Former Adjudication, II, A.

¶ 229. A provision in the laws of a mutual benefit association making final the decision of a tribunal created by the constitution to pass upon death claims, and barring any suit at law or in equity, was sustained against objection that it was contrary to public policy as ousting the courts of jurisdiction.—Canfield v. Great Camp of Knights of Maccabees, 87 Mich. 626.

¶ 230. A member of a mutual benefit society can only recover sick benefits according to the provisions of the by-laws, and if they provide for a committee to determine the question whether he is sick, its decision is final.—Van Poucke v. Netherland St. Vincent De Paul Soc., 63 Mich. 378.

¶ 231. A good faith determination by the superior body of a beneficial organization of questions submitted to it, is binding.—Barker v. Great Hive L. O. T. M. M., 135 Mich. 499.

¶ 232. A beneficiary in a benefit certificate, who without objection acquiesced in the mode of submitting evidence in the form of affidavits, provided by the articles of association and by-laws of the association in question, in relation to the trial of claims, and who participated at the hearing upon appeal to the great hive and made no demand that witnesses be produced, was concluded by a finding adverse to the claim, made in good faith and in the usual course.—Derry v. Great Hive L. O. T. M. M., 135 Mich. 494.

¶ 233. The finding adverse to a claim, upon an appeal to the superior body of a benefit association, was not invalidated by the fact that the medical examiner at the hearing before such body referred to statements made to her by one of the decedent's neighbors, where the defendant's attorney promptly told the members that it was their duty not to consider such reference.—Derry v. Great Hive L. O. T. M. M., 135 Mich. 494.

¶ 234. The validity of a decision by the great hive of a beneficial organization, after legal and fair hearing, could not be affected by such an irregularity as not affording counsel for the claimant an opportunity of being present at the announcement of the decision by the first committee, where such counsel had been theretofore fully heard.—Barker v. Great Hive L. O. T. M. M., 135 Mich. 499.

¶ 235. The determination of the delegates of the great hive of a benefit organization, adverse to a benefit claim, was not invalid because there was read to them an unsworn physician's certificate, where counsel's objection was not based upon the lack of verification, nor on the ground that it was not a part of the proofs taken before the executive committee, but upon the ground that he had a right to cross-examine.—Barker v. Great Hive L. O. T. M. M., 135 Mich. 499.

¶ 236. The inference necessarily to be implied from the submission of a controversy regarding a claim under a benefit certificate, to the great hive of the organization, consisting of several hundred lay delegates, was that the only rule for the admission and exclusion of testimony was that of common fairness.—Barker v. Great Hive L. O. T. M. M., 135 Mich. 499.

¶ 236a. The determination of the supreme tribunal of a beneficiary association disallowing a death claim may be invalidated on account of the admission of privileged statements of a physician in violation of Comp. L. 1897, § 10181, notwithstanding the contract of insurance makes this determination final.—Dick v. Supreme Body of the International Congress, 138 Mich. 372, Hooker & Grant, JJ. dissenting.

¶ 236b. The conclusive character of a determination of a beneficial association's supreme tribunal on a death claim provided by the insurance contract may be assailed

when such determination is set up as a matter of defense to an action on the claim, without proceeding in equity to set it aside. —Dick v. Supreme Body of the International Congress, 138 Mich. 372, Hooker and Grant, JJ., dissenting.

¶ 236c. The laws of a mutual benefit association confined beneficiaries to widows, relatives within the first degree of kinship, and dependents, and provided that the executive committee should have power to pass on all death claims, and that its decision should be final unless appealed from to a higher body, the decision of which body should bar any suit at law or in equity by the beneficiary to recover the insurance. A member named as beneficiary an alleged dependent, and the executive committee rejected the claim of the beneficiary on the ground that he was not such dependent, and the higher body affirmed the decision on appeal. The beneficiary sued to recover the insurance, and alleged that, at the time decedent became a member, the agent of the order assured him that plaintiff was a dependent, within the meaning of the policy. There was no averment of any facts tending to show fraud on the part of the executive committee or the higher body. Held, that, this being so, one of the very questions which they had to determine was the effect of any alleged statements which plaintiff was able to prove had been made by the agent; and that the determination being adverse, there could be no recovery in an action at law.—Hembeau v. Great Camp of Knights of Maccabees, 101 Mich. 161.

¶ 236d. A provision in the by-laws of a mutual benefit association that a tribunal created thereby shall have power to pass upon all death claims, which decision shall be final, and bar any suit at law or in equity, does not so far contravene public policy as to permit members who contract with reference to it, or their beneficiaries, to seek relief in the state courts, rather than in those of the order.—Fillmore v. Great Camp of Knights of Maccabees, 103 Mich. 437.

¶ 236e. A provision in the laws of a mutual benefit association that the decision of a tribunal created by the constitution to pass upon death claims shall be final, and bar any suit at law or in equity therefor is valid.—Hembeau v. Great Camp Knights of Maccabees, 101 Mich. 161.

¶ 236f. Where the constitution and laws of a fraternal benefit order, made a part of the policy of insurance, provide that the beneficiary must appeal to the tribunals established within the order and shall file no suit at law or equity against the order on a claim, the beneficiary cannot take the judgment of such tribunals, and thereafter, the judgment being adverse and no fraudulent conduct being charged or relied upon, pursue his remedy in the courts of the state. —Monger v. New Era Ass'n, 171 Mich. 614.

§ 69. Actions on the certificate or contract.

Capacity of society to sue and be sued, see ante, § 1.

Primary remedy within lodge, see ante § 64.

Conclusiveness of internal proceedings and decision, see ante § 68.

Equitable remedies of beneficiary, see post § 82.

Actions on life or accident policy, see Insurance, XX.

Venue of actions to recover benefits and insurance, see Venue, I.

Propriety and sufficiency of suits in name of representative, see Estates of Decedents ¶¶ 259, 260.

Right of representative to sue for benefit on behalf of beneficiaries, see Estates of Decedents ¶ 273.

Service of process upon benefit associations, see Process, II.

Appearance by officers of foreign grand lodge as appearance in the action against local lodge, see Appearance ¶ 25.

Improper argument on trial, see Argument of Counsel.

Personal liability of officers or members for death or disability benefits, see Pub. Acts 1917, No. 256, chap. IV, § 20.

¶ 237. Where an insurance policy in a wife provides for payment to the husband and the children of specified amounts to each, no misjoinder of plaintiffs occurs where the husband sues for himself and as next friend for the children.—Ruterbusch v. Supreme Court Independent Order of Foresters, 162 Mich. 213.

¶ 238. Action on certificate in name of administrator of deceased member, who as such member's sole heir was entitled to benefit fund, sustained.—Peet v. Great Camp of Knights of Maccabees, 83 Mich. 92.

§ 70. Pleading.

General law of pleading, see Pleading.

Pleading in actions on life or accident policy, see Insurance, XX.

Misjoinder of causes of action, see Pleading, II.

Amendments of pleading, see Pleading, VI.

¶ 239. A notice under the general issue setting out the provisions of the application, certificate, and by-laws is sufficient to admit the defense that the member engaged in a prohibited occupation after his admission to membership.—Brown v. Great Camp Knights of Modern Maccabees, 167 Mich. 123.

¶ 240. Under subdivision d of Circuit Court Rule 7, a life insurance company cannot avail itself of the failure to furnish proofs of loss as required by the policy as a defense unless it adds to its plea a notice indicating the facts relied upon.—Gilchrist v. Mystic Workers of the World, 188 Mich. 466.

§ 71. ——Issues and variance.
See also post § 74.

¶ 241. In an action upon a benefit certificate defendant gave notice under the general issue that he would show that the certificate was procured by false statements in the application and to the medical examiner, and that material facts concerning the applicant's health were concealed. Held, that under such notice evidence of a particular disease from which the member was suffering was admissible.—Briesenmeister v. Supreme Lodge Knights of Pythias, 81 Mich. 525.

¶ 242. In a suit on a policy of insurance in a benefit order, the only defense set up by defendant's plea of the general issue and notice thereunder was that the insured practiced fraud upon the defendant by misrepresenting to it in the application the nature of his employment. Held, that under this plea plaintiff did not have to show that she furnished proofs of death or that the deceased was a member in good standing.—Lessnau v. Catholic Order of Foresters, 163 Mich. 111.

§ 72. Presumptions and burden of proof.
Presumption of death, see ante ¶ 60.
Presumption that member in good standing continued such, see ante ¶ 15.
Presumption of payment of assessment from delivery of policy, see ante ¶ 79.
Presumption that member had notice of constitutional provision as to membership in other societies, see ante ¶ 45.
Sufficiency of evidence to sustain burden of proof, see post § 75.
Instructions as to presumptions against suicide, see post § 79.
Presumptions and burden of proof in general, see Evidence, II.
Presumptions as to marriage, see Marriage.
Presumptions of death in general, see Death §§ 2-4.

¶ 243. A certificate of membership in a mutual benefit society is proof of the good standing of the member at the time the certificate was issued, and such good standing will be presumed to have continued unless the contrary is made to appear.—Petherick v. General Assembly of Order of Amaranth, 114 Mich. 420.

¶ 244. In an action on a policy of life insurance the payment of the premiums by the assured is presumed until the contrary is proven.—Rousseau v. Brotherhood of American Yeomen, 186 Mich. 101.

¶ 245. An unanswered question in an application for a benefit certificate raises no inference for or against the applicant.—Briesenmeister v. Supreme Lodge Knights of Pythias, 81 Mich. 525.

¶ 246. It must be presumed that an insured who is questioned by the principal officer of a local camp through an interpreter was fully advised, and understood the nature of the questions as to whether he had been married, whether he had within the last 7 years consulted any physician in regard to his health, and whether he had been treated for specified diseases, and his answers in the application signed by him.—Sowiczki v. Modern Woodmen of America, 192 Mich. 265.

¶ 247. If the subordinate lodge has the duty of reporting a member's death to the supreme lodge, which refuses payment on the ground of fraud in the application, it will be presumed that the requisite proofs of death were made.—Loscher v. Knights of Honor, 72 Mich. 316.

¶ 248. In an action against a mutual benefit society on a certificate issued by it, the burden of proving fraud in the application for insurance is on defendant.—Lorscher v. Supreme Lodge Knights of Honor, 72 Mich. 316.

¶ 249. In an action on a mutual benefit certificate the burden of proof is on plaintiff to prove such knowledge on the part of the insurer of the habits of deceased as to constitute an estoppel to set up the defense of false statements in the application as to the use of liquor and drugs.—Cameron v. Royal Neighbors of America, 197 Mich. 173.

¶ 250. The burden of showing that the order did not amend its articles so as to permit the insured to substitute his brothers and sisters in place of his wife as beneficiary of an insurance policy, is upon the party who asserts it, and it must be shown by affirmative and not negative proof.—Grand Lodge Ancient Order United Workmen v. Brown, 160 Mich. 437.

¶ 251. Where the defense of suicide is relied upon to defeat an action on an insurance policy, the company has the burden of proof to establish the fact of suicide.—Ruterbusch v. Supreme Court Independent Order of Foresters, 162 Mich. 213.

¶ 252. As the burden of showing a particular facts rests upon the party within whose knowledge such fact peculiarly lies, a mutual benefit society the by-laws of which restrict its liability to the amount realized from one assessment upon its members, has the burden when sued for benefits, of showing the number of its members in order to establish that the amount to be realized would be less than plaintiff claims.—Gnau v. Masons' Frat. Acc. Ass'n, 109 Mich. 527.

¶ 252a. In an action on a benefit certificate where plaintiff bases his right to recover on a certain dispensation which permitted the reinstatement of members whose policies had lapsed, it is essential that he show authority to issue such dispensation.—

Edgerly v. Ladies of Modern Maccabees, 175 Mich. 28.

§ 73. ——Production of certificate and documents.

¶ 253. Where, under defendant's association's laws, the contract is complete upon examination of an applicant, approval of the application by the supreme lodge, signing of the certificate of membership, and forwarding such certificate to the subordinate lodge for delivery to the member, the beneficiary who sues for the benefit fund is excused from producing the certificate upon the trial, if the subordinate lodge retains the certificate because of fraud in the application.—Lorscher v. Supreme Lodge Knights of Honor, 72 Mich. 316.

¶ 254. The duty of producing the certificate is on the insurer, where there is sufficient testimony to enable the jury to determine what the contract of insurance was, and the certificate contains special provisions or limitations which do not appear from the constitution and regulations and other evidence in the case.—Lorscher v. Supreme Lodge Knights of Honor, 72 Mich. 316.

§ 74. Admissibility of evidence.

See also ante § 71.

Evidence to show contract not to change beneficiary, see ante ¶ 105.

Declarations by insured admitting fraud as affecting beneficiary, see Evidence ¶ 2161.

Admission of physician's death certificate in actions on life or accident policy, see Insurance, XX.

Disqualification of witness as party to transaction with deceased, see Witnesses, IV.

Admissibility of copies of certificate in evidence, see Pub. Acts 1917, No. 256, chap. IV, § 8.

¶ 255. In order to show false statements and concealment of material facts, evidence of a particular disease afflicting decedent is admissible.—Briesenmeister v. Supreme Lodge Knights of Pythias, 81 Mich. 525.

¶ 256. That part of a death certificate of a woman containing the words "contributory abortion" is a proper part of the certificate required by statute (Comp. Laws 1897, § 4616, How. St., 2nd Ed., § 1579, which requires certificates of death from the attending physician, stating the immediate and contributory causes of death); and such certificate is admissible to prove the cause.—Gilchrist v. Mystic Workers of the World, 188 Mich. 466.

¶ 257. The words "said by deceased to have been performed by Dr. ———," relating to an abortion performed by him are not a proper part of the certificate of death of a woman required by statute (Comp. Laws 1897, § 4616, How. St., 2nd Ed., § 1579), and accordingly are not admissible to prove the cause.—Gilchrist v. Mystic Workers of the World, 188 Mich. 466.

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§ 75. Weight and sufficiency of evidence.

Sufficiency of evidence to show ratification of act of secretary in giving notice of assessment, see ante ¶ 73.

Certificate as evidence of members good standing, see ante ¶ 243.

General principles as to weight and sufficiency of evidence, see Evidence, X.

Weight and sufficiency of evidence in actions on life or accident policies, see Insurance, XX.

¶ 258. The recital of age in a certificate of membership in a benefit society would perhaps avail plaintiff to make out a case on such certificate had no inquiry been made as to age; but it is merely the decedent's own statement, and could avail nothing against testimony.—Hunt v. Supreme Council of the Order of Chosen Friends, 64 Mich. 671.

¶ 259. The presumption of good standing is not overcome, in an action for death benefits, by the introduction in evidence of a book of the deceased, which contains a printed statement of quarterly dues, with spaces for the entry of the date of payment and the name of the financial secretary, showing no entry of payments as to two quarters' dues; especially if the same book fails to credit assessments proved to have been paid.—Petherick v. General Assembly of Order of Amaranth, 114 Mich. 420.

¶ 260. Production of a benefit certificate in an action thereon, together with proof of the death of the insured, makes a prima facie case for the plaintiff.—Homann v. Allgemeiner Arbeiter Bund of Michigan, 184 Mich. 417.

¶ 261. The finding of a jury that a certificate in a beneficial association was issued to the deceased is sufficiently supported by undisputed facts that she signed the original petition for a charter for the local lodge, that she made application for medical examination, that in that application reference was made to her application for membership, that she paid to the proper officer of the defendant the dues necessary to become a member, that she was examined and approved by the medical examiner, that she tendered the first assessment which was received under protest, testimony by the presiding officer of the local lodge that he signed a certificate issued to her and gave it to the recording secretary, testimony by the recording secretary that there was a certificate issued to her, that he left it in a drawer in his possession, that it disappeared from there, that he did not know what became of it, that it was in the same form as certificates issued to other members, and testimony by another charter member that she had seen the certificate issued in the name of the member in question, although evidence on the part of the defendant shows that the name of the alleged member did not

appear upon the association's records, and that there was no record of any fees or assessments received from her.—Wagner v. Supreme Lodge Knights and Ladies of Honor, 128 Mich. 660.

¶ 262. In an action on a mutual benefit insurance certificate evidence held insufficient to sustain the burden of proof as to an estoppel of the company, through knowledge obtained by a deputy supreme oracle of the society before delivery of the certificate of the habits of insured, to claim as a defense that deceased had made false statements concerning his habits as to the use of liquor and drugs in the application for insurance.—Cameron v. Royal Neighbors of America, 197 Mich. 173.

¶ 263. In an action on a life insurance policy, in which the defense was that insured was guilty of having procured a criminal operation upon herself in violation of the terms of the policy making it void for violation of the criminal laws of the state, evidence held insufficient to establish the defense that insured procured a criminal abortion upon herself.—Gilchrist v. Mystic Workers of the World, 196 Mich. 247.

¶ 264. In a suit upon an accident policy, plaintiff testified, that while washing clothes water splashed into her eye; that she rubbed the same with her hand; that her eye became inflamed; that she consulted a specialist and was treated by him, and that she lost the sight of said eye. She stated that she had no knowledge of the disease of gonorrhea being in her family; and that the clothes washed were family clothes. Her physician testified that the eye was afflicted with gonorrhea. Defendant offered no evidence, and made no motion for a new trial. Held, a verdict for plaintiff should not be reversed on the ground that the evidence showed plaintiff lost her eye from disease and not from accident.—Sullivan v. Modern Brotherhood of America, 167 Mich. 524.

¶ 265. In a suit upon an accident policy, plaintiff testified that while washing clothes water splashed into her eye; that she rubbed the same with her hand; that her eye became inflamed; that she consulted a specialist and was treated by him; and that she lost the sight of said eye. She stated that she had no knowledge of the disease of gonorrhea being in her family; and that the clothes washed were family clothes. Her physician testified that the eye was afflicted with gonorrhea. Defendant offered no evidence, and made no motion for a new trial. Held, a verdict for plaintiff should not be reversed on the ground of the improbability under the evidence that the gonorrhea resulted from the splashing of the water in plaintiff's eye.—Sullivan v. Modern Brotherhood of America, 167 Mich. 524.

¶ 266. In an action on a mutual benefit insurance certificate where the deceased was questioned by a medical officer of the local camp through an interpreter as to whether he had ever been married, whether within the last 7 years he had consulted a physician in regard to his health, and whether he had ever been treated for such specified diseases, and the examiner testified that these questions were asked and answered through the interpreter and that he asked them correctly and recorded them as answered, evidence held insufficient to overcome the presumption that the deceased was fully advised and understood the nature of such questions so as to create a question for the jury.—Sowiczki v. Modern Woodmen of America, 192 Mich. 265.

¶ 267. Where the proof of loss stated that one cause of death of the insured was a self-inflicted wound, such admission is simply an item of evidence, to be weighed by the jury with other evidence, and it is not compulsory upon the jury to find that death resulted from suicide.—Ferris v. Loyal Americans of the Republic, 152 Mich. 314.

§ 76. Questions of law and fact.

¶ 268. The question whether or not a member of a mutual benefit society was over 45 at the time he became a member is for the jury, upon evidence which either leaves a question of the identity of the member with the person whose age it tends to show, or which is inferential leaving a possibility of his having been less than 45 when he joined.—Reis v. Arbeiter Unterstuetzung Verein, No. 2, 111 Mich. 127.

¶ 269. Where there is medical testimony showing that at the time of making application for insurance the insured, contrary to her express warranties as to the condition of her health, was suffering from an incurable malady, testimony of laymen to the contrary does not raise an issue of fact for the jury.—O'Brien v. Brotherhood of American Yeomen, 183 Mich. 86.

¶ 270. In an action on a mutual benefit insurance certificate, where the evidence was conflicting as to the condition of health of the insured at the time he applied for reinstatement after suspension for nonpayment of dues, held that it was a question for the jury whether the insured was in fact in good health.—Sowiczki v. Modern Woodmen of America, 192 Mich. 265.

¶ 271. In an action upon an insurance certificate in which the defendant set up as a defense an alleged fraudulent statement in the medical examiner's blank as to pregnancy, held that under the evidence the question as to whether the examiner actually asked the insured if she was pregnant, and whether she answered falsely, was properly submitted to the jury.—Clark v. North American Union, 189 Mich. 589.

¶ 272. In an action upon a benefit policy, where the defense was that no assessment

was ever paid, and where the certificate contained a recital that it was issued in consideration of the membership fees and the payment of dues, and where the soliciting agent had remitted the membership fee, the jury might well have drawn the inference that such dues were paid.—Taylor v. Supreme Lodge Columbian League, 135 Mich. 231.

¶ 273. Whether the evidence of the defendant in an action on a policy of life insurance, is sufficient to overcome the presumption of the payment of the premiums by the assured, is a question for the jury.—Rousseau v. Brotherhood of American Yeomen, 186 Mich. 101.

¶ 274. The question whether a member of a mutual beneficiary association had assented to changes in its by-laws increasing certain benefits and decreasing others and increasing the dues, is properly left to the jury where the evidence showed that he paid the increased dues without protest and with full knowledge of the changes, and also expressed his satisfaction with the changes to a fellow member.—Pokrofky v. Detroit Firemen's Fund Ass'n, 131 Mich. 38.

¶ 275. The question of whether or not a member of a society acquiesced, after notice, in certain changes made in its constitution so as to preclude him from questioning the irregularity of their adoption, is one of fact for the jury.—Dick v. General Assembly Order of the Amaranth, 150 Mich. 215.

¶ 275a. The record book of a fraternal benefit order had pasted into it a printed by-law including the printed signatures or names of proper attesting officers. The passing of the law was proved by undisputed oral testimony. The law was published, circulated and treated as in force, and was filed with the commissioner of insurance. Held, in a suit to recover the amount of an insurance certificate brought contrary to the provisions of such law, the existence of the law was sufficiently established by defendant.—Monger v. New Era Ass'n, 171 Mich 614. (Moore, C. J., and Bird, J., dissenting.)

¶ 275b. The facts that an applicant for membership in a fraternal benefit society answered in the medical examination that she was not pregnant when in fact she was, that she failed to sign a pregnancy waiver, and that she examined the certificate containing the false answer and retained it for four months, all tend to establish a fraudulent intent.—Kolosinski v. Modern Brotherhood of America, 175 Mich. 684.

¶ 275c. Evidence held insufficient to show that a member of a fraternal beneficiary society requested that the beneficiary in her certificate of insurance should be changed.—Supreme Council Ladies' Catholic Benev. Ass'n v. Scherer, 174 Mich. 25.

§ 77. ——Cause of death and contributing conditions.

¶ 276. In an action on a beneficiary certificate, testimony of the death from cancer two months after the execution of the application for insurance and that the insured was seriously ill by that disease one month after the application, does not show conclusively that he had the disease at the time of the application and the submission of the question to the jury is not erroneous.—Tobin v. Modern Woodmen of America, 126 Mich. 161.

¶ 277. The questions of whether insured used intoxicating liquor at the time application was made, whether he had before that time been intoxicated, whether he had delirium tremens, or whether he died as a direct result of taking intoxicating liquor, are properly submitted to the jury.—Gall v. Sovereign Camp of Woodmen of the World, 166 Mich. 690.

¶ 278. The insured had suffered for years from meningitis and fatty degeneration of the heart. On the day before his death he severed a vein in his neck in an attempt to commit suicide. Held, it was for the jury to decide from the testimony given by the doctor who testified as an expert on the cause of death, whether the deceased died by suicide.—Ferris v. Loyal Americans of the Republic, 152 Mich. 314.

¶ 279. Testimony that the insured had declared on the evening of initiation into a beneficial association that he felt pretty sick and that he had had difficulty in mounting the stairs leading to the hall of the association, that he did not remain throughout the meeting, that he had said that the reason that he was not initiated at a previous meeting was on account of illness, has a tendency to show ill health but it cannot be said to be error to leave the question to the jury.—Tobin v. Modern Woodmen of America, 126 Mich. 161.

¶ 280. Evidence that a hospital nurse, a witness for an insurance company, heard insured on the day before her death tell the attending physician, in answer to his direct inquiry, that an abortion had been performed on her the day before she was brought to the hospital, and that the deceased told the witness that the reason the act was done was that she could not afford to raise any more children, and that upon the day deceased was brought to the hospital she stated that she had suffered a miscarriage, brought on by working in the garden, held to raise the question of fact for the jury whether a criminal abortion caused her death or she suffered a miscarriage from unintentional overexertion.—Gilchrist v. Mystic Workers of the World, 196 Mich. 247.

§ 78. ——Directing verdict.

General rules as to directing verdict, see Directing Verdict.

¶ 281. It was error for the court to direct a verdict for plaintiff in an action upon a benefit certificate conceded to be void if deceased was upwards of sixty-one years of age in 1885, when the certificate was issued, where decedent's brother-in-law, an unwilling witness for defendant, testified that he was born in 1829, and that deceased was six or seven years his senior.—Drozdowski v. Supreme Council of Order of Chosen Friends, 114 Mich. 178.

¶ 282. A verdict should be directed for the defendant in an action on a certificate of fraternal insurance, where the undisputed testimony shows that at the date of the issuance of the certificate the insured, contrary to her express warranties as to the condition of her health, was suffering from an incurable malady.—O'Brien v. Brotherhood of American Yeomen, 183 Mich. 86.

¶ 283. Where the laws of a mutual benefit society preclude a recovery of benefits where the insured commits suicide except where the executive council or supreme court of the society is satisfied that the deceased was at the time of the suicide of unsound mind, and that prior thereto he shall have been known and reported to the supreme secretary as such, there can be no recovery on a policy in the absence of a proof of these facts-and the trial court should direct a verdict in such a case.—Post v. Supreme Court, Independent Order of Foresters, 146 Mich. 666.

¶ 284. The deceased was insured in a benefit order under a by-law providing that the use of opiates as a habit, so as to be deleterious to health, would invalidate the policy. The evidence showed that the deceased began the use of morphine to relieve the pain of an injury to his back, and acquired the habit so strongly that he was twice sent to institutions to be cured. No testimony was offered by the beneficiary from experts or others that the deceased used the morphine only to alleviate pain, and in a way to prolong life. Held, the jury should have been directed to return a verdict for defendant.—Conley v. Supreme Court Independent Order of Foresters, 158 Mich. 190.

§ 79. Instructions.

Instruction in respect to notice of assessments, see ante ¶ 71.

General principles as to instructions, see Instructions.

Instructions unduly emphasizing particular matters, see Instructions, V, C.

Instructions in actions on life or accident policy, see Insurance, XX.

¶ 285. In an action on a beneficial certificate in which the physical condition of the applicant at the time of taking out the certificate and all statements in regard thereto are made warranties, it is erroneous to charge the jury that they may find for the plaintiff, notwithstanding he is suffering from some illness provided that illness is not prejudicial to the rights of the defendant.—Tobin v. Modern Woodmen of America, 126 Mich. 161.

¶ 286. In an action on a beneficial certificate, an instruction requested by the defendant requiring the jury to bring in a verdict for the defendant if the insured was not in good health at the time that he secured the benefit certificate is not erroneous when modified by the court by words to the effect that a slight indisposition only temporary in its effects would not invalidate the policy.—Tobin v. Modern Woodmen of America, 126 Mich. 161.

¶ 287. An instruction in an action on a beneficial certificate, that if the member had paid dues, etc., perhaps even though no certificate was ever issued she would have been a member of the association, is not prejudicial error where it is connected with instructions discussing the question of fact of the issuance of a certificate and a subsequent instruction requires the jury to find that a certificate was issued if they find for the plaintiff.—Wagner v. Supreme Lodge Knights and Ladies of Honor, 128 Mich. 660.

¶ 288. An instruction in an action for death benefits, that if the deceased received a notice of assessment and failed to pay the same, so that he was suspended, and he not being reinstated, his beneficiary would not be entitled to recover, as he was bound by the terms of the certificate, and knew that his failure to pay assessments would work a suspension of his certificate, is erroneous as leaving out the element of waiver of forfeiture, it appearing that assessments were collected by subordinate lodges, who had full power as to such assessments, including the right to reinstate members, and that the officers of the particular subordinate lodge involved, had by a long continued course of conduct misled the deceased into a belief that strict performance of his contract would not be exacted, and that delay in payment of his assessments would not result in forfeiture of his benefit certificate.—Wallace v. Fraternal Mystic Circle, 121 Mich. 283.

¶ 289. Where the proof of death states as one cause of death of the insured a self-inflicted wound, it is not error to refuse to charge the jury to find for the company, unless such admission is explained.—Ferris v. Court of Honor, 152 Mich. 322.

¶ 290. Where the question is whether the insured died as the result of natural causes or from a wound admitted to be self-inflicted, it is not error to instruct that where a death may be attributed either to suicide or to

natural causes, the presumption of law is against suicide.—Ferris v. Loyal Americans of the Republic, 152 Mich. 314.

¶ 291. Where the question of whether insured had been intoxicated prior to an application for insurance is in issue, an instruction charging the jury that the term "intoxicated" means "inebriate, made drunk, excited to frenzy" is so unfavorable to defendant as to constitute reversible error.—Gall v. Sovereign Camp of Woodmen of the World, 166 Mich. 690.

¶ 292. In an action on a certificate of insurance payable in case of total disability to follow any avocation, an instruction that the fact that a man may work continuously for a few months is not conclusive evidence that he can follow some avocation is not prejudicial to defendant, where the jury is explicitly instructed that, if plaintiff can follow any line of employment, he cannot recover, and that the question of his ability to do so is one solely for the jury.—Starling v. Supreme Council Royal Templars of Temperance, 108 Mich. 440.

¶ 293. The insured had paid seventeen assessments into the benefit society, but had paid all but five of these after the date specified by the by-laws. Held, the court properly refused to charge that this course of dealing on the part of the society induced the insured to think promptness in payment was not required so as to excuse a subsequent payment made after the date due.—Koehler v. Modern Brotherhood of America, 160 Mich. 180.

§ 80. Verdict and findings.

General law of verdicts and findings, see Verdicts.

¶ 294. In an action on an insurance policy, special questions as to whether at the time of insured's death he had had his checks protested for nonpayment, had collected money due his employers which he was unable to pay, and had written a letter to his son indicating an intention to commit suicide, are properly refused as not controlling.—Grimme v. General Council of Fraternal Aid Ass'n, 167 Mich. 240.

§ 81. Interpleader suits.

See also ante ¶¶ 95, 117.

Right to question competency of insured, see also ante ¶ 124.

General grounds for interpleader and practice in interpleader suits, see Interpleader.

Costs to interpleading complainants, see Costs § 35.

¶ 295. Where a mutual benefit society on the death of a member, interpleads his widow and a divorced wife who was named in the benefit certificate as beneficiary, the widow may show that the divorced wife, although there had been no change of beneficiary after the divorce, had no right under the laws of the society, to the proceeds of the certificate.—Knights of Maccabees of the World v. Brown, 186 Mich. 284.

§ 82. Equitable remedies of beneficiary or person interested in benefits.

See also ante ¶ 115.

Capacity of society to sue and be sued, see ante § 1.

Primary remedy within the lodge, see ante § 64.

Conclusiveness of internal proceedings and decision, see ante § 68.

Actions on the certificate or contract, see ante § 69.

¶ 296. Where a member of a mutual benefit association complies with all of its by-laws and does all required of him to effect a change of beneficiary, and dies while the necessary papers are on the way to the supreme officers for formal ministerial action, a court of equity will protect the right of the intended beneficiary.—Supreme Court I. O. O. F. v. Frise, 183 Mich. 186.

¶ 297. If a member of a mutual benefit society dies after complying with all of its by-laws pertaining to changing his beneficiary, and only formal action by the supreme officers remains, equity will protect the rights of the intended beneficiary.—Supreme Court I. O. O. F. v. Frise, 183 Mich. 186.

¶ 298. Where without fault on the member's part a certificate of membership in a mutual benefit society had been lost or mislaid so that he could not make the indorsement thereon which the by-laws of the society required in order to effect a change of beneficiary, equity will, after his death, recognize a disposition by will as a valid designation of a new beneficiary.—Grand Lodge A. O. U. W. v. Noll, 90 Mich. 37.

FRAUD AND DECEIT.

TREATS of deception by falsehood or misrepresentation injurious to the person deceived and of unfair and unconscionable practices and arts depriving another of his property or rights without his free and uninfluenced assent, also of the remedies for fraud or undue influence, the right to make defense of fraud, and the redress of fraud by act of the party. It excludes frauds upon creditors and subsequent bona fide purchasers (see Fraudulent Conveyances), criminal frauds and cheats (see Crimes, II; Indictment) and the requirements of writings to evidence contracts and conveyances as a precaution against fraud (see Frauds, Statute of). Other matters excluded are denoted by cross-references throughout this topic.

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I. GENERAL NATURE AND ELEMENTS OF FRAUD, AND ACTUAL FRAUDS AND DECEIT.

A. IN GENERAL.

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¶ 1. By the term fraud the legal intent and effect of the acts complained of is meant.—Kirby v. Ingersoll, H. 172.

¶ 2. Equity takes cognizance of cases in which a party is deceived as to material things by means well fitted to cause the deception, and which the party using them had good reason to know actually caused it.—Match v. Hunt, 38 Mich. 1.

§ 2. Fraud by misrepresentation.

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Fraud by suggestion, concealment or half-truth, see post §§ 19, 20.
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¶ 3. A representation made with a knowledge that it is received in a sense that makes it deceptive is fraudulent.—Match v. Hunt, 38 Mich. 1.

¶ 4. The gist of a fraudulent misrepresentation is that it was intended to produce a false impression or belief on the mind of the person to whom it was made.—Krolik v. Lang, 187 Mich. 286.

¶ 5. A contract is not vitiated by previous statements of one of the parties unless they were statements of fact rather than opinion, and were made for the purpose of obtaining the contract, were relied on by the other party as a controlling reason for entering into it, and turned out to be false.—Berringer v. Cobb, 58 Mich. 557.

¶ 6. It is fraud for a county treasurer to represent falsely to an inquiring mortgagee of lands that the taxes on them were paid, the treasurer being the mortgagor and owner, and to let them be sold for taxes in consequence of the resulting delinquency to one in collusion.—Christian v. Soderberg, 118 Mich. 47.

¶ 7. Where a person receives information from others and believes it, repeating it, but explaining that he has no personal knowledge he is not guilty of fraud.—Krause v. Cook, 144 Mich. 365.

§ 3. ——Representations of matters of law.

Misrepresenting legal effect of instrument presented for signature, see post § 11.

Statements as to construction of by-law of corporation, see also post ¶ 80.

¶ 8. It is a fraud to obtain from an ignorant woman promissory notes upon the representation that they are only renewals of the notes of her deceased husband, on which she was surety, and that she was originally liable upon such former notes.—Holland v. Maus, 69 Mich. 180.

¶ 9. Where plaintiff claims to have been defrauded in the purchase of the note of an insolvent corporation by false representations that its receiver had arranged to pay the note in lumber, it cannot be urged that plaintiff had no right to rely upon such representations, the arrangement being one that the receiver had no right to make.—Averill v. Wood, 78 Mich. 342.

¶ 10. A vendor of land sold by contract on instalment payments filed a bill to quiet title against the contract and a quitclaim deed given by the vendee to an assignee, both instruments being recorded, claiming that through fraud and deception she was led to believe the contract was an option which expired by its own limitation. She was a woman of some business experience and had executed the same kind of an instrument before and after the transaction in question. Held, relief could not be granted on the ground of fraud.—Donnelly v. Lyons, 173 Mich. 515.

§ 4. Materiality and meaning of statements.

Statements as to quality of goods inspected by other party, see also post ¶¶ 59-61.

Disavowal of personal knowledge as invitation to inquiry, see post ¶ 67.

Representation that stock was treasury stock when it was worthless in any event, see also post ¶ 104.

Question for jury, see post § 58.

Instructions on materiality, see post § 61.

¶ 11. False representations, if not material to the transaction at issue, will not avoid an agreement even if relied on, where the person to whom they are made is of ordinary intelligence; where he is not, the fact should be shown.—Hall v. Johnson, 41 Mich. 286.

¶ 12. Statements to a plaintiff to induce a settlement of a lawsuit, to the effect that the case might be delayed three or four years in the supreme court, and that his attorney was a scoundrel, are material, and, if relied upon as made, are important in the question of fraud.—Lewless v. Detroit, G. H. & M. R. Co., 65 Mich. 292.

¶ 13. A note was procured upon the false representation that a bond of a "Bohemian oat association," given to the maker of the note and forming part of the same transaction therewith, was the bond of an incorporated company. Held, that the representation was material.—McNamara v. Gargett, 68 Mich. 454.

¶ 14. It cannot be laid down as a rule of law that value is never a material fact. And when the purchaser expressly relies upon the knowledge of the seller as to quality or value, the seller is bound to act honorably and deal fairly with the purchaser.—Ricard v. McCormick, 11 Mich. 68.

¶ 15. Before entering into a contract to convey land to plaintiff, defendant represented that he had a perfect title in fee, whereas in fact he had only an equity in peril of being foreclosed and cut off by an overdue mortgage. Held, that such representation of condition of title is material, and is ground for rescission of the contract.—Allen v. Talbot, 170 Mich. 664.

¶ 16. The statement by the vendor to the purchaser of city lots, that the improvements are all in and paid for except the paving, is a material statement of fact and, if relied upon by the purchaser and untrue, he may recover because thereof in an action for damages based thereon.—State Security & Realty Co. v. Badger, 200 Mich. 104.

¶ 17. Statements by the survivor of two joint and several makers of a promissory note, which bore indorsements of payments by the deceased sufficient to bar the operation of the statute of limitations as to his estate, made to a proposed purchaser of the paper, to the effect that it was as good a note as he, the survivor, could make, and that it would be all right to purchase it, as he intended to pay it, the payor being ignorant of his statutory defense of limitations, are not a representation that such survivor has no defense and are insufficient to warrant a recovery by the purchaser for fraud and deceit in inducing such purchase, he having been defeated in a suit on the note against said payor by the plea of the statute of limitation.—Black v. Miller, 75 Mich. 323.

¶ 18. Where the representation is concerning a condition of affairs not susceptible of

exact knowledge, the assertion of knowledge is to be taken as meaning no other than the strong belief founded upon what appears to the person to be reasonable and certain grounds; in such a case the question is wholly one of good faith.—Krause v. Cook, 144 Mich. 365.

¶ 19. When defendants sued for price of milk cans bought for creamery purposes with right to use them in certain territory, seek to recoup damages for failure of plaintiff's title to such territory, they may show that plaintiff's agent who made the sale represented that as soon as defendant's creamery was completed another creamery company then operating in the territory would have to leave it, and that they bought relying upon such representation.—Davis v. Davis, 97 Mich. 419.

§ 5. Falsity of statements.

Admissibility of evidence of falsity, see post § 41.
Questions for jury, see post § 59.
Pleading falsity, see post § 90.
Element of falsity and deception in estoppel, see Estoppel §§ 27-29.

¶ 20. Recovery of damages for a fraud in obtaining property by false representations as to the responsibility of the maker of the note given therefor is not necessarily precluded by the fact that the maker is able to meet the particular note, especially if it does not appear that he can pay his other debts.—Daniels v. Dayton, 49 Mich. 137.

¶ 21. Where the seller of horses represents that they are sound, but they are afflicted with glanders, an incurable disease, an action of fraud lies in favor of the buyer, and it is immaterial whether the disease is in its incipient stage, or further developed.—Weinberg v. Ladd, 199 Mich. 164.

§ 6. Intent of speaker or utterer.

See also ante ¶ 4.
Knowledge of falsity by speaker, see post § 7.
Good or bad faith entering into opinions and predictions or promises, see also post §§ 14-17.
Pleading in chancery bills, see post § 96.
Necessity of proof of intent or purpose as alleged, see post § 94.
Admissibility of evidence of actual intent, see post § 41.
Repetition of statement as evidence of intent, see post ¶ 286.
Other letters as evidence of intentional statement, see post ¶ 287.
Other frauds and statements at other times as evidence of intent, see post §§ 33, 34.
Intent as jury question, see post § 58.
Instructions on intent, see post § 61.
Element of intent to induce reliance and of reliance to prejudice in estoppel; see Estoppel §§ 28, 29.

¶ 22. The concealment of or misrepresentation as to the real financial condition of a vendee need not be wilful nor intended in order to constitute such fraud as will vitiate a sale made in reliance thereon; it is sufficient if they have the effect to defraud.—Mooney v. Davis, 75 Mich. 188.

¶ 23. If the conduct of a party is such as, in its tendency and result, to operate to defraud others, it will be deemed fraudulent, although no such purpose was intended.—Sweet v. Converse, 88 Mich. 1.

¶ 24. The law has a standard for measuring the legal intent of parties, and declares an illegal act, prejudicial to the rights of others, a fraud upon such rights, although the party denies all intention of committing a fraud.—Kirby v. Ingersoll, H. 172.

¶ 25. A denial of actual intent to defraud will not avoid the consequences of an act which is in effect a fraud.—Newlove v. Callaghan, 86 Mich. 301.

¶ 26. In a civil action it is immaterial whether a false representation is made innocently or fraudulently, if, by its means, the party to whom it is made is injured.—Sawyer v. Menominee Loan & Building Ass'n, 103 Mich. 228.

¶ 27. Where defendant's agents made misrepresentations to plaintiff as to certain land, and defendant assures the plaintiff that the representations of his agents are true, thus inducing him to buy, the plaintiff may recover in an action of deceit, although defendant's false statement was not intentionally or recklessly made.—Aldrich v. Scribner, 154 Mich. 23. (Montgomery, Blair and Ostrander, JJ., dissenting.)

¶ 28. If representations of fraud in the sale of horses are made and relied upon by the other party to his injury and they are false, an action for fraud may be maintained, even though such representations were made in good faith.—Weinberg v. Ladd, 199 Mich. 164.

¶ 29. The mere fact that untrue representations as to the productivity of land are made in good faith is no defense to an action for damages for fraud where such representations are relied upon by the purchaser.—Houder v. Reynolds, 195 Mich. 256.

¶ 30. One who purchases property in the belief of, and reliance upon false statements regarding it, may sue for and recover the damages occasioned thereby irrespective of whether the representations were made in good or bad faith.—Krause v. Cook, 144 Mich. 365.

¶ 31. The rule that a purchaser of property in the belief of and reliance upon false statements regarding it may sue and re-

cover damages irrespective of the good or bad faith of the representations is applicable to equity cases as well as those of law.—Krause v. Cook, 144 Mich. 365.

¶ 32. Courts of equity cannot sustain dealings that have the effect of fraud on people who are practically helpless, even though such fraud is not deliberate and intentional.—Crips v. Towsley, 73 Mich. 395.

§ 7. Knowledge of truth or falsity by speaker.

Intent of speaker to deceive, see ante § 6.
Knowledge or belief as element in fraud by false predictions or opinions, see also post §§ 14-17.
Admissibility of evidence of knowledge of truth, see post § 41.
Other like frauds and misstatements as evidence of knowledge, see post § 33.
Statements at other times as evidence, see post § 34.
Subsequent or prior facts as evidence, see post § 34.
Instructions on knowledge, see post § 61.
Notice to agent as imputed to principal, see Agency, II, E.

¶ 33. Where the representations on which a party relies are untrue, it is immaterial whether the party making them knows them to be so or not, the effect upon him being the same in either case.—Jones v. Wing, H. 301.

¶ 34. One who, to induce another to buy, recklessly makes a false representation, of the truth or falsity of which he knows nothing, whereby the vendee is deceived and defrauded, is liable.—Beebe v. Knapp, 28 Mich. 53.

¶ 35. One is liable for false representations made intentionally to induce, and which do induce, action in reliance upon them; and it is fraud if he believes or has reason to believe them false, whether he knows them to be false or not.—Stone v. Covell, 29 Mich. 359.

¶ 36. If one obtains the property of another by means of untrue statements, though in ignorance of their falsity, he must be held responsible for a legal fraud.—Converse v. Blumrich, 14 Mich. 109; Beebe v. Young, 14 Mich. 136.

¶ 37. If one recklessly makes a false representation, of the truth or falsehood of which he knows nothing, and makes it for the fraudulent purpose of inducing another, in reliance upon it, to make a contract or do an act to his prejudice, and the other party does so rely and act upon it, the first party is as liable for the fraud as if he had known the representation to be false. This principle applies equally in courts of law and of equity.—Beebe v. Knapp, 28 Mich. 53; Stone v. Covell, 29 Mich. 359.

¶ 38. In an action based on fraudulent misrepresentation of the value of a note, the exclusion of evidence of the maker's insolvency, and of a letter from defendant to plaintiff concerning his solvency, is not error where the offer of such evidence does not include a proposal, also, to show that defendant knew the statements in the letter to be untrue.—Whitten v. Wright, 34 Mich. 92.

¶ 39. A right of action for damages for fraudulent representations arises though the misrepresentation was made innocently, if its deceptive influence was effective, and if the consequence to plaintiff was as serious as though it had proceeded from a vicious purpose.—Busch v. Wilcox, 82 Mich. 315, aff'd on rehearing 82 Mich. 336.

¶ 40. Where a partner in selling his interest to a third person falsely represents that certain accounts included in the sale are collectible, such representations, whether innocently or fraudulently made, are actionable if injurious.—Totten v. Burhans, 91 Mich. 495.

¶ 41. In determining the liability of a vendor for making false statements inducing the vendee to buy, it is immaterial whether or not the vendor believed them to be true.—Hall v. Duplex-Power Car Co., 168 Mich. 634.

¶ 42. It is not necessary, in order to constitute fraud, that a person making a statement should either know that it is untrue, or be recklessly and consciously ignorant of whether it be true or untrue, but it is sufficient if the representation be false in fact, and the person making it is a party to the contract, and profits by the other's loss.—Power Specialty Co. v. Michigan Power Co., 190 Mich. 699.

¶ 43. One charged with having obtained a contract by means of misrepresentations may show that he was not aware of the untruthfulness of the statements imputed to him, and that he had grounds for believing them to be true.—Comstock v. Smith, 20 Mich. 338.

¶ 44. A broker and his clerk who effects the sale of a rooming house business are not liable to the purchaser for alleged fraudulent representations by the clerk as to the character of the tenants and the rent receipts unless the statements were known to be false and were made with intent to deceive.—Williamson v. Hannan, 200 Mich. 658.

§ 8. Reliance and deception of hearer.

Propriety of reliance, effect of notice of true facts, see post §§ 9-12.
Reliance on statements made as true without knowledge of truth or falsity, see also ante § 7.
Necessity of damage or detriment in consequence of reliance, see post § 13.
Pleading belief in truth and reliance, see post § 90.

Admissibility of evidence of reliance and inducement, see post § 42.
Evidence of knowledge at other times to disprove deception, see post ¶ 282.
Evidence as to reliance by and deception of skilled person respecting land conditions observed by him, see post ¶ 452.
Questions for jury, see post § 59.
Instructions on reliance and deception, see post § 61.

¶ 45. An essential element of actual fraud is the fact that it is relied and acted upon. —Arnstine Brothers & Mier v. Treat, 71 Mich. 561.

¶ 46. Misrepresentation is not actionable in fraud unless there is a reliance upon the representation.—Kimble v. Gillard, 177 Mich. 250.

¶ 47. He who claims to have been defrauded must show that he was actually deceived.—Hamilton v. Billingsley, 37 Mich. 107.

¶ 48. A misrepresentation, however fraudulent, will be no defense to a contract unless it served to deceive the party at the time he became fixed by the treaty.—Whiting v. Hill, 23 Mich. 399.

¶ 49. One who is sued for false representation is estopped from claiming that the plaintiff's previous knowledge was enough to protect him in the absence of proof that the plaintiff was in possession of the truth at the time of the transaction.—Hamilton v. Billingsley, 37 Mich. 107.

¶ 50. In order to constitute fraud by a buyer on a seller it is not essential that every statement of the buyer be accepted as literally true.—Heineman v. Steiger, 54 Mich. 232.

¶ 51. To avoid a contract on the ground that one was induced to enter into it on the faith of unwarranted representations, it is essential that he should have been ignorant of the matters represented, since if before he acted, he had knowledge of the truth, he was not deceived.—DeGrasse v. Verona Min. Co., 185 Mich. 514.

¶ 52. A plaintiff may recover money invested in a corporation by him in reliance on the fraudulent representations of the officers, even though such reliance was only one of several inducements leading him to make the investment.—Massey v. Luce, 158 Mich. 128.

¶ 53. Statements to a plaintiff to induce a settlement of a lawsuit, to the effect that the case might be delayed three or four years in the supreme court, and that his attorney was a scoundrel, if relied upon as made, are important in the question of fraud.—Lewless v. Detroit, G. H. & M. R. Co., 65 Mich. 292.

¶ 54. There are no fraudulent representations upon which to base a rescission of the purchase of a boat in the statements by officers of the corporation seller to the effect that they believed the boat would go 15 miles per hour, particularly where the parties were unwilling to rely on these statements but insisted on a written warranty to that effect.—H. W. Williams Transportation Line v. Darius Cole Transportation Co., 129 Mich. 209.

¶ 55. A purchaser of stock who had transferred land in payment of the stock cannot have the land reconveyed on the ground of misrepresentation in the value of the stock where in making the exchange he did not rely on the value placed upon it, inasmuch as he already owned stock and had formed his own opinion as to the value, neither can he succeed because of false representations in the annual report of the company, when such false statements had not been brought to his attention before his purchase and they had not contributed to deceive him.—Scott v. Brusse, 148 Mich. 529.

¶ 56. The purchaser of corporate stock cannot recover from the seller the purchase price on the ground of misrepresentations as to the earning capacity thereof where he knew precisely what the representations meant, and had full knowledge concerning the capital stock.—Van Cleve v. Radford, 149 Mich. 106.

¶ 57. There can be no claim of fraud by one who, in settlement of a suit, begun by capias and instituted in good faith, has agreed to a re-exchange of properties, and has assigned to the mortgagors, without recourse, notes and a mortgage securing the same given him in the original transaction of exchange, and who has not been financially prejudiced by such settlement, and who acted without reasonable care in making the settlement and took no precautions against being deceived therein.—McKinney v. Jones, 89 Mich. 26.

¶ 58. Defendant and certain other persons were stockholders in a lumber business of which defendant was the manager. Said other persons losing confidence in defendant apprised complainant of the situation and invited him to purchase stock from defendant, complainant and said other persons all acting together for the purpose of ousting defendant from control. After personally investigating the company and property interests involved, complainant then went to defendant and purchased certain shares of stock, giving his note in payment and pledging the stock with defendant as collateral. Complainant sought to enjoin defendant from selling said stock to satisfy the debt due defendant on the ground that he was induced by false representations of defendant to purchase same. Held, the circumstances indicating that, when complainant negotiated

the purchase of said shares from defendant, he had little confidence in the latter and therefore did not rely on the latter's representations, the injunction should be denied. —Brooks v. Culver, 168 Mich. 436.

¶ 59. Where a party buys lumber upon inspection only, a representation as to quality is immaterial.—Redfield v. Engel, 171 Mich. 207.

¶ 60. If lumber is bought because of representation as to quality, supported by perfunctory inspection, the representation is material.—Redfield v. Engel, 171 Mich. 207.

¶ 61. Complainants did not rely on alleged misrepresentations as to the value of certain furniture where it appears that they were experienced, that they made a careful inventory of the furniture, and exercised their own judgment in the purchase thereof and that the inducement of their purchase of the furniture and taking a certain lease was not the value of the furniture, but was the making of a sublease.—McKenzie v. Call, 176 Mich. 198.

¶ 62. The reiteration by the mortgagee's agent, to a purchaser from the mortgagor in a chattel mortgage, of fraudulent representations made to the mortgagor in connection with such mortgage, did not give such purchaser a right of action for fraud, as he was then already the owner of the property. —Soule v. Harrington, 135 Mich. 155.

¶ 63. In assumpsit for the balance of the purchase price of land where both parties treat a third party as owner and the plaintiff agrees to sell under an option for the price paid such owner but in fact charges $500 more which is discovered by the defendant before the price is paid, the plaintiff should be held to be bound by his representations of facts concerning the price within his knowledge but unknown to the defendant.—McGough v. Hopkins, 172 Mich. 580.

§ 9. Propriety of reliance; notice.

Actual deception of party by reliance, see ante § 8.

Representations as to matters of law, see ante § 3.

Neglecting available means of knowledge, see post § 10.

Signing instrument without reading it, see post § 11.

Representations concerning land, see post § 12.

Right to rely on statement of person referred to for information, see post § 22.

Effect of notice, see also post ¶ 115.

Invitation to make inquiries about stock as taking away right to rely on opinion, see also post ¶ 120.

Actual notice of the facts making other misstatements immaterial, see post ¶ 265.

Statements or communications at other times as evidence of knowledge, see post ¶ 282.

Evidence to rebut inference of nonreliance, see post ¶¶ 350-352.

Personal knowledge or notice of facts as taking away right to rely on agent's statements, see also Agency § 50.

Notice and right to rely on representations to borrower in building association, see Building Associations ¶ 47.

Notice of title or equities under the doctrine of bona fides or the recording acts, see Notice and Record of Title.

¶ 64. What constitutes fraud so as to avoid a settlement of an existing lawsuit depends considerably on circumstances, but not all deceit or false assertion is fraud. Parties are always held to some diligence in protecting their own interests, and those dealing with them have a right to suppose they will be.—Lewless v. Detroit, G. H. & M. R. Co., 65 Mich. 292.

¶ 65. The mortgagor induced by misrepresentation to give it is entitled to have the mortgage set aside as procured by fraud, unless he was, at the time, chargeable with such notice of the facts as should preclude him from complaining.—Converse v. Blumrich, 14 Mich. 109.

¶ 66. One cannot complain of false representations whereby he has been induced to buy corporation stock, if he had at the time actual notice of the facts.—McEacheran v. Western Transp. & Coal Co., 97 Mich. 479.

¶ 67. Where one used a mortgage in making payment, his statement that there was no prior mortgage that he knew of, was not a fraudulent representation, but was of a character to fairly put the vendor upon inquiry to ascertain the fact for himself.—Bristol v. Braidwood, 28 Mich. 191.

¶ 68. Where the purchaser of a mortgage on distant lands relies on and is misled by representations made to him by the seller as to the mortgagor's responsibility and the value of the securities, which representations, though honestly made, were really false, they amount in legal effect to fraud, even though the seller had suggested to the purchaser that he look at the lands himself, as their judgment might not agree, and had offered to pay his traveling expenses if they did not suit; such a suggestion implies the assertion that the seller had exercised an intelligent judgment, and would increase the purchaser's sense of security therein.—Webster v. Bailey, 31 Mich. 36.

¶ 69. Where one makes false representations of material facts, which are exclusively within his knowledge, and the other party relies upon them to his injury, liability for such false representations follows, and it does not lie in the mouth of the party perpetrating such fraud, when called to account, to say that his victim should have been more vigilant, should have been less credulous.—

John Schweyer & Co. v. Mellon, 196 Mich. 590; Johnson v. Campbell, 199 Mich. 186.

¶ 70. One charged with fraud cannot escape liability because the party with whom he is dealing has confidence in him, relies upon him, and by reason of such confidence is not more vigilant.—Boston Piano & Music Co. v. Pontiac Clothing Co., 199 Mich. 141.

¶ 71. A real estate broker who bears no contract relation to the owners of real estate and who is a mere volunteer and expects to get his commission out of the purchaser cannot recover from one of such owners damages for misrepresentations as to her right to make the sale, it having fallen through.—Dickinson v. Hanley, 193 Mich. 585.

¶ 72. A letter received prior to the purchase of stock, stating that the corporation was prosperous, and then had $287,000 in property with only $40,000 unpaid on it, and with the expected dividend of 30 per cent at least "divided among the present stockholders and applied on their stock" would bring "their stock up to par value with what they have already paid in cash," imparts notice that the stock is not paid in full.—McEacheran v. Western Transportation & Coal Co., 97 Mich. 479.

¶ 73. A person contemplating the purchase of stock of a bank has a legal right to rely upon the published report provided for by U. S. Revised Statutes, § 5211 as a true statement of the financial condition of the bank without further inquiry, in the absence of any personal knowledge tending to show the unreliability of the statement.—Smalley v. McGraw, 148 Mich. 384.

¶ 74. The seller of a moving picture business who represents, contrary to fact, that the business has been a profitable one cannot invoke the doctrine of caveat emptor as a defense to an action by the purchaser for fraud.—Johnson v. Campbell, 199 Mich. 186.

¶ 75. An owner of land contracted to pay defendant a certain price per foot for the cutting and removal of timber. He claimed that he was defrauded by defendant, as the merchantable timber gotten out did not reach the amount paid for. Held, as the timber was poor and inferior "down timber," the rule of a "merchantable scale" could not be applied and plaintiff could not rely thereon.—Watkins v. Burdick, 176 Mich. 433.

¶ 76. One who buys a worthless bond, relying upon the vendor's representation that it is good, may recover the amount paid though the misrepresentation was innocently made and though the purchaser had opportunity for examination.—Ripley v. Case, 86 Mich. 261; Ripley v. Case, 78 Mich. 126.

¶ 77. On the issue whether the buyer of bonds was defrauded into taking them for what was supposedly an issue of another road whose bonds were not in default, where the bonds were very similar in general appearance and would have required a reading to distinguish them, the absence of past-due coupons is some indication that a coupon bond is not in default.—Ripley v. Case, 78 Mich. 126.

§ 10. ——Neglect of available means of knowledge.

Representations concerning land open to inspection, see post § 12.
Opinions on matters equally open to both parties, see post §§ 14-17.

¶ 78. When the subject-matter of the representation of a fact is not particularly within the knowledge of the person making it, but is one concerning which the party to whom it is made has equally available means and opportunity for investigation, the latter cannot claim that he was misled, where he was not prevented by fraud or artifice from making inquiry or investigation.—De Grasse v. Verona Min. Co., 185 Mich. 514.

¶ 79. An assignor of a mortgage who falsely represents that it is a first mortgage, and that the property is good security, upon which representations he knows that the assignee relies in taking the assignment, cannot claim that the latter is not entitled to relief because he might have discovered the facts by an examination of the abstract of title.—Cornell v. Crane, 113 Mich. 460.

¶ 80. One who applies for a loan in a building and loan association and asks the secretary as to the construction which is and will be placed on its by-laws, does not stand on an equality of knowledge with the secretary and may rely on what he is told, notwithstanding he might have had access to them for himself and that under the law it is not allowable to do business of that kind according to the construction represented.—Sawyer v. Menominee Loan & Building Ass'n, 103 Mich. 228.

¶ 81. A prospective purchaser of national bank stock is not chargeable with knowledge of such circumstances affecting the truth of a report to the comptroller as he might have discovered by the exercise of ordinary prudence and diligence, but only with the natural inferences deducible from the knowledge possessed by him, when he relied on it.—Smallet v. McGraw, 148 Mich. 384.

¶ 82. The misrepresentation to a public board of facts which they can ascertain and are bound to know as pertaining to their own duties, but as to which they neglect to inform themselves, does not furnish any substantial ground for remedial equity.—Churchill Township v. Cummings Township, 51 Mich. 446.

§ 11. ——Signing instrument without reading.

See also post ¶¶ 424, 636.

Signing by mistake as to contents, see also Mistake.

¶ 83. Fraudulent representations as to the legal effect of an instrument will avoid it, even if made to one who has actually read it, if unable to judge of its true construction. But the fraud must be contemporaneous with the execution of the instrument, and must consist in obtaining the assent of the party defrauded by inducing a false impression as to its legal or literal nature and operation.—Berry v. Whitney, 40 Mich. 65.

¶ 84. A short contract of submission to arbitration between an insurer and insured cannot be set aside for fraud because the insurer neglected to read it, having had time in which to do so.—Michels v. Western Underwriters' Ass'n, 129 Mich. 417.

¶ 85. Where a party to an instrument undertakes to read it over in the presence and hearing of the other party thereto, in order that the latter may understand its contents before signing it, the party reading is bound to read it correctly, and the other has a right to rely upon its being so read, and is not guilty of negligence in signing it without further examination.—Anderson v. Walter, 34 Mich. 113.

¶ 86. One who signs without reading a deed of real estate, when fraudulently induced by his attorney to believe that it is a duplicate of a lease that has been read to him, is not guilty of negligence so as to lose his rights in the premises as against one holding under such forged deed.—McGinn v. Tobey, 62 Mich. 252.

¶ 87. Fraud in procuring the signature of a lease with a clause omitted from the former lease does not appear where it is shown that the draft was in possession of the signer for three days before he signed it and that there were other changes in it to apprise him that he was not signing a renewal on the same terms.—A. E. Wood & Co. v. Standard Drug Store, 192 Mich. 453.

¶ 88. The signing of a note by a man of mature, intelligent business experience without reading it, and in blind reliance upon the representations of another in whom, by reason of their relation, he had no reason to repose confidence, does not constitute fraud.—Northern Assur. Co. v. Meyer, 194 Mich. 371.

¶ 89. The rule that one charged with fraud cannot escape liability because the party with whom he is dealing has confidence in him, relies upon him, and by reason of such confidence is not more vigilant, applies in the case of the signing of a contract without reading it.—Boston Piano & Music Co. v. Pontiac Clothing Co., 199 Mich. 141.

§ 12. ——Representations concerning land.

Opinions and predictions as to values and possibilities, see post § 16.

Representations concerning mortgages, see also ante ¶¶ 67, 68.

¶ 90. In order that misrepresentations as to the value of land shall be regarded as fraudulent towards a purchaser who was on the ground, there must be some artifice, trust or confidence to warrant a reliance on such representations.—Walker v. Casgrain, 101 Mich. 604.

¶ 91. Statements of a seller of land in answer to an inquiry by the purchaser as to how he knew that plaster was there, to the effect that he had made an examination and had found the same rock as in a certain quarry, constitute more than mere opinions, and are positive statements of fact which the purchaser may rely upon, he not being bound to verify such statements by an independent investigation.—Morman v. Harrington, 118 Mich. 623.

¶ 92. Defendant, a real estate agent, in negotiating a sale of land to plaintiff for $1,200, represented that he was giving plaintiff the premises at the owner's price, and that the owner would not take less. Plaintiff paid defendant nine hundred dollars in cash and gave a mortgage to defendant for three hundred dollars, which sum he borrowed of defendant on the representation that it was to go with the nine hundred dollars to the owner. The owner in fact authorized defendant to sell the premises for nine hundred dollars. Defendant knew his representation was fraudulent. Plaintiff lived at a distance from the land and was unable to form any rightful estimate of its value. Held, plaintiff was entitled to recover the three hundred dollars in an action in assumpsit for fraud, under 3 Comp. Laws 1897, § 10421.—Hokanson v. Oatman, 165 Mich. 512.

§ 13. Detriment or damage.

See also ante ¶ 57.

Reiteration of statement after it has become true, see also ante ¶ 62.

Degree or extent of the falsity, see also ante § 5.

Reliance and deception, see ante §§ 8-12.

Burden of proof that paper has become uncollectible by fraud, see post ¶ 219.

Evidence as to damages, see Damages §§ 314, 352.

¶ 93. The doctrine that, to support a claim for relief for fraud, there must be damage also, does not apply to a case where one who has fraudulently obtained the guardianship of a minor sells the latter's lands without permission, even though he returns their value to the owner. One cannot be forced to submit to a sale at another's estimate of value.—Tong v. Marvin, 26 Mich. 35.

¶ 94. Depriving an infant of his title to land by a voluntary redemption from a foreclosure and then procuring a guardian's sale of the land to pay the redemption money is a detriment, even if the land was worth no more than the money incumbrance and but for the redemption would have been lost.—Tong v. Marvin, 26 Mich. 35.

¶ 95. It is not fraud on subsequent grantees and incumbrancers for one who has bought subject to a mortgage to induce a friend to purchase the mortgage instead of causing it to be discharged. It makes no difference to the mortgagor and the subsequent lienors whether one person or another owns it, and it does not change his relations with the owner of the land or the mortgage creditor. Nor does it affect the right of foreclosure.—Hall v. Harrington, 41 Mich. 146.

¶ 96. A married woman's inchoate right of dower is property in her sufficient to support an action by her for deceit against the purchaser of the husband's lands, the deceit consisting in misrepresenting facts to her by which she was induced to join in the deed.—Bissell v. Taylor, 41 Mich. 702.

¶ 97. The fact that the plaintiff in an action against defendants for obtaining by fraudulent representations his note for oats, bought by him of them at $15 per bushel in return for an agreement and bond of a fictitious corporation to sell twice as many bushels for plaintiff at the same price on commission, received the oats, which were of some value, does not alter or diminish the fraud except as regards the damages.—Pearl v. Walter, 80 Mich. 317.

¶ 98. A fraud upon one's rights is actionable as such though those rights may depend upon contract relations between the same parties.—Oliver v. Perkins, 92 Mich. 304.

¶ 99. An action by a bank payee against an accommodation maker of a promissory note cannot be defeated by the defendant showing false statements of the cashier of the bank, who is the principal debtor, to the effect that he had paid one note; where the defendant has not changed his position and his rights against the cashier and the cashier's property have not been jeopardized.—State Savings Bank of Ionia v. Montgomery, 126 Mich. 327.

¶ 100. A false representation as to the value of stock is actionable though plaintiff had already invested in some stock where he was thereby induced to purchase more of it.—McDonald v. Smith, 139 Mich. 211.

¶ 101. Recovery may be had for fraud inducing the conveyance of property though the title thereto stood in another than plaintiff, where the conveyance was made in plaintiff's behalf.—McDonald v. Smith, 139 Mich. 211.

¶ 102. One is not defrauded by being induced to consent to the transfer of right in a benefit certificate by another, who at that time has the full right of disposal.—Knights of Modern Maccabees v. Grice, 148 Mich. 422.

¶ 103. A right of action accrues immediately upon ascertaining that one has parted with property in reliance on the false or fraudulent representations of another, without waiting until default in payments entails actual loss.—Merlau v. Kalamazoo Circuit Judge, 180 Mich. 393.

¶ 104. Where a plaintiff buys shares of stock of a mining company upon the representation of the defendant owner that they are treasury shares, when in fact they were not, he cannot recover in an action of deceit, since he suffers no additional loss, the stock proving worthless, from the fact that the shares were not treasury shares.—Findlater v. Dorland, 152 Mich. 301.

§ 14. Opinions, predictions and promises.

See also ante ¶¶ 5, 19.
Statement as to time of arrival of shipment as opinion or fact, see also Carriers ¶ 57.
Representation of matters not capable of exact knowledge, see ante ¶ 18.
Promise with intention not to perform, see post § 18.
Evidence of falsity and intent to deceive, see post § 41.
Disparity between results and average experience as evidence of fraud in inspection, see post ¶ 263.
Falsity of opinion as fact question, see post § 58.
Instructions on fraudulency of opinions and predictions, see post § 61.
Breach of agreement as ground for rescission, see Rescission, II.
Representations amounting to warranties, see Sales, VI.
Contracts of guaranty, see Guaranty, I.

¶ 105. Fraud must be predicated on existing facts rather than promises.—Flint v. Le Heup, 199 Mich. 41.

¶ 106. Statements promissory in their character that one will do a particular thing in the future are not misrepresentations, but are contractual in their nature, and do not constitute fraud.—Boston Piano & Music Co. v. Pontiac Clothing Co., 199 Mich. 141.

¶ 107. A promise of something to be done in the future is not a misrepresentation of an existing fact.—Boston Piano & Music Co. v. Pontiac Clothing Co., 199 Mich. 141.

¶ 108. Calling a promise a misrepresentation does not make it such.—Boston Piano & Music Co. v. Pontiac Clothing Co., 199 Mich. 141.

¶ 109. A representation that a worthless medicine was a sure cure for hog cholera,

whereby plaintiff was induced to invest in the stock of a company, is not a mere expression of opinion but is a misrepresentation of fact and actionable.—McDonald v. Smith, 139 Mich. 211.

¶ 110. An offer to buy stock at more than its par value with a statement that "he had investigated it enough to know that he wanted some of it," made by one who was party to a scheme to induce plaintiff to invest in worthless stock, is more than a mere expression of opinion and is actionable, being equivalent to a statement of knowledge of facts giving it a greater value.—McDonald v. Smith, 139 Mich. 211.

¶ 111. A seller has a right to praise his property and to give his opinion concerning it.—Haener v. McKenzie, 188 Mich. 27.

¶ 112. The rule that a seller has a right to praise his property, and to give his opinion concerning it, cannot be extended to embrace false representations of alleged facts which may be and are relied upon by the purchaser, and become an inducing cause of the trade.—Wegner v. Herkimer, 167 Mich. 587; Pratt v. Allegan Circuit Judge, 177 Mich. 558.

¶ 113. Representations made to promote the sale of stock of a corporation, which are mere matters of opinion, are not actionable though false.—Getchell v. Dusenbury, 145 Mich. 197.

¶ 114. Representations by a physician and an attorney in the employ of an insurance company to an injured employee of the insured that an injury to such employee's eye was but trivial, and that he would recover his sight within a few weeks, whereas his sight was permanently destroyed, held actual fraud.—Bertha v. Regal Motor Car Co., 180 Mich. 51.

¶ 115. Where a mortgage was given by the vendee in a land contract in the full belief, induced by the mortgagee's acts and statements, that the rights of the latter were paramount to any that could be claimed under the original contract, and that he had done nothing to recognize or make himself responsible for sales by the mortgagor's vendors, which statements were untrue, the mortgagor is entitled to have the mortgage set aside as procured by fraud, unless he was, at the time, chargeable with such notice of the facts as should preclude him from complaining.—Converse v. Blumrich, 14 Mich. 109.

§ 15. ——As to value or salability or possibilities.

As to land values and possibilities, see post § 16.

Necessity and sufficiency of reliance on statements, see ante § 8.

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Opinions as to probable speed of boat not relied on, see ante ¶ 54.

Other misrepresentations to other persons as evidence, see post § 33.

Admissibility of value as bearing on the alleged fraud, see post § 37.

Realized prices as evidence, see post § 37.

Evidence of impossibility to falsify representations, see post § 41.

Sufficiency of evidence of fraud in valuations, see post § 55.

¶ 116. A mere assertion of value made by the seller, where no warranty is intended, is no ground of relief to a purchaser, because the assertion is a matter of opinion which does not imply knowledge, and in which men differ. Every person reposes at his peril in the opinions of others where he has equal opportunity to form and exercise his own judgment.—Picard v. McCormick, 11 Mich. 68.

¶ 117. A jeweler, knowing the purchaser's ignorance, deliberately and designedly availed himself of it to defraud him by false statements of the value of articles in his trade, which none but an expert could reasonably be expected to understand. It was held that an action would lie for fraud.—Picard v. McCormick, 11 Mich. 68.

¶ 118. A vendor's statements of his opinion as to his stock do not generally stand on the same footing as facts; but they are sometimes ground of liability in an action for fraud where they are meant and understood on both sides to be relied on.—Jackson v. Collins, 39 Mich. 557.

¶ 119. A vendor's honestly expressed but incorrect opinion as to the amount, quality and value of the goods he sells will not support an action for fraudulent representations if the purchaser sees or knows the property, or has opportunities to know it. The purchaser cannot recover unless the vendor, with superior means of knowledge, intentionally gives a false opinion as to material facts for the purpose of defrauding the purchaser, and the latter has reason to rely and does rely on it as true.—Collins v. Jackson, 54 Mich. 186.

¶ 120. Complainant being owner of certain real estate sold the same to defendant, and received in payment certain copper stock and defendant's note. Defendant directed complainant, before taking the stock, to make inquiries as to its value, and not to rely upon the defendant's estimation of it. The stock proved worthless. Held, that in such a case, where parties stand upon equal terms as to their opportunity of obtaining information concerning them, each must rely upon his own judgment and means of information.—Beeker v. Hastings, 15 Mich. 47.

¶ 121. Where one who offers a mortgage in payment remarks on its value, irrespective of

the question of the existence of a prior mortgage, his remarks should be taken simply as the expression of his opinion, or as a matter of commendation; the other party to the trade, if ordinarily diligent, can judge of the value as well as he, and is therefore not relieved from the application of the principle of caveat emptor in regard to it.—Bristol v. Braidwood, 28 Mich. 191.

¶ 122. A contract of sale cannot usually be avoided for an undervaluation, or because a party in bargaining has sought to abate and depreciate the price by the common bantering between buyer and seller.—Swimm v. Bush, 23 Mich. 99.

¶ 123. A vendor's representation on a sale of worthless corporate stock and also a corporate bond for $1,000 worth but $500, that the corporation was prosperous and paying dividends on the stock and that it was worth par and that the corporation's mortgage bond which he was selling "was just as good as gold, and was just as good as wheat in the bin, and was worth $1,000," was not allowed to sustain a recovery for the amount of the bond in an action for fraud and deceit brought by the vendee.—French v. Fitch, 67 Mich. 492.

¶ 124. The rule of caveat emptor does not necessarily apply to representations of value made by the vendor of mining stock to one who knows nothing about the values of mining property and who relies upon such representations.—Maxted v. Fowler, 94 Mich. 106.

¶ 125. While, ordinarily, representations as to value are not evidence of fraud, yet in a case where an adult is dealing with an infant, who is presumed by law to be unfamiliar with the value of a watch which he is solicited to purchase, it is proper to submit to the jury the question whether good faith was observed towards him.—Welch v. Olmstead, 90 mich. 492.

¶ 126. If in selling his stock of goods the vendor merely states an opinion as to their value, which turns out then to be less than he supposed, the vendee is not entitled to rescind his purchase and recover the money he has paid.—Johnson v. Seymour, 79 Mich. 156.

¶ 127. The rule that a vendor has the right to praise his goods in order to make a sale does not apply to statements of value which the vendor knows to be false, and upon which the vendee, who is ignorant on the subject, relies in making the purchase.—Peck v. Jenison, 99 Mich. 326.

¶ 128. Where a person has organized a corporation and is practically its sole owner and all its assets have been acquired under his immediate supervision, it cannot be said that statements made by him as to the value of the stock were mere expressions of opinion when such statements were given to induce a traveling salesman of the corporation to invest in such stock.—Hubbard v. Oliver, 173 Mich. 337.

¶ 129. Where a corporation, in order to induce a purchase of stock and the acceptance of a position as selling agent of its product, represents that a good manager could secure sales to a certain amount per month, whereas in its experience no manager had ever been able to sell such an amount per month, such representations may constitute fraud.—Martin v. Veana Food Co., 153 Mich. 282.

¶ 130. A representation by a seller that property would readily sell in a certain market at a given price, is the representation of an alleged fact and where relied upon may be the basis of a false representation.—Pratt v. Allegan Circuit Judge, 177 Mich. 558.

¶ 131. Statements made by a seller of a tractor plowing outfit to the purchasers that the purchasers could pay for the outfit out of the earnings of the same and that any man of ordinary intelligence, after a few hours of instruction, could operate the same, constitute merely "puffing," and not misrepresentations, if untrue.—John D. Gruber Co. v. Smith, 195 Mich. 336.

¶ 132. Statements by the vendor's agent as to the amount of profits a purchaser of a threshing machine will make before the first payment thereon falls due, are no more than the ordinary "puffing" used by salesmen generally.—Truman v. J. I. Case Threshing Mach. Co., 169 Mich. 153.

§ 16. ——As to lands and their value or possibilities.

Assertions amounting to fact or opinion, see also ante ¶ 91.
Materiality of representations as to value, see ante § 4.
Erroneous statements without fraudulent intent, see ante § 6.
Reliance on statements, see ante § 8.
Propriety of reliance on the representations, see ante § 12.
Admissibility of evidence as to value and conditions of adjacent and similar lands, see post § 33.
Evidence of value as bearing on alleged fraud, see post § 37.
Comparative conditions and results on other land as evidence, see post § 37.
Sufficiency of evidence of fraud in land transfers and mortgages, see post § 52.
Sufficiency of evidence of fraud in valuations, see post § 55.
Instructions on the fraud and reliance thereon, see post § 61.

¶ 133. Representations of the value of land by the owner to one who was thereby induced to lend money upon the land as security,

held to be fraudulent statements of fact and not matters of opinion merely.—Coulter v. Minion, 139 Mich. 200.

¶ 134. False statements of value intentionally made to one who is in ignorance of the quality and value, under circumstances indicating a purpose that such statements are to be relied upon, and where the party to whom they are made has no opportunity to examine the property, may be treated as an affirmation of fact and fraudulent.—Pinch v. Hotaling, 142 Mich. 521.

¶ 135. Where a defendant seller of land represents to a plaintiff purchaser, in order to induce him to buy a parcel, that other parcels of the land have been sold and the buyers intend to settle upon and cultivate the land, such statements, if false, are actionable.—Painter v. Lebanon Land Co., 164 Mich. 260.

¶ 136. False representations by the assignor of a land contract as to the amount paid by him thereon, and as to the extent of his title thereunder, are actionable and cannot be classed as "selling talk."—Wegner v. Herkimer, 167 Mich. 587.

¶ 137. A representation by a real estate agent to a purchaser that the price named by him is the price at which the owner offers to sell the property, is not a mere statement of opinion as to the value of the property, but a statement of fact within the agent's knowledge and unknown to the purchaser, upon which the purchaser has a right to rely. —Hokanson v. Oatman, 165 Mich. 512.

¶ 138. In an action for the purchase price of a set of books and a city lot, held that representations that the lot is in a suburb of New York and in easy reach of the city by railways every hour, that such lots are rapidly increasing in value and only a few of them are for sale are more than the expression of an opinion or ordinary "puffing." —J. B. Millett Co. v. Andrews, 175 Mich. 350.

¶ 139. A representation that land was high and dry and good agricultural land, without mire, swamp or boggy portions, is a material representation of a fact.—Haener v. McKenzie, 188 Mich. 27.

¶ 140. A representation made by a vendor to the purchaser of farm lands that the fruit on the farm would pay for it in the first year is not a representation concerning a present existing fact, but is a matter of opinion.—Draft v. Hesselsweet, 194 Mich. 604.

¶ 141. A contract for the sale of standing timber will be canceled where it appears that complainants were not familiar with the value and that defendants induced them not to have any estimate made by assuring them that it was not necessary, and that they would deal fairly with them, whereby the contract was made for a sale for $1,650, when in fact the timber was worth $4,000.—Garr v. Alden, 139 Mich. 440.

¶ 142. A mining company held a lease on some property which it had been unable to work profitably, and its president obtained a reduction of the royalty upon the representation that it was essential in order to get the mine worked. Thereafter he negotiated the lease to another company which took it at the original royalty and worked the property. In an action against the original lessee for an accounting, held that the agreement reducing the royalty should be set aside as fraudulently obtained.—Lasier v. Appleton Land & Iron Co., 130 Mich. 588.

§ 17. ——As to financial conditions or prospects.

See also ante ¶¶ 109, 110, 113.
Necessity and sufficiency of reliance on statements or predictions, see ante § 8.
As to values of corporate stocks, see also ante § 15.
Statements imparting notice, see ante ¶ 72.
Necessity that representation be in writing to be actionable, see Frauds, Statute of, § 80.

¶ 143. Representations made by a mortgagee of chattels, upon inquiries by other creditors, that the mortgagor was doing a good business and would be able to meet his obligations, must be regarded as mere opinions, and cannot affect the mortgagee's rights where it does not appear that they were not made in good faith.—Chafey v. Mathews, 104 Mich. 103.

¶ 144. Representations as to the probable earnings of a corporation which the party making them desires to organize, made to induce the party to whom they are made to become a stockholder in the corporation, may be fraudulent and constitute a basis of action if made in bad faith, with a design to deceive and mislead said party, by one possessed of superior knowledge on the subject. —French v. Ryan, 104 Mich. 625.

¶ 145. Statements by officers of a building and loan association as to when shares of stock will attain their full value, and how low the rate of interest to a borrower will be, are matters of opinion merely, and are not to be treated as fraudulent representations.—Myers v. Alpena Loan & Building, etc., Ass'n, 117 Mich. 389.

¶ 146. The expression of favorable opinions as to a corporation and its prospects by a promoter to a purchaser is not a fraud which will defeat his liability on his subscription.—Dieterle v. Ann Arbor Paint & Enamel Co., 143 Mich. 416.

¶ 147. A person may, without legal liability for results, permit another, for a consideration, to share his hopes, although the

statement of such hopes may be adroitly phrased; but such rule will not permit one person to induce another, by an actual misstatement, to believe that a venture is without other risk than the usual risk of an established and prosperous business.—Martin v. Veana Food Co., 153 Mich. 282.

¶ 148. Representations made to induce the purchase of stock, such as the value of the shares, the probable life of the mine, and the probable quantity of ore defendant had seen, are no more than the mere expressions of opinions and are not actionable.—Krause v. Cook, 144 Mich. 365.

¶ 149. Representations made to induce the purchase of mining stock that the company issuing the stock owned the mine which comprised 85 acres, that they had a pipe line run, and water power enough to run the mine, that the company had paid dividends, and enough ore had been mined to pay the dividends already paid, that there was dump ore containing enough gold to pay for the working of the plant and keep it running, are clearly statements of fact, and when proved to be false are sufficient to justify the court to refuse to direct a verdict for the defendant in an action of assumpsit for money obtained by fraud and deceit.—Krause v. Cook, 144 Mich. 365.

¶ 150. Evidence that a manufacturing corporation, in securing a sale of its stock, represented that there was a constantly increasing demand for its product, that it had a plant which cost about $100,000, that the experimental stage had been passed, and that a net profit of 35 per cent could be shown, establishes representations of fact, and not merely expressions of opinion, and will sustain an action for fraud and deceit in the sale of stock.—Martin v. Veana Food Co., 153 Mich. 282.

¶ 151. Statements made by the officers of a corporation in obtaining the execution of an accommodation note for a debt owed by it, that the instrument would be cared for at maturity, that the company was doing a better business than in the past, and would soon be in a position to care for its indebtedness, and that the accommodation maker would never be called on to pay the note, are not false and fraudulent statements of fact.—Irwin v. Wolcott, 183 Mich. 92.

§ 18. ——Promises with intent not to perform.

See also post ¶ 691.
Opinions and predictions as fraud, see also ante § 14.
Pleading the fraudulent promise, see post § 90.
Presumption as to fraudulency of purchase, see post § 28.
Breach of agreement as evidence, see post § 38.
Sufficiency of evidence of complicity in the fraud, see post § 56.
Instructions on presumable intent not to pay, see post ¶¶ 544, 546.

¶ 152. A purchase made by one who is insolvent, and with the purpose not to pay, is void even though the buyer has not made false representations.—Shipman v. Seymour, 40 Mich. 275.

¶ 153. To buy goods intending never to pay for them, and intending to mortgage them to another creditor, is such a fraud as avoids the sale; it is the same as if the buyer had made false and fraudulent representations as to his financial standing at the time of the purchase.—Ross v. Miner, 67 Mich. 410.

¶ 154. The failure of a vendee, who knows that he is in failing circumstances or insolvent, to disclose that fact to a vendor, will not make the purchase fraudulent, unless coupled with an intent on his part, at the time of the purchase, not to pay for the goods.—Reeder Bros. Shoe Co. v. Prylinski, 102 Mich. 468.

¶ 155. A chattel mortgage of a stock of goods obtained from a retail dealer under promises to extend him credit in the sale of goods for replenishing his stock is void for fraud if there was no intention to extend credit at the time of making the mortgage.—Crowley v. Langdon, 127 Mich. 51.

¶ 156. If a vendee makes no misrepresentation when he purchases goods, his insolvency alone will not make the transaction fraudulent and entitle the vendor to rescind.—Kirschbaum v. Jasspon, 123 Mich. 314.

¶ 157. A promise made in bad faith, with no intent to carry it out, and as a part of a scheme to defraud, may be received in evidence because it is connected with representations of fact, and its nonperformance may be proven, but, standing alone, statements promissory in their character are contractual in their nature and do not constitute fraud.—Barker v. Finley, 200 Mich. 166.

§ 19. False suggestion or silence.

See also post ¶ 442.
Evidence as to concealment of liens, see post ¶ 438.
Silence as evidence, see also post ¶ 243.
Silence or nondisclosure to person in relation of confidence as implied fraud, see post II.

¶ 158. The failure of a vendee who knows that he is insolvent to disclose that fact to the vendor will not make the purchase fraudulent unless coupled with an intent at the time of the purchase not to pay for the goods.—Zucker v. Karpeles, 88 Mich. 413.

¶ 159. A fraud arising from the suppression of the truth is as prejudicial as that which springs from the assertion of a false-

hood, and courts have not hesitated to sustain recoveries where the truth has been suppressed with intent to defraud.—Tompkins v. Hollister, 60 Mich. 470.

¶ 160. In order to charge plaintiff with liability for fraudulent representations, it is not essential that the false assertions be made in express words; fraud may be accomplished by encouraging and taking advantage of a delusion known to exist in the minds of others.—Busch v. Wilcox, 82 Mich. 315, affirmed on rehearing 82 Mich. 336.

¶ 161. A settlement of a claim will not be set aside for fraud because of the refusal of the executor of the estate against which the claim is made to produce the evidence in his possession, and of his assertion that there was no such evidence.—Macomber v. Cottrell, 171 Mich. 371.

¶ 162. It seems that no fraud on an accommodation maker signing a renewal note is involved in failing to tell him of the reported losses of the principal maker, previously represented to be worth enough so that "no risk" would be taken in signing for accommodation.—First Nat. Bank v. Johnson, 133 Mich. 700.

¶ 163. Fraud may be consummated by suppression of facts and of the truth, as well as by open false assertions.—Fred Macey Co. v. Macey, 143 Mich. 138.

¶ 164. Where one fails in a duty he bears to inform another that the latter is not liable personally upon an obligation which she has signed, his neglect to so inform her being for his own benefit or for that of a bank with which he is connected, he commits a fraud that entitles her to relief in equity.—Tompkins v. Hollister, 60 Mich. 470.

§ 20. Equivocations and half-truths.

Gravity or degree of the falsity, see ante § 5.

¶ 165. Every one is responsible for the belief he intentionally creates, whether by words or otherwise, and will be precluded from profiting by any unconscionable use of an obligation which he has wrongfully obtained thereby. It is no defense to fall back upon the literal meaning of the language alone.—Mizner v. Kussell, 29 Mich. 229.

¶ 166. Designed partial statements which deceive, and concealment of facts such as to make those declared partial and misleading, are fraudulent in law.—Kenyon v. Woodruff, 33 Mich. 310.

¶ 167. In an action for fraudulent representations, made by defendant's agent in contracting for cutting pine on defendant's land, it appeared that such agent held two greatly varying estimates as to the quantity of the pine. Held, that the agent should have shown both estimates to the contractor, and that if he exhibited only the larger one, which was grossly incorrect, in order to induce the contractor to enter into the agreement, plaintiff was entitled to recover though the agent himself believed at the time in the correctness of the larger estimate.—Busch v. Wilcox, 82 Mich. 315, affirmed on rehearing 82 Mich. 336.

¶ 168. A bank of which inquiry has been made concerning a person's credit is not liable for simply giving a fair statement as to his credit and standing without stating that it holds against him an unrecorded mortgage. —Fifth Nat. Bank v. Pierce, 117 Mich. 376.

§ 21. Maps or pictorial representations.

Superficial appearance of bonds as deception, see also ante ¶ 77.

¶ 169. A map on one side of letter paper of the agents of a landowner showing the location of lots, but incorrectly, is a representation of fact where the value of the lots depends upon their nearness to a city and a proposed plant of a great steel company as mapped.—Billig v. Goodrich, 199 Mich. 423.

§ 22. Statements made to or through agents or third persons.

Persons entitled to complain, right of persons not addressed or intended to hear or to rely on representations, see also post § 78.

Fraud on corporation operating on incoming stockholder as well, see post ¶ 187.

Persons responsible for the fraud, principal's and agent's responsibility, see post §§ 25-27.

Burden of showing that interpreter translated truly, see post ¶ 231.

Other frauds as evidence of knowledge or intent, see post § 33.

Evidence of agent's statements to show the fraud, see post ¶ 244.

¶ 170. A husband persuaded his wife to execute a note and mortgage for the purchase of a patent right sold to him, and falsely represented by the vendor to be valuable, by repeating to her such representation. Held, that she could complain of the vendor's fraud, being the party most injured by it.—Waterbury v. Andrews, 67 Mich. 281.

¶ 171. Although representations as to value of stock and as to promised dividends are mere matter of opinion, and an action for fraud will not lie when he who alleges the fraud did not rely on the statements alleged to be fraudulent, but on statements derived from other sources, one guilty of fraud cannot escape liability by sending the purchaser to a confederate for an opinion, nor by inducing the purchaser to make an investigation which will not disclose to him, as it would to an expert, the falsity of the statement.—Barron v. Myers, 146 Mich. 510.

¶ 172. An agent was instructed to inquire into a customer's credit and to sell to him if

he was satisfied with his answers. He sent an order to his principal without communicating the answers, and the order was filled. Held, that the principal had a right to assume that the inquiries were made and that the answers were satisfactory to the agent before he sent the order and to rely on that assumption even if not communicated.—Shipman v. Seymour, 40 Mich. 274.

¶ 173. One who enters a vessel on a shipbroker's books as for sale is responsible for the correctness of the data of description there appearing, if they were meant to be relied on and were relied on whoever made them.—Gilchrist v. Manning, 54 Mich. 210.

§ 23. ——To mercantile agencies or in financial statements.

Intent of the speaker in misrepresenting conditions, see ante § 6.
Right to rely on statements, see ante § 9 et seq.
Right to rely on national bank statement, see ante ¶ 81.
Statement omitting mention of debts, see also ante ¶ 168.
False reports of corporations filed with public officers, see also Corporations § 167.
Pleading the fraud, see post § 90.
Statement or report itself as evidence, see post § 35.
Evidence to prove reliance on statement, see post § 42.
Admissibility of other indicia of fraud than contents of the statement of finances, see post § 31, ¶ 248.
Admissibility of statement as depending on fact of communication to plaintiff, see post ¶ 291.
Previous statement as evincive of fraud, see also post ¶ 293.
Annual corporation reports as evidence, see post ¶ 295.
Subsequently realized price of stock as evidence of falsity in statement, see post ¶ 336.
Evidence as to fraudulent concealment, see also post ¶ 443.
Questions for jury, see post § 59.
Instructions on the fraud, see post § 61.

¶ 174. Representations made by a person on business to a commercial agency for the purpose of obtaining credit are, in effect, made to those who, relying on the representations, give the credit.—Genesee County Sav. Bank v. Michigan Barge Co., 52 Mich. 164.

¶ 175. A merchant who knowingly makes a false report to a commercial agency of material facts as to his financial condition, for the purpose of obtaining a standing thereby, is liable in an action for fraudulent representations brought against him by one to whom the agency has communicated the report, and who, believing such report to be true, has sold goods to him on credit.—Hinchman v. Weeks, 85 Mich. 535.

¶ 176. A merchant who allows considerable time to elapse after making a report to a commercial agency without making new representations cannot be said—even though his condition has changed—to be guilty of actual fraud unless he knows, or should know, that credit is extended upon the strength of his original rating.—Cortland Mfg. Co. v. Platt, 83 Mich. 419.

¶ 177. It is the duty of a merchant who has furnished statements to commercial agencies of his financial standing for the purpose of gaining credit to give them notice of any material change for the worse, to the end that persons with whom he has commercial dealings may not be misled as to the extent of credit they may safely give him.—Mooney v. Davis, 75 Mich. 188.

¶ 178. A merchant registered with a mercantile agency need not report every variation in his circumstances; it is only when he is insolvent and is or should be aware that he will be obliged to suspend or fail that he owes a duty to creditors or to notify a commercial agency of a change of situation.—Cortland Mfg. Co. v. Platt, 83 Mich. 419.

¶ 179. F. C., an insolvent, organized the firm of F. C. & Co., with M. and H., who were worth from $50,000 to $75,000, as his copartners. M. and H. lived in Ohio, and the principal office of the new firm was located in that state. C. continued to reside at G., in Michigan, and conducted business for himself in the name of C. & Co. C. ordered certain merchandise from plaintiffs, a Missouri firm, with whom he had had no prior dealings. The order was signed "F. C. & Co.," and was mailed from G. Plaintiffs, after consulting Dun & Co.'s reports, and finding the firm of F. C. & Co. in the G. list, rated at from $50,000 to $75,000, filled the order. C. disposed of the merchandise, deposited the proceeds to the credit of C. & Co., and refused to pay the purchase price. Plaintiffs sued in an action of deceit. It appeared that C. had been for years a subscriber to Dun & Co.'s reports, that he knew just how the firm of F. C. & Co. was rated, and understood that the rating would secure credit for the firm at the hands of strangers. Held, that he perpetrated a fraud in obtaining the merchandise, and in appropriating the proceeds, on the pretense that he was doing business for himself under the name signed to the order.—Frisbee v. Chickering, 115 Mich. 185.

¶ 179a. One undertaking to furnish a statement as to the financial condition of another who refers the inquirer to his books which show a capital of $8,000 without any deductions, is under a duty to disclose the amount of indebtedness which he knows to exist.—Banner Cigar Mfg. Co. v. Treusch, 125 Mich. 265.

§ 24. Inducing third person to break duty or contract or impair title.

Evidence of fraudulent collusion to cause breach, see post § 56.

Instructions on frauds by collusion, see post § 61.

Causing breach of contract or other relations as tort, see Torts; Libel.

¶ 180. False representations made to the natural guardian of a minor, that have the tendency to induce him to abandon all care for her interest in certain property, constitute fraud against her, in the view of a court of equity, as much as if she had been capable of managing her own affairs, and they had been made to her.—Tong v. Marvin, 15 Mich. 60.

¶ 181. It is actionable fraud to procure from a remote grantor, on a pretended purpose of perfecting the title of those holding under him, a quitclaim deed to a third person, and then by working on the fears of the owner and occupant, plaintiff, to induce him to give a note and mortgage on his land to protect it against the false title so acquired.—Hanold v. Bacon, 36 Mich. 1.

¶ 182. It is actionable wrong to induce one's corporation by fraud and deceit to reject a manufactured machine, which otherwise the corporation would have accepted from plaintiff.—Morgan v. Andrews, 107 Mich. 33.

¶ 183. Procuring a quitclaim deed from the original grantor of land correctly describing such land, which he had previously transferred by a deed containing a wrong description of such land, was a fraud on the mortgagee of such land holding under such prior deed and foreclosure of mortgage, and such mortgagee was entitled to the benefit of such quitclaim deed; where, in an action to clear title, it appeared that such land had been repeatedly deeded, the wrong description being always used, and was mortgaged in the same terms, and sold on foreclosure to the mortgagee; and where the mortgagor, subsequent to the execution of the mortgage, gave a stranger a deed correctly describing such land, and the grantee again conveyed it by the same description, but such deeds were not recorded; and where the last of such grantees mortgaged the land by the right description and such mortgage was foreclosed by advertisement; and where such quitclaim deed correctly describing the land, was then procured in the interest of such foreclosure purchaser, from the original grantor, without consideration, and upon representing to him that such deed did not interfere with any title previously conveyed.—Taber v. Shattuck, 55 Mich. 370.

¶ 184. A lessor who by a second mortgage fraudulently planned between his lessee and a third person has lost his right to exercise the power, given him by a chattel mortgage clause in the lease, to seize the lessee's goods on the premises in default of rent, has a right of action against the lessee and such third person based not upon his interest in the goods, but upon the fraudulent deprivation of a right.—Crockett v. Bearce, 104 Mich. 257.

§ 25. Responsibility and liability of parties.

Principals' and agents' or corporation's and member's or officer's liability, see post §§ 26, 27.

Statements made to or through third persons as fraud, see ante § 22.

Partner's liability for unfair competition by firm, see post ¶ 600.

Pleading participation or responsibility, see post § 91.

Sufficiency of evidence of complicity and responsibility, see post § 56.

Instruction on loss as between two persons equally innocent, see post ¶ 524.

Questions for jury, see post § 59.

Notice and record of title imputing notice of and responsibility for fraud, see Notice and Record of Title.

Right to hold purchaser of goods from fraudulent buyer as dependent on notice of fraud on original seller, see Sales, XI.

Collusion by bank and adverse claimant to deposit, see Banking § 15.

Fraud in taking acknowledgments, liability of officer, see Acknowledgments § 24.

¶ 185. A party defrauded may have more than one wrongdoer, actual or constructive, to look to for redress, but the active wrongdoer is always responsible for his own frauds.—Hempfling v. Burr, 59 Mich. 294.

¶ 186. In an action for fraud and deceit, where the declaration and proof showed that one codefendant did not personally make the false representations, he may still be liable if the jury find that they were made at his instigation, since in such case he is chargeable with the acts of his codefendant.—Sudworth v. Morton, 137 Mich. 575.

¶ 187. Pursuant to a scheme to unload the business of a firm, which had become unprofitable, and its property, which was heavily incumbered, upon a corporation to be organized as a part of the scheme, one of the partners, by fraudulent representations as to the profits of the firm business and the persons who were to join in forming the corporation, induced a party to subscribe for some of the corporate stock, in payment for which he gave his promissory note, which was transferred to the other partner. In consummation of the scheme the firm property was transferred to the corporation, and, by reason of the fact that the two partners controlled the directorate, the same was credited to the partner who made the false representations, on the books of the corporation, at a figure largely in excess of its actual value and of the value of which it had been agreed to be taken. Held, in a suit upon the note that although a fraud may have

been perpetrated upon the corporation, the whole scheme was none the less a fraud upon the maker of the note, for which the partner to whom it was transferred must be held liable, not only because a beneficiary, having received the proceeds of stock subscriptions, but because a participant in the final act which gave color to the whole transaction.—French v. Ryan, 104 Mich. 625.

§ 26. ——Principals and agents in frauds.

See also ante ¶ 173.

General doctrine of principal's liability for agent's fraud, see Agency § 50.

Coliability of principal and agent, see also Agency §§ 52, 85.

Confirming truth of agent's erroneous statement as true, see ante ¶ 27.

Agent's knowledge as element in his liability, see ante ¶ 44.

Misrepresentation to third person and repeated to person deceived, see ante § 22.

Merger of fraud by affirmance of contract as immaterial to agent's liability for fraud, see post ¶ 687.

Admissibility of evidence of agent's other frauds, see post § 33.

Pleading responsibility and complicity, see post § 91.

¶ 188. An agent who makes false representations of facts which he does not know to be true and does not know anything about, is guilty of bad faith and cannot escape the consequences of making false representations of existing facts.—Bartholomew v. Walsh, 191 Mich. 252.

¶ 189. In a transaction with A., B. in good faith represented to him that a certain mortgage was properly recorded, and a primary security upon certain lands in another state, which proved untrue. B. also referred A. to his agent in such state, who assured him to the same effect. A. relied and acted upon the information received from both. Held, that B. was bound by his agent's as well as by his own representations.—Beebe v. Young, 14 Mich. 136.

¶ 190. Where in an action of deceit, a defendant has made misrepresentations, it is immaterial that he has made them in the form of a report made up by another.—Diel v. Kellogg, 163 Mich. 162.

¶ 191. Under an agreement between an owner and a contractor providing that the architect shall be the final judge as to the work of building a house, and that money shall be paid to the contractor upon the architect's certificates, a plaintiff who furnishes materials for the house cannot recover for fraudulent representations made by the architect inducing plaintiff to refrain from taking steps to secure himself on the property, where there is not sufficient evidence to show that the defendant owner authorized the architect as his agent to make representations as to payment.—Michigan Lumber Yard v. Blesch, 166 Mich. 470.

¶ 191a. Where a person desiring to secure goods from plaintiff to sell on his own account was required to procure sureties to secure plaintiff against loss, it was held in an action against such sureties on a guaranty signed by them that there was no evidence that in procuring such guaranty such person acted as plaintiff's agent, and hence plaintiff was not responsible for misrepresentations made by him as to the character of the instrument presented to defendants for their signature.—Saginaw Medicine Co. v. Batey, 179 Mich. 651.

¶ 192. A release from a father of his interest in his daughter's estate, obtained by misrepresentation and concealment on the part of the daughter's attorney, who had possession of the property, and who was the only person who knew the exact amount, condition and value of the same, may be set aside for fraud.—Beedle v. Crane, 91 Mich. 429.

§ 27. ——Corporations and officers and agents.

Opinions and predictions or estimates of prospects of corporation as fraud, see ante §§ 14-17.

Falsehood by cashier as affecting bank, see also ante ¶ 99.

Fraud by promoters on corporation or subscribers, see Corporations §§ 38, 39.

Responsibility of corporation for agent's deceit, see also Corporations § 138.

Fraud of promoter worked through corporation, see also ante ¶ 187.

Effect of fraud by promoters to charge corporation seeking to enforce subscription, see also Corporations § 55.

Participation of corporate officers in frauds, see also Corporations § 160.

Misstatement of amount of capital in stock certificate signed by defendant officer, see also Corporations ¶ 589.

Statements by corporate officer at other times as evidence, see post ¶¶ 289, 290.

Necessity of writing to charge officers on representations made as to corporate solvency, see Frauds, Statute of, I, H.

¶ 193. Where defendant being an officer of a bank to which complainant owed a note, and also of a gas company, shares in which complainant had pledged collaterally to the note, fraudulently sold and transferred the shares and took up the note, he could not exempt himself from responsibility by claiming that the fraud was committed in an official capacity.—Hempfling v. Burr, 59 Mich. 294.

¶ 194. Where defendants, officers of a corporation, make fraudulent representations as to the financial condition of a business, with intent to deceive, and to secure money by persuading one to invest in a corporation, such person may recover from them for the

same in an action on the case.—Massey v. Luce, 158 Mich. 128.

B. FRAUD OR UNDUE INFLUENCE AS AN ISSUE; EVIDENCE, JURY QUESTIONS AND INSTRUCTIONS.

§ 28. Presumptions and burden of proof.

Necessity of showing reliance and deception, see also ante § 8.
Necessity of proof of falsity, see also post ¶ 367.
Burden of proof of fraud as defense, see post § 29.
Burden and presumptions as to fraud from relationship or nature of transaction, see post § 30.
Proof of fraud by circumstances and inferences, see post § 47.
Degree and clearness of proofs requisite to support inference or conclusion of fraud, see post § 46.
Inference from breach of agreement, see also post ¶ 314.
Matters necessary to be proved under the issues as joined, see post § 94.
Instructions on requirements of proof, see post § 62.
General law of presumptions and burden of proof, see Evidence, II.
Presumable knowledge of the law, see Evidence § 47.
Presumption from falsification or contrivance, see Evidence § 62.
Presumption as to fraud on motion to dissolve attachment, see Attachment § 122.
Presumptions and burden of proof as to fraud in assignments, see Assignments for Creditors § 15.
Burden of proof in equity as dependent on admission or denial by answer, see Equity § 160.
Burden of proving grounds for rescission, reformation or other like relief, see Rescission, VI; Reformation, III; Injunctions, III.

¶ 195. Fraud cannot be presumed, but must be proved, and the burden of proving it is on him who complains of it.—Miller v. Finley, 26 Mich. 249; Robert v. Morrin's Estate, 27 Mich. 306; Cranson v. Smith, 37 Mich. 309; Darling v. Hurst, 39 Mich. 765; Brown v. Dean, 52 Mich. 267; Edwards v. Edwards, 54 Mich. 347; Attorney General v. Ruggles, 59 Mich. 123; McArthur v. Oliver, 60 Mich. 605; Allison v. Ward, 63 Mich. 128; Bostwick v. Benjamin, 63 Mich. 289.

¶ 196. There is no presumption of fraud.—Beal v. Congdon, 75 Mich. 77; Johnson v. Seymour, 79 Mich. 156; Webber v. Jackson, 79 Mich. 175; Clinton v. Rice, 79 Mich. 354; Peaslee v. Collier, 83 Mich. 549; Sheldon v. Mann, 85 Mich. 265; Gilchrist v. Kelley, 85 Mich. 413; Henneberger v. Matter, 88 Mich. 396; Zucker v. Karpeles, 88 Mich. 413.

¶ 197. Fraud is never presumed; there must be evidence tending to prove it.—Island Mill Lumber Co. v. City of Alpena, 176 Mich. 575.

¶ 198. Fraud cannot be presumed, but must be established by preponderance of the evidence, and the burden of proving it is upon the party who complains of it.—Dorrington v. Carpenter, 171 Mich. 652.

¶ 199. Fraud is not to be lightly presumed, but must be firmly established by proof.—A. E. Wood & Co. v. Standard Drug Co., 192 Mich. 453.

¶ 200. The law presumes fairness rather than fraud.—Hopson v. Payne, 7 Mich. 334; Booth v. McNair, 14 Mich. 19.

¶ 201. While the law does not presume bad faith, it does presume that there may be bad faith.—Prince v. Clark, 81 Mich. 167.

¶ 202. It is an established rule of law that every man shall be credited with an honest, rather than a dishonest, motive in any transaction not suspicious on its face, or surrounded by such circumstances as would fairly lead an unprejudiced mind to the conclusion that a fraud was intended.—McMahon v. Rooney, 93 Mich. 390.

¶ 203. In an action to rescind a sale fraud is not presumed but must be proved, and the burden of proof is on the party alleging it.—Zucker v. Karpeles, 88 Mich. 413.

¶ 204. It cannot be assumed that the sale of a patent is fraudulent, or that, because it afterwards turns out to be of little or no value, that fact alone indicates fraudulent intent in the vendor.—Henneberger v. Matter, 88 Mich. 396.

¶ 205. The presumption that one knows the law is a violent one in most cases, and cannot be raised against one who has been defrauded by false representations.—Averill v. Wood, 78 Mich. 342.

¶ 206. Fraud cannot be assumed without proof, when, if it existed, it could be proved by a witness put on the stand as reliable by complainants, and not asked about it.—Beal v. Congdon, 75 Mich. 77.

¶ 207. While a particular fraud cannot be proved by presumption alone, yet, where the fraudulent act is shown to have been committed by one or more persons, presumption is admissible to show the complicity of others who have authorized or procured its commission.—Dayton v. Monroe, 47 Mich. 193.

¶ 208. The burden of proving fraud is upon the party alleging it or complaining of it.—Beal v. Congdon, 75 Mich. 77; Peaslee v. Collier, 83 Mich. 549; Blanchard v. Moors, 85 Mich. 380; Zucker v. Karpeles, 88 Mich. 413; Freedman v. Campfield, 92 Mich. 118; Bly v. Brady, 113 Mich. 176; Raymond v.

McKenna, 147 Mich. 35; Jobert v. Wagner, 147 Mich. 409.

¶ 209. Fraud is never presumed, and the burden should not be imposed upon a party of showing affirmatively that no fraud exists in a transaction.—Brace v. Berdan, 104 Mich. 356.

¶ 210. It is not ordinarily necessary to negative fraud until something has been offered tending to show it.—Attorney General v. Ruggles, 59 Mich. 123.

¶ 211. Not every purchase made by a merchant whose liabilities are equal to or even in excess of his assets is presumptively fraudulent, nor will a purchase under such circumstances justify an inference that the purchaser had a purpose not to pay for the goods so purchased.—Ross v. Miner, 101 Mich. 1.

¶ 212. It is not a fraud per se for a dealer, though insolvent, to continue to purchase goods, if he buys in good faith, intending to pay for them, and makes no misrepresentation; nor will the fact of a subsequent failure make the purchase fraudulent by relation. What constitutes fraud in such case is the presence of an actual intent on the part of the purchaser to obtain the goods without paying for them; and this cannot be inferred from the mere fact of insolvency, nor deduced from what some other buyer, less hopeful of success in his ventures, might have believed, under like circumstances, with reference to his ability to continue the business. —Illinois Leather Co. v. Flynn, 108 Mich. 91.

¶ 213. One signing a release of damages for personal injuries is presumed to have executed it understandingly, and prima facie it must be taken as truly stating the agreement of the parties, and the burden of proof is upon him not only to show by a preponderance of evidence that it is not true, but that he was fraudulently deceived and misled by what was done and said into believing that he was signing a mere receipt for money paid under a contract different from that stated in it.—Porth v. Cadillac Motor Car Co., 198 Mich. 501.

¶ 214. When equitable relief from a contract to purchase is sought on the ground of fraud, the burden of proof is upon the complainant.—Brooks v. Culver, 168 Mich. 436.

§ 29. ——Of fraud as defense.

¶ 215. In an action upon a written lease, plaintiff, by proving the execution of the instrument and offering it in evidence, makes out a prima facie case, and the burden is upon defendant, who seeks to avoid its effect under a claim that his signature was fraudulently obtained, to establish the fraud.—Bly v. Brady, 113 Mich. 176.

¶ 216. Where a written agreement of settlement bears the genuine signatures of the parties in interest the burden is upon an executor seeking to recover in disregard of it to show that it did not embody the terms of the preliminary oral negotiations, and that his testator's signature was obtained by fraud.—Sheley v. Brooks, 114 Mich. 11.

¶ 217. In an action on a written contract for the purchase price of a set of books, defendant where he pleads fraud has the burden of proving such fraud by a fair preponderance of the evidence.—J. B. Millett Co. v. Andrews, 175 Mich. 350.

¶ 218. Where fraud is set up as a defense in a suit to determine the rights to a fund paid into court, a charge that the burden is upon the party claiming fraud is correct. —Kahn v. Minthorn, 178 Mich. 312.

¶ 219. Where a director of a bank made an agreement with the cashier for the withdrawal of a note of which he was an indorser, the cashier to carry a fictitious entry of credit of its amount until the note became uncollectible, whereupon it was returned to the bank, in assumpsit to recover from the director the amount of the note it is incumbent upon the bank to show that at the time of the alleged agreement the note was collectible and that at the time it again appeared in the files of the bank it was worthless.—Crawford v. Steel, 137 Mich. 610.

¶ 220. Where, in defense to a foreclosure suit, it is averred that the mortgage was procured by false representations, the burden of proving such representations is on the defendant.—Sloan v. Holcomb, 29 Mich. 153.

¶ 221. The burden of proving fraud alleged as a defense to a mortgage is on the mortgagor.—Perrett v. Yarsdorfer, 37 Mich. 596.

§ 30. ——From relationship or character of parties or bargain.

Proofs sufficient to overcome presumptions, see post § 48.

Implication of fraud as matter of law from relationship of the parties or intrinsic nature of their transaction, see post, II.

As between parent and child dealing with each other, see Parent and Child, IV.

As between husband and wife in mutual dealings, see Husband and Wife, II.

As regards dealings by representatives or trustees with those whom they represent, see Estates of Decedents, X, A; Guardianship, VI; Trusts, VIII.

Implication of fraud against grantee of heir from profits made by purchaser in transaction, see Estates of Decedents ¶ 1140.

Implication of fraud in representative's sale from fact that purchaser resold at large profit, see Estates of Decedents ¶ 812.

Burden of proof and presumptions as to undue influence in wills, see Wills, III.

¶ 222. Relationship between the parties raises no presumption of fraud, which must be proved even among relatives.—Fraser v. Passage, 63 Mich. 551.

¶ 223. All presumptions are against fraud; it cannot be lightly charged against one in whom implicit confidence has been placed, especially if a near relation; such a person is fairly entitled to a favorable construction of any conduct that is reasonably consistent with integrity, and an accusation that may seriously affect his business reputation should not be held proved by circumstances that are merely ambiguous.—Pierce v. Pierce, 55 Mich. 629.

¶ 224. Undue influence is not necessarily to be presumed from the fact that a man, when in a dying condition, made a deed of land to be immediately transferred to a woman who had been regularly married to him and had lived with him for many years as his wife, and who, unless provided for by him, would have been left without proper support.—Johnson v. Rose, 50 Mich. 334.

¶ 225. When a party deals with a man whom he knows to be of weak intellect, and the good faith of such dealings is challenged, he has the burden of proof to show that no undue advantage was taken.—Gates v. Cornett, 72 Mich. 420.

¶ 226. Where one obtains from another, with whom he occupies a fiduciary relation such as that of a confessor, a conveyance to himself, the burden is upon him to show that his grantor acted freely and with full knowledge of all the facts.—Finegan v. Theisen, 92 Mich. 173.

¶ 227. Burden of showing that grantor understood import of deed and of negativing undue influence, is upon grantee, whose relations with grantor had been confidential as her brother and only adviser in business, and where the circumstances make it apparent that it was made on his advice or suggestion.—Smith v. Cuddy, 96 Mich. 562.

¶ 228. A weak-minded old woman, putting herself into a person's hands in a transaction which especially concerned the latter's interests, gave him, without the knowledge of her family, a mortgage as security for a debt of her son. Held, that the mortgagee was bound to show in defense of the validity of his mortgage that the mortgagor had fully understood what she was doing, that she was acting freely, and that he had not abused her confidence.—Wartemberg v. Spiegel, 31 Mich. 400.

¶ 229. Where one who stands in confidential relation to one of weak intellect, and who confides and places confidence in him, takes a benefit under a deed prepared by himself, the courts ought to refuse judicial sanction to the instrument until fully satisfied of the fairness of the transaction, and that the instrument is the intelligent act of the person executing it.—Seeley v. Price, 14 Mich. 541.

¶ 230. When a man is addicted to a habit which enfeebles his intellect and his power of self-protection, a person who spends day after day in driving hard bargains with him cannot obtain their enforcement in equity if he does not make a very clear showing of open dealing.—Storrs v. Scougale, 48 Mich. 387.

¶ 231. A stranger to a deed seeking to charge the grantor with a fraud in pretending to convey more than he had, which fraud depends on knowledge communicated in the negotiation for the deed through an interpreter, must show that the interpreter communicated to such grantor what the other party said on which the alleged knowledge rested.—Highstone v. Burdette, 61 Mich. 54.

¶ 232. The burden of proving that a quitclaim deed executed by a highly educated pastor in favor of ignorant parishioners of foreign birth was obtained by fraud, rests upon such pastor.—Mtynarczyk v. Zyskowski, 191 Mich. 213.

¶ 233. A quitclaim deed executed by a highly educated pastor in favor of ignorant parishioners of foreign birth presumptively contains the agreement of the parties, especially where made in consummation of previous negotiations extending over a period of one year.—Mtynarczyk v. Zyskowski, 191 Mich. 213.

§ 31. Admissibility of evidence.

Latitude allowable in receiving evidence, see post § 32.
Evidence of other frauds and other statements, see post §§ 33, 34.
Evidence of values, prices, sales, or breach of contract, see post §§ 37, 38.
Financial statements, documents and writings as evidence, see post §§ 35, 36.
Evidence of resources or standing, see post § 39.
Evidence of relations of the parties, see post § 40.
Evidence to show falsity, knowledge, reliance, or inducement, see post §§ 41, 42.
Evidence as to implication in fraud, see post § 43.
Rebutting or explaining facts, see post § 44.
Evidence as to waiver or merger of fraud, see post § 45.
Allegations of conspiracy to admit proofs, see post ¶ 720.
Weight and sufficiency of evidence, see post § 46 et seq.
Issues and variance under the pleadings, see post § 93.
General law of evidence, see Evidence.

Relevancy of evidence to prove intent, knowledge, belief, or motive, see also Evidence, III.
Parol evidence to invalidate instrument for fraud, see Evidence §§ 156-158.
Proof of statements out of court showing fraud, objection as hearsay, see Evidence § 326.
Statements and acts of person accused or of third person to him as evincive of fraudulent mind, see Evidence §§ 328, 333.
Admissibility of evidence of reputation or character as bearing on fraud, see Evidence, VII, B.
Offers of compromise as admissions of liability, see Evidence § 394 et seq.
Admissions of coconspirators and concerting wrongdoers against each other, see Evidence § 419.
Res gestæ showing fraud, intent or knowledge, see also Evidence § 451.
Acts of coconspirators as res gestæ, see Evidence § 475.
Admissibility of self-criminating answer as showing fraud, see also Examination of Witnesses ¶ 218.
Propriety of examination to impeach or contradict witnesses, see Witnesses, VI.
Striking out evidence afterwards appearing to be inadmissible, see Trial, V, C.
Admissibility of evidence on question of damages, see Damages § 314.
Evidence to make out defense of fraud in action on policy, see Insurance, XX.
Evidence in actions on negotiable instruments, see also Negotiable Instruments, XIV.
Evidences of fraud in transfers to hinder or delay creditors, see Fraudulent Conveyances, I, V, B.
Inadmissibility of feeble condition of grantor and other circumstances impeaching grant in ejectment, see Ejectment ¶ 162.
Admissibility of evidence in rescission suits, see also Rescission, VI.
Harmless errors in receiving or rejection, see Harmless Error.

¶ 234. In cases of conspiracies or combinations to commit a fraud all evidence must be held admissible which has any tendency to prove the conspiracy or combination, and its nature and objects, so far as these can have any bearing upon the issue on trial.—Beebe v. Knapp, 28 Mich. 53.

¶ 235. Where the issues involve fraud, all facts and circumstances tending to throw light upon the transaction between the parties claimed to have been implicated are admissible.—Hyde v. Shank, 77 Mich. 517.

¶ 236. In cases involving family transactions, where the testimony of the parties is conflicting, circumstances are important factors in getting at the truth.—Nolan v. Nolan, 78 Mich. 17.

¶ 237. The entire surroundings of a transaction claimed to have been fraudulent may be shown.—People v. Kemp, 76 Mich. 410.

¶ 238. Where it is claimed that a sale made by plaintiffs to defendant was due to the latter's fraudulent representations as to his financial condition, the whole conduct of the vendee at the time in any way concerning his business and property is material, and full inquiry into all the circumstances should be allowed.—Arnstine Brothers & Mier v. Treat, 71 Mich. 561.

¶ 239. Where fraud is charged, self-contradictions, vague and partial explanations from witnesses not likely to be well informed, failure to call others presumably acquainted with controlling circumstances, destruction of letters connected with the controversy, and inability, real or feigned, to reveal their contents, are held to be incidents inconsistent with a claim of good faith.—Smith v. Brown, 34 Mich. 455.

¶ 240. Where the defense of indorsers is that their indorsement was secured by fraudulent representations of the president of plaintiff bank as to financial soundness of the maker, evidence that another banker had told such president that the maker of the notes was in bad condition and would soon fail is inadmissible to show the fact, being an opinion then entertained by the witness.—Alpena Nat. Bank v. Greenbaum, 80 Mich. 1.

¶ 241. The vendee of an interest in a firm's business and assets who sues his vendor for falsely representing certain accounts included in the purchase to be good and collectible, may show that the other partner's interest was merely nominal.—Totten v. Burhans, 103 Mich. 6.

¶ 242. In a suit to recover the purchase price of three great gross papers of pins which the plaintiff claimed to have shipped to the defendant upon his written order, the defendant claimed that the order, as given, was for three gross of pins, but that plaintiff's agent fraudulently inserted the larger amount. Held, that it was competent for defendant to show, in support of his claim, that the order sued upon was grossly disproportionate to the business in which he was engaged and would require 75 years to dispose of.—Shrimpton & Sons v. Netzorg, 104 Mich. 225.

¶ 243. Where it is not shown that the clerk of a broker making the sale of a rooming house business knew of the reputation or character of any of the roomers, his silence on the subject is not evidence of a fraudulent design to deceive the buyer as to those facts.—Williamson v. Hannan, 200 Mich. 658.

¶ 244. In an action on a written contract for the purchase price of a set of books and a city lot, testimony as to representations made by plaintiff's agent at the time the contract was signed is admissible for the purpose of showing the contract was procured

by fraud.—J. B. Millett Co. v. Andrews, 175 Mich. 350.

¶ 245. In a suit to recover money advanced for goods under a contract alleged to have been secured by fraud, the plaintiff who received the goods may testify in order to prove fraudulent inducements, that he was not invited by defendant to test any samples. —Ward v. Cook, 158 Mich. 283.

¶ 246. Plaintiff sued defendant to recover on the ground of fraud money advanced by the former for goods furnished him by the latter. Held, it was proper to admit in evidence plaintiff's statement that he became suspicious about defendant's representation as to the magnitude of his business.—Ward v. Cook, 158 Mich. 283.

¶ 247. In an action for deceit, a witness may give his conversation with defendant which tended to show, although it did not necessarily show, that defendant recognized his obligation to plaintiff.—Diel v. Kellogg, 163 Mich. 162.

¶ 248. Fraud by a buyer on a seller may be considered by the jury though it lies outside of the written financial statement by defendant buyer which he told the seller was not correct.—Heineman v. Steiger, 54 Mich. 232.

§ 32. ——Latitude allowable.

Latitude allowable in examination of witnesses, see Examination of Witnesses, I.

Scope and range of cross-examination as to fraud or good faith, see Examination of Witnesses § 53.

In garnishment proceedings, see Garnishment, VI.

¶ 249. Where the issue involves a charge of fraud, evidence tending to show fraud is freely admitted, and a wide range of inquiry into transactions between the parties is allowed.—Comstock v. Smith, 20 Mich. 338; Anderson v. Walter, 34 Mich. 113; Jacobson v. Metzger, 35 Mich. 103; Cook v. Perry, 43 Mich. 623; Fury v. Strohecker, 44 Mich. 337; Dibble v. Nash, 47 Mich. 589; Gutsch v. Pittsley, 51 Mich. 566; Angell v. Pickard, 61 Mich. 561; Burrill v. Kimbell, 65 Mich. 217; Ross v. Miner, 67 Mich. 410; Ganong v. Green, 71 Mich. 1; Hyde v. Shank, 77 Mich. 517; Stevenson v. Woltman, 81 Mich. 200.

¶ 250. Upon the trial of issues involving fraud, a large latitude of inquiry is permitted; and all facts and circumstances tending to throw light upon the transaction between the parties alleged to have been implicated are allowed to be given in evidence. —Hyde v. Shank, 77 Mich. 517; Miller v. Hanley, 94 Mich. 253.

¶ 251. Where fraud is charged, a wide range of investigation is usually permitted, but irrelevant testimony is no more admissible than in other cases.—Wessels v. Beeman, 87 Mich. 481.

¶ 252. When the inquiry upon the trial of a cause involves fraud, the court is invested with a wise discretion as to the latitude he will allow counsel in the introduction of testimony and cross-examination of witnesses. —Stevenson v. Woltman, 81 Mich. 200.

¶ 253. When the issue to be tried involves a charge of fraud, evidence tending to establish the alleged fraud is freely admitted, and a wide range of inquiry into transactions between the parties is allowed.—Gumberg v. Treusch, 103 Mich. 543.

¶ 254. In replevin of goods obtained by fraudulent representations, great latitude must be allowed in the examination of witnesses, and therefore it was error to refuse to admit testimony in such a case, that within six months of the giving of a chattel mortgage under which immediate possession had been given, the debtor's purchases had been much larger in amount than prior to such time, and that most of them had been purchased from firms he had never dealt with before.—Kirschbaum v. Jasspon, 119 Mich. 452.

¶ 255. In an action on a contract where the defendant seeks damages for false representation as to the value of land deeded to him broad latitude is given, and it is not error to permit a question as to what the plaintiff seller paid for the land.—Morman v. Harrington, 118 Mich. 623.

¶ 256. Much latitude will be allowed in the admission of circumstantial evidence when fraud is alleged.—Krolik v. Lang, 187 Mich. 286.

¶ 257. Where in an action for fraud and deceit arising out of the exchange of properties where the plaintiff was permitted to testify fully as to the representations made by the defendants, it was proper to ask him the reason why he made the exchange.—Pinch v. Hotaling, 142 Mich. 521.

¶ 258. In a suit by plaintiff vendee of land to recover damages for false representations made by defendant vendor as to the land being good for farming and capable of growing numerous crops, plaintiff was allowed to testify to the extent of the labor and effort made to produce crops and to state that enough could not be raised to support his family; that he had to go elsewhere for work; and that his family had to be assisted by others. Held, while the testimony was remote and might have been properly excluded, its reception did not constitute reversible error.—Yanelli v. Littlejohn, 172 Mich. 91.

§ 33. ——Other frauds or misstatements and collateral facts.

General rules as to admissibility of other or similar facts, see Evidence, III.

Admissibility of representations of profit realized by former corporation as evidence of damages in action for fraudulent sale of stock in new corporation, see also Damages ¶ 1169.

¶ 259. In a suit for fraudulent representations of the value of land, it is competent to show that the same representations concerning it were made on the former sale of an adjoining parcel to the same purchaser, and it is immaterial that the second sale was not then in contemplation and that the seller was not in position to make it.—Kost v. Bender, 25 Mich. 515.

¶ 260. In an action for fraud from false representations to the plaintiff, evidence that defendant made the same representations to another person after the cheat had been accomplished is admissible, not as substantial proof of the statements, but to identify the agency by which the fraud was committed, and to show that plaintiff had not misunderstood the defendant.—Cook v. Perry, 43 Mich. 623.

¶ 261. In an action for fraudulently procuring plaintiff to loan money upon land of third parties, which defendant falsely represented to be valuable and with clear title, it is proper, as tending to prove defendant's fraudulent knowledge and intent in the transaction complained of, to show that about the same time defendant had employed similar fraudulent methods upon others than plaintiff.—Stubly v. Beachboard, 68 Mich. 401.

¶ 262. Any purchase obtained by false representations as to solvency made by a firm within a period before its failure equal to the period of credit usually allowed to it upon its purchases may be shown as bearing on the question whether another purchase made within that period was fraudulent or not, in contemplation of insolvency.—Shipman v. Seymour, 40 Mich. 275.

¶ 263. It is relevant on a charge of fraud by a buyer in concert with lumber inspectors to show that the inspection was much more to the disadvantage of plaintiff than the average variance ascribable to a difference in judgment of inspectors.—Turnbull v. Boggs, 78 Mich. 158.

¶ 264. On a charge of fraud in inspecting and measuring lumber, it may be shown what the lumber counted on a dock before it was inspected.—Turnbull v. Boggs, 78 Mich. 158.

¶ 265. Where one who sues for false representations whereby he was induced to buy corporation stock, had actual notice of the facts, testimony that like representations were made by the same persons to other parties at the time of his purchase, becomes immaterial even if competent.—McEacheran v. Western Transp. & Coal Co., 97 Mich. 479.

¶ 266. It is competent for the maker of a note, in support of his defense that he was induced to subscribe for the stock for which the note was given by fraudulent representations, to show that like representations were made by the same party to other persons to induce them to become stockholders in the corporation.—French v. Ryan, 104 Mich. 625.

¶ 266a. Where one is charged with fraudulently procuring an order for goods, evidence of similar transactions between him and others is admissible upon the question of intent.—Shrimpton & Sons v. Rosenbaum, 106 Mich. 68.

¶ 267. Evidence of the fact that fraudulent representations, made to the seller's agent on a fraudulent purchase of goods by another, were communicated to the seller, is admissible in an action to recover the value thereof, not for the purpose of corroborating the testimony of such agent that such statements were made, but for the purpose of showing that the seller knew of them, and relied upon them in selling the goods.—Banner v. Schlessinger, 109 Mich. 262.

¶ 268. Upon a charge of fraud, evidence of the commission of another and distinct fraud is inadmissible, unless there is such a connection between the transactions as to make it inferable that both are parts of a general scheme or purpose to defraud.—Thompson v. Newland, 144 Mich. 595.

¶ 269. In garnishment proceedings where it is claimed defensively that sale of goods was not made by the principal defendants to the garnishee defendants but by a third person and it is contended that such a defense is a subterfuge, testimony of other sales to other persons by the principal defendants of which the garnishee defendants are not shown to have knowledge, and which were claimed to be fraudulent is inadmissible, and the admission of such is prejudicial.—Seitz v. Starks, 144 Mich. 448.

¶ 270. Plaintiff sued defendant to recover, on the ground of fraud, money advanced to defendant. Plaintiff was led to deal with defendant by a certain advertisement. Held, that the testimony of four other persons who had answered the same advertisement, and had been similarly treated, was admissible to show fraud.—Ward v. Cook, 158 Mich. 283.

¶ 271. In an action of deceit in which plaintiff alleges he was deceived by fraudulent representations in defendant's letter of a certain date, it is not reversible error to show that the letter was shown to other persons and that they also were induced to buy stock by the representations contained therein.—Diel v. Kellogg, 163 Mich. 162.

¶ 272. In a suit by plaintiff vendee of land to recover damages for false representations made by defendant vendor to the effect that

the land was valuable and suitable for farming and for a home and that a living could be made by suitable cultivation thereof, it is proper to receive evidence not only of climatic or frosty conditions of the farm, but also of other land similar situated in the neighborhood; and to show that whole sections of land in the vicinity, including the land in question, were so poor in quality as to be abandoned for farm purposes, especially when these questions are gone into by both parties and defendant is treated impartially. —Yanelli v. Littlejohn, 172 Mich. 91.

¶ 273. In an action on a written contract for the purchase price of a set of books, testimony as to representations made by plaintiff's agent to others in soliciting their orders is admissible to show fraud.—J. B. Millett Co. v. Andrews, 175 Mich. 350.

¶ 274. In a suit by plaintiff vendee of land to recover damages for fraudulent representations by defendant vendor, plaintiff was permitted to cross-examine defendant as to his practice of advertising in the newspapers land under false descriptions which he did not have to offer for sale, and as to whether he had not in fact advertised land in the same vicinity at lower prices than that paid by plaintiff. Held, the examination was permissible as bearing upon the intentional making of false representations by defendant as part of a general scheme to defraud.—Yanelli v. Littlejohn, 172 Mich. 91.

¶ 275. In an action for inducing plaintiff, by false representations as to its value, to purchase corporate stock, nonperformance of a promise of employment made to plaintiff as a part of the inducement to such purchase is inadmissible.—Hubbard v. Long, 105 Mich. 442.

§ 34. ——Prior and subsequent communications or transactions.

To show falsity, intent or knowledge, see also post § 41.

General rule as to facts before or after time of action brought, see Evidence § 94; Pleading. IX.

Declarations out of court and admissions as evidence, see generally Evidence, VII.

¶ 276. To avoid, on the ground of fraud, a sale of goods on credit, the fraud must have existed when the goods were sold, but it may be made out by evidence of the vendee's subsequent acts, admissions and dealings; and the vendor in an action to recover the goods is not restricted to evidence of the fraud and misrepresentations made by the vendee at or before the time of the sale.—Ross v. Miner, 64 Mich. 204.

¶ 277. An agent sold goods to a firm just before its failure. He claimed to have relied on their assurance that their assets exceeded their liabilities. He had taken notes for goods sold them fifteen months before the failure, and had extended the notes from time to time, and during this period he had offered to sell them other goods, which they declined. Held, that evidence of what they said to him on those occasions was inadmissible to show that he had not relied upon their assurance in the sale last made; it was prima facie mere hearsay, and did not tend to throw light upon the later conduct of the parties.—Shipman v. Seymour, 40 Mich. 274.

¶ 278. In an action for the value of timber delivered under a contract, there was no error in excluding testimony that before the contract was made one of the plaintiffs had represented the timber as of specified dimensions, where there was nothing to show that the representation was made to any one interested.—McKay v. Evans, 48 Mich. 597.

¶ 279. On a charge of fraud in concert between a buyer and chosen inspectors of lumber, it is proper to show that after the seller ascertained that the inspection was false he asked the buyer to change inspectors for others to be chosen jointly and was refused, and that a false reason was given for not allowing a man, sent at the seller's expense and by consent of the buyer to assist and observe the inspection, to do so.—Turnbull v. Boggs, 78 Mich. 158.

¶ 280. Alleged false representations made by the president of the bank, after defendants took the notes, to induce them to indorse such notes or a renewal thereof, were inadmissible, in an action by such bank against the indorsers, where such indorsers alleged that they were induced to sell goods to the maker of the notes by the representations of plaintiff's president that the maker was solvent, and that if defendants would sell the goods and take the notes, plaintiff would discount them, relying upon the maker alone for payment.—Alpena National Bank v. Greenbaum, 80 Mich. 1.

¶ 281. In an action on a stock subscription under the defense of fraud in the inception of the contract, it is not error to introduce a letter by the sellers promising to release the defendant if he would keep quiet and give them a chance to sell the stock to some one else.—Chicago Building & Mfg. Co. v. Yell, 129 Mich. 517.

¶ 282. In an action for alleged misrepresentation in the purchase of shares of stock, testimony showing that after the purchase of the stock, plaintiff was present at a stockholders' meeting and was elected a director and afterwards participated in its management, that he heard read the annual reports, voted to secure loans and give mortgages, and remained with the company for two years and until after its affairs passed into the hands of a receiver, tended to show that plaintiff was not misled.—Hoeft v. Kock, 119 Mich. 458.

¶ 283. In a suit to recover money advanced under a contract alleged to have been secured by fraud, it is proper to admit in evidence letters passing between the parties prior to the executing of the contract which contained representations tending to induce plaintiff to enter into the contract.—Ward v. Cook, 158 Mich. 283.

¶ 284. Letters and documents arising subsequently to the execution of a contract are admissible to show the performance of plaintiff's part of the contract, and his rescission of it in a suit to recover on the ground of fraud for money advanced under the contract.—Ward v. Cook, 158 Mich. 283.

¶ 285. Where in an action for deceit, plaintiff alleges that he was fraudulently induced by a letter of a certain date, written by defendant, to take stock in a corporation, it is material and proper to show whether or not plaintiff had agreed to take the stock before said date.—Steele v. Kellogg, 163 Mich. 132.

¶ 286. In an action of deceit in which plaintiff alleges he was deceived by fraudulent representations in defendant's letter of a certain date, a letter of a subsequent date, containing a repetition of such representations, may be introduced in order to show that they were not made inadvertently.—Diel v. Kellogg, 163 Mich. 162.

¶ 287. In an action of deceit, a letter written after the transaction in question is admissible to show that in a letter written prior to the transaction defendant intentionally made false representations.—Steele v. Kellogg, 163 Mich. 132.

¶ 288. Defendant organized a new corporation to buy a proprietary food article belonging to an old corporation. Plaintiff sued him in an action of deceit for fraudulent representations by which defendant induced plaintiff to purchase stock in the new corporation, and his declaration alleged such representations to have been made by defendant in certain letters. Held, that evidence of oral representations made by defendant prior to the time of writing the letters was admissible to show the intent with which defendant made the representations in the letters.—Steele v. Kellogg, 163 Mich. 132.

¶ 289. Where indorsers sued by a bank on notes alleged that they were induced to sell goods to the maker of the notes by the representations of plaintiff's president that the maker was solvent, and that if defendants would sell the goods and take the notes plaintiff would discount them, relying upon the maker alone for payment, such representations made by the president before the bank was organized, and also afterwards at the time when defendants took one of the notes in settlement for goods previously sold to the maker, were inadmissible.—Alpena Nat. Bank v. Greenbaum, 80 Mich. 1.

¶ 290. On the question of false warranty of a tractor plowing outfit, based on a claim for breach of implied warranty of fitness for the purpose, held that evidence of defendant, referring to a letter from one of plaintiff's officers, that less than a certain percentage of the people who used gas tractors ever had success with them, that if he had known that that had been the experience of the plaintiff he would not have bought the machinery was improperly admitted, where it appeared that the letter was dated more than two years after the sale, and there was nothing to show that such officer had any such information at the time the contract of sale was made.—John D. Gruber Co. v. Smith, 195 Mich. 336.

§ 35. ——Financial statements and reports.

¶ 291. Representations made by a merchant to a commercial agency as to the amount of his indebtedness, but not as to his assets, and not shown by any competent testimony to have been communicated to or relied on by vendors from whom he orders goods five months afterwards, have no tendency to prove an intention on his part not to pay for the goods at the time he gave the order.—Zucker v. Karpeles, 88 Mich. 413.

¶ 292. In order to show that a person was deceived in extending credit in reliance on a false financial statement, he may show previous representations of the maker, as well as their financial dealings.—Krolik v. Lang, 187 Mich. 286.

¶ 293. Financial statements made previously to the one on which credit was obtained, are admissible in an action for making fraudulent representations, as tending to show that the creditor was deceived.—Krolik v. Lang, 187 Mich. 286.

¶ 294. In an action for obtaining goods by fraudulent representations made to a commercial agency, the agent to whom defendant's statement was made may testify as to the agency's method of doing business in collecting its reports.—Hinchman v. Weeks, 85 Mich. 535.

¶ 295. In an action upon notes given for corporate stock alleged to have been sold as a result of false representations as to the financial condition and property of the corporation, held that the articles of association and annual reports of the company were admissible to substantiate such defense.—Loud v. Solomon, 188 Mich. 7.

§ 36. ——Writings and documents involved in fraud.

Dishonored check as evidence of intent, see also post ¶ 335.

Admissibility of letter without foundation proof of knowledge, see ante ¶ 38.

Letters shown to other persons, see ante § 33, ¶ 271.
Letters and written communications before or after the fraud, see also ante § 34.
Financial statement or report as evidence, see ante § 35.
Authentication and foundation of documents to admit them, see Evidence, VIII, A.
Writings as res gestæ of fraud, see Evidence § 474.
Letter to agent with intent that he should exhibit it deceptively as evidence, see also Evidence ¶ 2007.

¶ 296. Fraud may always be shown as between the immediate parties to a written agreement, and in most cases the execution of the agreement is the first step in the proof.—Towle v. Dunham, 76 Mich. 251.

¶ 297. L. bought land from F., gave his note and a mortgage on it, and after improving it persuaded the vendor to cancel the sale and discharge the mortgage. But while the mortgage to F. was yet unrecorded he had mortgaged the land again to a third person without the knowledge of F., who sought damages against him for deceit in asserting that he had not incumbered it. Held, that it was not error to admit in evidence the record of the first mortgage to F., as it would show priority of the other mortgage as well as being a circumstance in the fraud.—Lenox v. Fuller, 39 Mich. 268.

¶ 298. In special assumpsit on a contract of agency for certain counties to recover the amount paid because of fraud of the defendant party to the contract, the contract being set out, it is not error to introduce the contract showing a change in the counties covered, that being immaterial to the cause of action.—Angell v. Loomis, 97 Mich. 5.

¶ 299. It will be error, in an action on a contract defended on the ground of fraud, to admit defendant's evidence of promises made to induce the contract when there is no claim that such promises were made in bad faith, with no intent to perform them and as part of a scheme to defraud, but it does appear that the contract was disaffirmed before the time for the fulfillment of the promises arrived.—Boston Piano & Music Co. v. Pontiac Clothing Co., 199 Mich. 141.

¶ 300. The fact that a contract of submission between an insurer and insured provides that the award shall be binding upon both parties while the policy provided that such award shall be prima facie evidence of loss is not evidence of fraud in the inception of the contract where the language is plain and there is testimony that the insured read it.—Michels v. Western Underwriters' Ass'n, 129 Mich. 417.

¶ 301. Where a defendant advertised for branch managers stating "experience unnecessary," the language of the advertisement, taken with the other evidence of fraud, may be taken as evidence of a fraudulent representation.—Ward v. Cook, 158 Mich. 283.

§ 37. ——Sales, mortgages, values, and prices.

Sale or price received as bearing on intent, see post ¶ 326.
Subsequently realized price as evidence of fraud in valuation, see also post ¶ 336.
Selling under fictitious name as evidence of complicity in fraud, see also post ¶ 349.
Evidence of value as bearing on probability of agreement to rescind by trading back properties, see also post ¶ 354.

¶ 302. In an action for fraud in misrepresenting the character and value of a note and mortgage received in exchange for personal property, it was held admissible to prove the value of the chattels, both to show the extent of the fraud, and as part of the res gestæ to throw light on the probabilities of the whole transaction.—Stone v. Covell, 29 Mich. 359.

¶ 303. In an action to recover damages for defendant's false representation that the amount of a mortgage upon land conveyed by him to plaintiff in exchange for other land was $2,500 instead of $3,000, defendant's offer—made to sustain his claim that he represented the amount due to be $3,000,—of testimony as to the value of the exchanged properties is inadmissible where the difference in value is not so great as to be beyond the range of a fair difference in judgment, and where there is no claim that either party was deceived as to the value of the lands or that any misrepresentations were made as to such value.—Short v. Cure, 100 Mich. 418.

¶ 304. In an action for fraudulent representation of the value of lands traded for lands belonging to the plaintiff, the value of the latter is immaterial.—Snow v. Nowlin, 43 Mich. 383.

¶ 305. Where one party to an exchange of land sues the other for fraud, and the latter claims recoupment on the ground that he too was defrauded by the false representations of the plaintiff as to the quality of the land which the plaintiff gave in exchange, the value of plaintiff's land becomes material.—Jackson v. Armstrong, 50 Mich. 65.

¶ 306. In an action of deceit for fraudulent representations as to land exchanged, evidence of the value of the plaintiff's property is admissible as bearing upon the probability of the defendant having made the representations alleged as to condition of what he offered and of reliance being placed on them.—Aldrich v. Scribner, 146 Mich. 609.

¶ 307. Where, in an action to recover damages for defendant's falsely understating to plaintiff the amount of a mortgage upon land conveyed to the latter in exchange for land deeded by him to defendant, it appears that plaintiff took the mortgaged premises at their

fair value, and as valued by defendant, testimony as to the nature of the premises conveyed to defendant is immaterial.—Short v. Cure, 100 Mich. 418.

¶ 308. In an action by contract purchasers of farm land, after rescission of the contract, to recover damages for fraudulent representations as to the productivity of the soil, evidence of witnesses who claimed knowledge of the soil and what plaintiffs did on the land and results obtained as to the value of the land when plaintiffs purchased it, held admissible only for the purpose of showing that the land had no value for farm purposes.—Houder v. Reynolds, 195 Mich. 256.

¶ 309. On a bill to set aside a conveyance for inadequate consideration the fact that the land transferred had been held under a tax title only is relevant; the purpose of the inquiry is to find out how the amount paid compares with the market value of the interest sold.—West v. Russell, 48 Mich. 74.

¶ 310. In a suit by vendors to recover from the assignee of the vendee goods alleged to have been fraudulently purchased, it was shown that just prior to the assignment the vendee had run a special sale of goods at fifty cents on the dollar, claiming to have just received an extensive consignment of goods from a Boston firm, to whom he gave a chattel mortgage the day before the assignment. Plaintiffs then called a former clerk of the vendee, who was allowed to testify that only a small package of goods was received from the mortgagees during the two months preceding the assignment, which was made on the third day of the succeeding month. Held, that the evidence was admissible, as, if the goods so sold at half price were those of the plaintiffs instead of the Boston firm, such sale within a month after their purchase would be evidence of fraud in such purchase. Koch v. Lyon, 82 Mich. 513.

¶ 311. Where collusion between an administrator and his wife, a claimant against the estate, was charged, evidence of a sale by the administrator and of a purchase at such sale by the claimant was admissible as bearing on the good faith of the claim.—Stackable v. Stackable's Estate, 65 Mich. 515.

¶ 312. A mortgage given by the vendee of goods, and the assignment thereof, are admissible, in replevin by the vendor on the basis of fraudulent misrepresentations, to show the vendee's financial condition.—Brock v. Garson, 117 Mich. 550.

¶ 313. In replevin of goods claimed to have been obtained by fraudulent representations as to financial ability, where plaintiff claimed that there was a conspiracy between the defendant who purchased the goods and mortgaged them to relatives who were also defendants, the fact that the mortgages were withheld from record for some 20 days, while the mortgagor continued in business, and that instead of filing the mortgage a new one was executed, was significant and bore on the question of conspiracy, particularly where it appeared that the mortgagees had been advised when the first mortgage was given, that the failure to file it would entitle intervening creditors to priority.—Durrell v. Richardson, 119 Mich. 592.

§ 38. ——Nonpayment or breach of contract.

Nonperformance of other collateral promise, see ante ¶ 275.

¶ 314. No inference of fraud can be drawn from the fact that money not yet due remains unpaid; but there is no error in admitting testimony that the purchase price of goods purchased by means of a falsehood is still unpaid.—Shipman v. Seymour, 40 Mich. 275.

¶ 315. In an action of fraud based on misrepresentations and promises which were not performed, evidence that certain promises made were not performed is admissible though the promises themselves may have been contrary to public policy and not enforceable, where the promises were connected with the scheme to defraud.—McDonald v. Smith, 139 Mich. 211.

§ 39. ——Financial standing, conditions and resources.

Insolvency as evidence of intent, see also post ¶ 331.

Making of mortgage as evidence of financial resources, see also ante ¶ 312.

¶ 316. General reputation as to financial standing cannot prove fraud.—Bodine v. Simmons, 38 Mich. 682.

¶ 317. Insolvency may always be submitted to the jury, with other facts, to show an intention to defraud.—Edson v. Hudson, 83 Mich. 450.

¶ 318. A vendee's insolvency together with the existence of a large mortgage on his stock of goods and the concealment of such mortgage from the vendors, held evidence tending to show fraud in the purchase of the goods.—Edson v. Hudson, 83 Mich. 450.

¶ 319. Where it is claimed that a sale made by plaintiffs to defendant was due to the latter's fraudulent representations as to his financial condition, evidence that defendant was before the sale indebted to plaintiffs is relevant, and the amount of his indebtedness is also relevant, both as bearing on the truth of his representations and on the question of insolvency.—Arnstine Brothers & Mier v. Treat, 71 Mich. 561.

¶ 320. Where a fraudulent mutual aid society pretended in its prospectus to have a reserve fund in bank, evidence of the condition of its bank account is admissible in an

action against it for money fraudulently obtained.—Timmerman v. Bidwell, 62 Mich. 205.

¶ 321. Where one who complains of being cheated in a land trade testifies to having offered defendant a certain sum to trade back, it was held proper to exclude on cross-examination the question whether he had the necessary amount of money; the fact would not fairly test the good faith of the offer.—Snow v. Nowlin, 43 Mich. 383.

¶ 322. In an action upon notes given for corporate stock, resisted by defendant on ground of fraudulent representations that it was well financed, evidence of an expert witness that if a specified tract of land for a cement plant was purchased and paid for and there was a certain amount of cash on hand for construction purposes the plant could be successfully completed and operated by the sale of stock as the work progressed, does not tend to substantiate the representation that the company was fully financed.—Loud v. Solomon, 188 Mich. 7.

¶ 323. In an action for obtaining goods by fraudulent representations as to resources and property, the records in the office of the register of deeds showing that another party instead of the defendant had a deed of the property at the time the defendant declared he owned it may be contradicted by testimony that the deed had been issued to the defendant as purchaser, by him refused as unsatisfactory, and that later after making the statement he resold and had the name changed in accordance with an agreement and the deed then recorded in the name of the other party.—Musselman Grocer Co. v. Casler, 138 Mich. 24.

§ 40. ——Relations of the parties.

¶ 324. Evidence that parties had lived together in adulterous intercourse is pertinent as a fact tending to prove the existence of undue influence in procuring a deed.—Wallace v. Harris, 32 Mich. 380.

§ 41. ——To show falsity and knowledge or intent.

See also ante ¶¶ 38, 43.

Competency of one to testify to his own fair or fraudulent intent, see Evidence § 235.

¶ 325. In an action to recover on account of misrepresentations of the amount paid on a contract, evidence as to whether defendant intended any fraud is inadmissible; the result to plaintiff being the same whether defendant acted in good or bad faith.—Angell v. Loomis, 97 Mich. 5.

¶ 326. Where the value of the note of a third party, given by defendants to plaintiff, is in question, the issue being deceit in representing it to be good, and where one of defendants has testified that he himself has sold a horse for notes of said third party, it is admissible to ask how much he got for the horse, for the purpose of showing his own opinion of the notes of the third party, and his own animus in the transaction at issue; if not admissible for this purpose, the evidence is impertinent, has no bearing on the case, and cannot injure the defense.—Beebe v. Knapp, 28 Mich. 53.

¶ 327. When fraud is charged on an agent and made to depend on his management of a sale of lands, the condition of the title to the lands and the agent's knowledge of its condition are pertinent subjects of inquiry.—Weeks v. Downing, 30 Mich. 4.

¶ 328. In an action for fraud in substituting one parcel of land for another in an exchange of real property, it is admissible to show that before the exchange defendant had offered to the witness the land which he afterwards agreed to let plaintiff have, as this would tend to show that the substitution was not a mere mistake.—Dibble v. Nash, 47 Mich. 589.

¶ 329. On the question whether there was fraud in procuring plaintiff to loan money upon land falsely represented to be valuable and held and occupied by the mortgagors by a clear title, it is competent, for the purpose of showing the falsity of defendants' representations, to show that the land was in fact adversely occupied.—Stubly v. Beachboard, 68 Mich. 401.

¶ 330. To show that there was intentional fraud in an inspection of lumber by the chosen inspectors, it is relevant to show that defendant solicited plaintiff to consent to those chosen.—Turnbull v. Boggs, 78 Mich. 158.

¶ 331. Insolvency may always be submitted to the jury with other facts to show a vendee's intention to defraud.—Edson v. Hudson, 83 Mich. 450.

¶ 332. One who has bought a partner's interest in a firm cannot, when suing his vendor for falsely representing that the business was profitable, show how he himself conducted the business, or how his vendor counseled with him in its management; nor can he show a sale of the business back to the vendor or the details of such transaction.—Totten v. Burhans, 91 Mich. 495.

¶ 333. Evidence that one who is claimed to have made a fraudulent sale of chattels was in poor health and required a change of climate, is admissible to show the good faith of the transaction.—Vyn v. Keppel, 108 Mich. 244.

¶ 334. Where in an action for deceit, plaintiff alleges that he was fraudulently induced by a letter of a certain date, written by defendant, to take stock in a corporation, it is material and proper on the question of intent

to show whether or not defendant believed at the time of sending out said letter that plaintiff had already agreed with defendant's representatives to take the stock.—Steele v. Kellogg, 163 Mich. 132.

¶ 335. Where a chattel mortgagee sells the property secured by an unrecorded mortgage, and the chattel mortgagee sues the mortgagee in fraud for fraudulently inducing the mortgagee not to record the mortgage, a check, drawn against the purchasers, given by defendant to plaintiff, in pretended payment of the debt, which was dishonored because of no funds, is admissible in evidence.—Priebisch v. Ottenwess, 176 Mich. 476.

¶ 336. What a stock of merchandise subsequently sold for may be shown in an action against the owner for obtaining credit by means of a false financial statement.—Krolik v. Lang, 187 Mich. 286.

¶ 337. In a suit for damages for fraud and deceit in the sale of motor trucks, evidence of representations by defendant corporation's officers in the course of the negotiations and testimony tending to show that at the time of making the contract of sale the cars had not reached a point where they were practicable and salable as commercial machines, is admissible where said officers have represented same to be manufactured by skilled workmen and to be beyond the experimental stage. —Hall v. Duplex-Power Car Co., 168 Mich. 634.

¶ 338. Where defendant employed plaintiff as a branch manager under the representation that he intended to establish a permanent branch, evidence that the defendant equipped the branch office with poor, second-hand furniture is admissible to show defendant's lack of such intention.—Ward v. Cook, 158 Mich. 283.

¶ 339. Where, as a moving consideration for the entering into a contract, it was represented that a certain amount of goods could be sold each month, plaintiff, in an action for fraud and deceit, is entitled to show that it is impossible or unlikely that such an amount of goods could be sold.—Martin v. Veana Food Co., 153 Mich. 282.

¶ 340. A manufacturing corporation, through false representations, induced plaintiff to purchase some of its stock. As a part of the consideration plaintiff agreed to act as district manager, contemplating the sale of three hundred cases of its goods per month. Held, in an action for fraud, that evidence was competent to show that it was impossible or unlikely that a district manager could sell three hundred cases per month.—Martin v. Veana Food Co., 153 Mich. 282.

¶ 341. Plaintiff sued defendant to recover money advanced on the latter's fraudulent representations as to the quality of goods supplied the plaintiff. Plaintiff offered in evidence a sample case containing samples of products of the defendant, which samples plaintiff had relied on and which analyzed appeared of poor quality. Held, the sample case was admissible although plaintiff had received it unlocked.—Ward v. Cook, 158 Mich. 283.

§ 42. ——To show reliance or inducement.

See also ante ¶ 245.

To show deception by financial statement, see ante ¶¶ 292, 293.

Competency of one to testify of his own belief and reliance on other's representations, see Evidence § 235.

¶ 342. In order to prove reliance upon false representations whereby a loan was procured upon land not owned by the mortgagors, it is proper to ask plaintiff's agent (who made the loan) whether he would have made it if he had known that the land was adversely occupied and that one of the mortgagors had only a tax title.—Stubly v. Beachboard, 68 Mich. 401.

¶ 343. In an action for obtaining goods by fraudulent representations to a commercial agency as to defendant's financial condition, plaintiffs may show that before the report to such agency was made they directed their salesman not to call upon defendant, and that they refused to sell him goods.—Hinchman v. Weeks, 85 Mich. 535.

¶ 344. In an action for fraud in passing a note, falsely represented to be good, the plaintiff may testify that he relied upon the representations and believed them to be true; this is a vital point, on which his knowledge exceeds that of any one else.—Beebe v. Knapp, 28 Mich. 53.

¶ 345. Where a patient sued his doctor for cheating him in an exchange of land, it was held admissible to ask the patient on his examination-in-chief as to what the state of his health was previous to the bargain, it being claimed that the doctor had represented the land as a healthier location than that where the patient then resided.—Dibble v. Nash, 47 Mich. 589.

¶ 346. Where plaintiff sues defendant to recover on the ground of fraud money advanced to defendant under a certain contract, it is proper to admit plaintiff's testimony that he relied on the fraudulent representations.—Ward v. Cook, 158 Mich. 283.

¶ 347. In an action for fraud and deceit arising out of the exchange of properties the plaintiff should have been permitted to testify to the fact that he relied upon a prospective lessee's opinion as to the rental value of the property, but the exclusion of such evidence was harmless where the plaintiff had already testified that he relied upon the defendant's representations made through

alleged fictitious leases, and the rental of these leases corresponded with the rental value placed by the prospective lessee, who was an alleged conspirator with the defendant in the exchange.—Pinch v. Hotaling, 142 Mich. 521.

§ 43. ——To show complicity of parties.

Evidence as to agent's silence, see ante ¶ 243.
Evidence against garnishee without knowledge of facts, see also ante ¶ 269.

¶ 348. To show fraudulent purchases, complicity in original scheme, of vendee's assignee and his vendee, from whom goods are replevied, need not be shown, if such scheme existed, as they may be unable to hold goods though not guilty of actual dishonesty.—Redpath v. Brown, 71 Mich. 258.

¶ 349. In replevin for goods sold by plaintiffs to R., who, soon after the purchase exchanged his goods and business for defendant's farm, plaintiffs claimed that R. bought the goods without intending to pay, and on the trial they sought to show by the cashier of a bank in the village where R.'s store was, that fourteen days after the purchase of the last bill of goods from plaintiffs, and shortly before the exchange, an account was opened at the bank in the name of R. and Co., that no such partnership was in fact entered into, that defendant checked out the account, and that R., during the month before the exchange and prior to said last purchase, advertised his stock for sale, not in his own name, but by reference to the number of a certain post-office box; the theory being that the advertisement and partnership were a scheme between R. and defendant to prevent creditors from learning of the proposed deal before it was accomplished. Held, that the testimony was competent as a link in the chain of evidence to establish the fraudulent purpose and defendant's notice thereof.—Reid, Murdoch & Co. v. Johnson, 100 Mich. 445.

§ 44. ——Rebuttal or explanation by defrauded person.

Investigation as rebuttal of reliance, see post ¶ 436.
Redirect to bring out knowledge of facts by defendant, see Examination of Witnesses § 97.

¶ 350. In replevin for goods sold because of defendant vendee's fraudulent representations as to his pecuniary condition, one of plaintiff vendors who went to defendant's place of residence to make inquiry may testify, as explaining why he went to see vendee, that the letter ordering the goods was forwarded to him at another place.—Arnstine Brothers & Mier v. Treat, 71 Mich. 561.

¶ 351. Plaintiff in replevin for goods purchased by fraudulent representations by the buyer in an order sent by mail, having gone a second time to the buyer's town should have been permitted to testify that information of defendant's failure a few days after the sale led him to go to see defendant.—Arnstine Brothers & Mier v. Treat, 71 Mich. 561.

¶ 352. In replevin for goods purchased in fraud of plaintiff seller, who shortly afterwards failed, an attorney who called on defendant to see him about some claims may testify that he actually held the claims, and that he found defendant making an inventory of his stock.—Arnstine Brothers & Mier v. Treat, 71 Mich. 561.

¶ 353. Plaintiff sued for the purchase price of three great gross cards of hooks and eyes, claimed to have been shipped to defendant upon his written order. The defense claimed that the order actually given was for three gross only, and that the larger number was fraudulently inserted by plaintiff's agent. As an inducement to the order, plaintiff was to print defendant's advertisement upon the cards containing the hooks and eyes. Plaintiff afterwards wrote to defendant, acknowledging the receipt of an order for "three great gross," giving a copy of the advertisement, and requesting defendant to examine the same, and, if O. K., to sign and return. Defendant signed the printed statement which followed, to the effect that he had "checked this all over carefully," and found it to be "correct in every particular," placed his "O. K." within the space containing the advertisement, and returned the letter. Held, that defendant was properly permitted to testify that he supposed the letter to have been sent to obtain his approval of the advertisement, and that he gave no attention to anything further included therein.—Shrimpton & Sons v. Rosenbaum, 106 Mich. 68.

§ 45. ——As to waiver or merging agreement.

Evidence to rebut inference of waiver, see ante § 44.
Sufficiency of proofs of laches, waiver or affirmance, see post § 57.

¶ 354. On the question whether a defrauded vendor of land agreed to take it back from the purchaser after the purchaser had incumbered it with a mortgage to a third person prior in record to the purchase money mortgage, it was proper to show the value of the improvements made on the land and the changes in its character, since that would bear on the likelihood of having agreed to take it back subject to the other mortgage.—Lenox v. Fuller, 39 Mich. 268.

§ 46. Weight and sufficiency of proofs.

[Note. It is not possible to separate with exact assurance those cases on the substantive sufficiency of the facts to constitute a fraud from those which determine the weight and sufficiency of the evidence offered. In this and the following sections the evidentiary sufficiency is considered, while cases on the requisite

facts are collected ante, I, A., They should be consulted as complementary of each other.]

Of circumstantial proofs, see post § 47.

Of proofs of undue influence or implied fraud, see post § 48.

To establish relations of the parties, see post § 49.

To show fraud in various specific transactions and contracts, see post §§ 50-55.

To show responsibility and complicity, see post § 56.

To show laches, waiver or affirmance, see post § 57.

Sufficiency of the evidence to go to the jury, see post § 59.

Admissibility of evidence, see ante §§ 31-45.

Variances of proof from allegations, see post § 93.

Instructions on requirements of proof, see post § 62.

[Note. In numerous cases rescission and cancellation has been decreed or denied on evidence weighed and held sufficient or insufficient to establish the grounds alleged, which alleged grounds were fraud or undue influence and incompetency and mistake. Some of these cases leave it open to doubt on reading the opinions whether it is the one or the other ground which the evidence is ascribed to. Such cases have been classified in Rescission, II, VI, because of their equivocal nature. Where it has been safe to say that the evidence of fraud or undue influence was weighed as such, the cases have been kept in topic Fraud in this section.]

For cases in which the evidence has been regarded as sufficient or not on two or more grounds without considering them distinctively, see Rescission, VI.

Sufficiency of proofs in reformation suits, see also Reformation, III.

Evidence on motion to dissolve attachment, see Attachment §§ 122-124.

Evidence to prove fraud in assignments, see Assignments for Creditors § 16.

Weight and sufficiency of evidences of fraud on creditors, see Fraudulent Conveyances, I, V, B.

In transactions between parents and children, see Parent and Child, IV.

Sufficiency of evidence to establish trust, see Trusts, IV, XII.

Special findings overcoming general verdict, see Verdicts, IV.

¶ 355. Fraud in fact may in civil cases be shown by testimony that produces a rational belief; it need not be so "clearly and conclusively established as to leave no rational doubt."—Watkins v. Wallace, 19 Mich. 57; Hough v. Dickinson, 58 Mich. 89; disapproving for the purpose of instructing the jury the rule as expressed in Buck v. Sherman, 2 D, 176.

¶ 356. The rule of the criminal law that the proof of fraud must be so conclusive as to leave no rational doubt of its existence does not apply in civil cases, where it may be shown by a preponderance of proof, or even by circumstantial evidence.—Hough v. Dickinson, 58 Mich. 89.

¶ 357. The proof of fraud in civil cases need not be such as to be inconsistent with any other view than that the accused party is guilty thereof.—Morley v. Liverpool & London & Globe Ins. Co., 85 Mich. 210.

¶ 358. The proof of fraud in civil cases need not be so clear and convincing as to leave no rational doubt.—Sweeney v. Devens, 72 Mich. 301; Morley v. Liverpool & London & Globe Ins. Co., 85 Mich. 210.

¶ 359. The defense of fraud in a civil action need not be established beyond a reasonable doubt; a mere preponderance of evidence is sufficient.—Knop v. Nat. Fire Ins. Co., 107 Mich. 323.

¶ 360. The proof of fraud in a civil case is sufficiently "convincing" if it creates a belief that a fraud has been perpetrated.—Gumbert v. Treusch, 103 Mich. 543.

¶ 361. Fraud must be established by a preponderance of the evidence, and where two witnesses affirm, and two others, no more interested in the subject-matter, and for all that appears fully as creditable, deny the fraud, it is not proved to the satisfaction of a court of equity.—Allison v. Ward, 63 Mich. 128.

¶ 362. Fraud will not be presumed on slight circumstances, but must be clearly proved by satisfactory evidence.—Buck v. Sherman, 2 D. 176; Hollister v. Loud, 2 Mich. 309; Campau v. Lafferty, 50 Mich. 114; Bumpus v. Bumpus, 59 Mich. 95; Johnson v. Seymour, 79 Mich. 156; People v. Rice, 79 Mich. 354; Peaslee v. Collier, 83 Mich. 549; Sheldon v. Mann, 85 Mich. 265; Gilchrist v. Kelley, 85 Mich. 413; Zucker v. Karpeles, 88 Mich. 413; Graham v. Graham, 184 Mich. 638.

¶ 363. In the case of an unconscionable arrangement between husband and wife the same full and positive showing on her part of actual fraud and duress is not required as against a stranger.—Witbeck v. Witbeck, 25 Mich. 439.

¶ 364. Fraud need not be established beyond a reasonable doubt.—Morley v. Liverpool & London & Globe Ins. Co., 85 Mich. 210.

¶ 365. Fraud must be proved by substantial evidence.—Weir v. Union Trust Co., 188 Mich. 452.

¶ 366. Fraud must be proved clearly and conclusively in a suit for relief from a contract and cannot be lightly inferred.—Brooks v. Culver, 168 Mich. 436.

¶ 367. On an issue of whether representations as to the solvency of the maker of

notes as an inducement to secure their indorsement were false, it is not sufficient to show that the representations as to solvency of maker were made, but it must be proved that such representations were false.—Alpena National Bank v. Greenbaum, 80 Mich. 1.

¶ 368. Complainant's claim that he was induced, by the misrepresentations of the members of the board of public works of a certain town, to make bids for the construction of certain sewers, and to deposit certain checks, the payment of which he seeks to have enjoined, held not to be supported by a preponderance of the evidence.—Langley v. Harmon, 97 Mich. 347.

¶ 369. In an action for fraudulently claiming to be a sincere, honest conscientious believer in the principles of Christian Science and qualified to give instruction in Christian Science mind healing whereby plaintiff was induced to pay for a course of instruction therein, evidence that defendant some two years before had superfluous hair removed from her face by material means, does not show that she was not a true believer in, and a practicer of the principles of, Christian Science, and does not tend to show fraud in holding herself out as a teacher thereof.—Meyer v. Knott, 137 Mich. 714.

¶ 370. In an action by a real estate broker against certain of the owners of property for damages for misrepresentation as to the right of a certain one of the owners to make the sale, evidence consisting merely of hearsay testimony of the plaintiff that he had been told after the deal fell through that a party other than the defendant had to be consulted before a sale could be effected, held insufficient to show that there was a misrepresentation.—Dickinson v. Hanley, 193 Mich. 585.

¶ 371. On a supplemental bill in divorce proceedings by a wife against her husband who, when alive, was a tenant by entirety of certain mortgaged premises which had been sold under foreclosure and the mortgagee, alleging that conspiracy and fraud had been practiced upon the complainant by her husband and the mortgagee in preventing her from protecting her rights in the redemption of the premises covered by the mortgage, and seeking equitable relief, evidence held insufficient to show fraud and conspiracy.—Palmer v. Palmer, 194 Mich. 79.

¶ 372. A charge in an action by an administrator for an accounting, that a son and his wife who lived upon and worked a farm owned by the former's mother during her lifetime, had defrauded the latter out of a large sum of money in the management of the farm, held not sustained by the evidence.—Graham v. Graham, 184 Mich. 638.

§ 47. ——Circumstantial proofs.

Admissibility of circumstances, see ante § 31 et seq.

Latitude allowable in examination and evidence, see ante § 32.

Proof of implied or constructive fraud or undue influence, see post § 48.

Instructions on degree and sufficiency of circumstantial proof, see post § 62.

¶ 373. Fraud need not be shown by direct proof. It may be, and generally is, proved by inference from facts and circumstances that satisfy the mind of its existence.—O'Donnell v. Segar, 25 Mich. 367; Adair v. Cummin, 48 Mich. 375; Burrill v. Kimbell, 65 Mich. 217; Ross v. Miner, 67 Mich. 410.

¶ 374. Fraud is provable by facts and circumstances from which it can be inferred; positive proof is not required.—People v. Rice, 79 Mich. 354; Webber v. Jackson, 79 Mich. 175; Freedman v. Campfield, 92 Mich. 118; Henneberger v. Matter, 88 Mich. 396.

¶ 375. When fraud is denied it is not to be inferred from slight circumstances; but a denial of it in a chancery answer does not preclude inquiry or disarm the court of its power when, from the pleadings and proofs, it is satisfied of its existence.—How v. Camp, W. 427.

¶ 376. Fraud is seldom shown by direct proof, but may be established, like any other fact, by facts and circumstances and the inferences to be drawn therefrom.—Morgan v. Andrews, 107 Mich. 33.

¶ 377. Proof of facts and circumstances is sufficiently clear if it creates a belief that a fraud has been perpetrated, and a conviction so produced is hearty enough to predicate a verdict upon.—Gumbert v. Treusch, 103 Mich. 543.

¶ 378. Fraud is not to be assumed without proof, but it is nevertheless oftener shown by circumstances than in any other way.—Webber v. Jackson, 79 Mich. 175.

¶ 379. Circumstances of mere suspicion are not enough to warrant the conclusion of fraud.—Fraser v. Passage, 63 Mich. 551.

¶ 380. The circumstances should be such as amount to clear proof before a party can be held liable in fraud. The inference to be drawn from the circumstances must not only be consistent with the acts of fraud charged, but inconsistent with honesty and good faith in the transaction.—Blish v. Collins, 68 Mich. 542.

¶ 381. Fraud must be proven from facts inconsistent with honesty of purpose.—Graham v. Graham, 184 Mich. 638.

¶ 382. While it is true that fraud need not be shown by direct proof, and may be, and generally is, proved by inference from facts and circumstances, yet it cannot be presumed from mere suspicion, nor from facts or cir-

cumstances which are entirely consistent with an honest purpose.—Henneberger v. Matter, 88 Mich. 396.

¶ 383. Fraud cannot be presumed from mere suspicion, nor from facts and circumstances which are entirely consistent with an honest purpose.—Island Mill Lumber Co. v. City of Alpena, 176 Mich. 575.

¶ 384. Fraud must generally be ascertained from a variety of circumstances, some of them of slight significance in themselves, but altogether forming a chain of facts which carry conviction to the mind.—People v. Rice, 79 Mich. 354.

¶ 385. Where the intent to defraud is fully and completely denied by defendant, and complainants' case rests upon wrong which must be presumed, the circumstances from which such presumption arises must be strong and irresistible to allow complainants to recover.—Krolik v. Root, 63 Mich. 562.

¶ 386. Obstinate resistance to judicial inquiry is strong evidence of probable fraud.—Heath v. Waters, 40 Mich. 457.

¶ 387. When the facts in any given case lead the unbiased mind to the irresistible conclusion that a fraud has been committed, and there is no innocent explanation of such facts, there is no necessity for weighing the facts, or examining them singly, to see whether, if standing alone, any one of them is sufficient to establish the fraud.—People v. Rice, 79 Mich. 354.

¶ 388. Fraud and undue influence cannot be inferred from mere opportunity.—Powell v. Pennock, 198 Mich. 573.

¶ 389. Upon a question of fraud in selling stock, if a material representation, known to be false, is intelligently made, a fraudulent intent may be inferred.—Roy v. Bordas, 161 Mich. 567.

¶ 390. Fraudulent influence is rarely susceptible of direct and clear proof and may be inferred from circumstances tending to show it.—Dodson v. Dodson, 142 Mich. 586.

¶ 391. Keeping secret the fact of a settlement by which a widow, coexecutrix of her husband's estate, gave her own note in composition of matters in litigation is not to be regarded as a badge of fraud when it appears after her death that it was done at her instance, that her coexecutor had declined to make any endeavor to settle, claiming no liability existed, and where it appears that other notes given by her were without his knowledge until they were presented against her estate.—Young v. Shepard's Estate, 124 Mich. 552.

§ 48. ——Of undue influence or implied fraud.

See also post ¶ 558.

Presumptions of fact and burden of proof, see ante § 30.

Implication of fraud or undue influence as matter of law, see post II.

Circumstantial or inferential proof of actual fraud, see ante § 47.

Of fraud in procuring execution of instruments, see post § 50.

In deeds or mortgages of land, see also post § 52.

Respecting fairness and freedom of transfers in specific relations, see also Husband and Wife, II; Parent and Child, IV; Estates of Decedents, X, A; Guardianship, VI; Trusts, VIII.

Sufficiency of proofs in rescission suits, see also Rescission, VI.

Weight and sufficiency in will cases, see Wills, III.

¶ 392. Clear and convincing evidence is necessary to overcome the presumption that a quitclaim deed releasing mineral rights in land executed by a highly educated pastor in favor of ignorant parishioners of foreign birth who are unable to read or speak the English language was made deliberately in consummation of previous negotiations.—Mtynarczyk v. Zyskowski, 191 Mich. 213.

¶ 393. Opportunity for the exercise of undue influence upon a party executing an instrument is not proof of its exercise; proof of opportunity alone is not sufficient.—Noble v. Hunter, 195 Mich. 713.

¶ 394. The fact that a deed effectuates a previously declared purpose of the alleged grantor goes far towards overcoming testimony that it was signed without knowledge of its contents and without assent thereto, and that the signature was procured by fraud upon the grantor then ill and almost unconscious, the relations of the parties lending credit to the deed and the fraud being directly contradicted.—Brennan v. Zehner, 97 Mich. 98.

¶ 395. A mortgage is presumably fraudulent where it was made by a surviving partner to his brother, administrator of the deceased partner and brother, several years after his death when the maker was embarrassed, where it purported to secure a loan by the mortgagee to the survivor but the lender could not on the evidence have had enough resources to make such a loan, and where the inventoried assets of the estate all came into the hands of the survivor, as such or as a claimant against the estate, and where the effect coupled with the insolvency of the survivor would be entirely to consume the estate in winding up the firm while leaving the administrator or his assignees stand as firm creditors.—Brown v. Watson, 66 Mich. 223.

¶ 396. Evidence of the circumstances of procuring an attorney at night for drafting a release of a mortgage held sufficient to show undue influence in obtaining discharge from dying mortgagee.—Worthington v. Major, 94 Mich. 325.

¶ 397. A., an old man, wrote to B. to sell his personal property and come and live with A., which B. did, and A. conveyed lands to him upon his agreement that B. would care for him as long as A. lived. Soon afterwards A.'s daughter insisted that the arrangement should be set aside, and a settlement was made by which B. conveyed half of the lands to the daughter, taking up a note which he had previously given and making a new one with an agreement for support. Then the daughter deeded to A. the lands conveyed to her. Subsequently A. filed a bill to set aside his deeds to B. Held, that the proofs did not show that B. took any undue advantage of A., and that as the settlement was deliberately agreed to by all parties without fraud or overreaching, it must stand.—Allen v. Snyder, 100 Mich. 290.

¶ 398. Evidence that the grantor in a deed of property worth about $1,500. for a specified consideration of $1,800, was old and of weak memory, and that the grantee actually paid only $5 down, and failed to secure the balance by mortgage on the property as had been contemplated, but actually incumbered it with a mortgage to another, and that the grantor was induced to convey by fear as to the outcome of a suit brought against the grantee, who was his tenant, by a third person, to oust him from possession, justifies the setting aside of the deed, notwithstanding it rests largely on the testimony of complainant, the grantor.—Landis v. Smith, 113 Mich. 407.

¶ 399. A deed will not be set aside because it was made on the day previous to grantor's death from cancer to the son of an uncle who had been closely associated with the grantor and was with him at the time the deed was made, notwithstanding the existence of a will making other disposition of the property.—Taft v. Simpson, 125 Mich. 206.

¶ 400. The deceased being in ill health and threatened with paresis, arranged for defendant, his sister, to live with him, and take care of him. By arrangement with the complainants, brothers of the defendant, defendant was to see that deceased did not foolishly dispose of his farm. Deceased deeded the farm to defendant in consideration, according to her testimony, that she take care of him, and there was evidence from others that defendant had talked over such a plan with reference to deeding to defendant. On a bill to set aside the deed for fraud and undue influence, held, the evidence did not support the bill.—Hoag v. Allen, 152 Mich. 528.

¶ 401. Complainant was born after his mother had separated from his father. Deceased always denied that complainant was his own child. He had for many years been associated in business with one Wiggins and through the latter's patronage and advice had accumulated land and other property, Wiggins being the better educated and more capable man and the deceased being an ignorant laborer following his lead. The deceased, having lived alone for many years prior to his death, deeded his land to the wife and daughter of Wiggins, which deed complainant sought to set aside on the ground of Wiggins' fraud and undue influence. No evidence was offered of this charge except the confidential and friendly relation existing between the two men. Held, the facts were not sufficient even to shift the burden of proof upon defendants to show that the conveyances were not obtained by the means charged.—Nelson v. Wiggins, 172 Mich. 191.

¶ 402. On bill to cancel a quitclaim deed and a contract relating thereto executed by complainant under a threat of injury to sons, evidence held to show that the instruments must be canceled.—Longenecker v. Graham, 176 Mich. 84.

¶ 403. On a bill by a daughter for recovery of an undivided one-half interest in, and cancellation of, complainant's quitclaim deed to land purchased by testatrix, their mother, out of proceeds of land she had originally devised by will to defendant but later sold, so that the devise was adeemed, where it appeared that although complainant claimed to be ignorant of the terms of her mother's will, she knew the contents of a contract executed in settlement of litigation by testatrix and herself whereby testatrix agreed to devise to complainant the land actually devised to her and to bequeath the sum actually bequeathed to her and she received a quitclaim deed from defendant to the tract devised to her and the amount of money bequeathed to her, evidence held insufficient to show fraud in the procurement of the quitclaim deed from complainant.—Kirsher v. Todd, 195 Mich. 297.

¶ 404. On a bill to cancel a deed made by complainant to his niece and her husband under an arrangement whereby complainant was to reside with defendants and receive care and support for the rest of his life, and the deed, which was in the custody of a third person, was to be delivered to defendants upon complainant's death, where it appeared that complainant's wife had died before execution of the deed; that he had no children; that he was 77 years of age at the time of the execution of the deed; and that the execution of the deed was in accordance with the desires of complainant's wife, evidence held sufficient to show that undue influence was not exercised upon complainant and that he was competent to make the deed.—Canedy v. Turner, 196 Mich. 462.

¶ 405. On a bill by a highly educated pastor to set aside a quitclaim deed releasing mineral rights in land, formerly conveyed subject thereto, in favor of ignorant parishioners of foreign birth on the ground of fraud, evidence held insufficient to overcome the presumption that the quitclaim deed con-

tained the agreement of the parties understandingly made in consummation of previous negotiations.—Mtynarczyk v. Zyskowski, 191 Mich. 213.

¶ 406. Where a person from infirmity and mental weakness is likely to be easily influenced by others, transactions entered into by such person without independent advice will be set aside, if there is any unfairness in them. The principle upon which courts act in such cases applied to a conveyance of land obtained from a woman advanced in years, of doubtful sanity, living entirely by herself, without friends to take care of her, and confined to her house by sickness.—Allore v. Jewell, 94 U. S. 506, 24 L. ed. 260.

§ 49. ——Of fiduciary relations of parties.

See also post ¶¶ 573, 581.

Sufficiency of evidence of relationship to which trust or confidence is incident, see Agency, I; Marriage, III; Estates of Decedents § 54; Guardianship, II; Trusts.

¶ 407. On a bill to set aside deeds on the grounds of mental incapacity and undue influence, evidence held insufficient to show fiduciary relations existed between complainant's father and her brother at the time her father executed such deeds conveying certain property to her brother and to her stepmother.—Noble v. Hunter, 195 Mich. 713.

¶ 408. An insurance adjuster who disputed the claims of a person insured, and occupied a hostile position throughout the negotiations, and gave his opinions falsely concerning the legal rights of the parties on questions of law and on facts, where the assured had the same knowledge or means of knowledge with himself, cannot be regarded as occupying any fiduciary relation which would entitle the assured to rely upon his representations; and a settlement hastily made with him under such circumstances, and under a threat that payment would not be made without suit, will not be set aside for fraud. The insured was bound to inform himself of his rights before acting and to stand upon them, and, failing to do so, is himself responsible for the loss.—Mayhew v. Phœnix Ins. Co., 23 Mich. 105.

§ 50. ——Of fraud in obtaining execution of instruments.

Implication of undue influence or fraud from relation of parties or nature of transaction, see post II.

Of undue influence in procuring transfers, see ante § 48.

Of fraud in sales and transfers, see post § 51.

Of deeds and mortgages, see also post § 52.

Right to rely on representations as to character of instrument, see ante § 11.

Deception as to nature of the contract, see also ante ¶ 10.

Questions for jury, see post § 59.

Evidence of signing, delivery and acceptance of instruments, see Execution of Instruments.

Sufficiency of evidence to establish delivery of deed alleged to have been fraudulently destroyed, see Execution of Instruments ¶ 245.

Sufficiency of proofs of fraud pleaded defensively in suit to restore lost deed, see Restoration of Papers.

¶ 409. The presumption that one signing a written instrument (application for life insurance), had read it over, and was acquainted with its contents, may be rebutted by evidence of circumstances fairly tending to show that he was misled in that regard by the conduct of the other party; e. g., where an agent did not read it aloud and filled in some matters from his own supposed knowledge then requesting signature.—Van Houten v. Metropolitan Life Ins Co., 110 Mich. 682.

¶ 410. In an action to recover for personal injuries in which the defense was a complete settlement and release, where the testimony was in conflict, held that it was a question for the jury as to the terms of the contract and whether plaintiff was fraudulently deceived into signing the release, he claiming that he thought it was a receipt for money paid under the contract, as he was assured by a representative of defendant and of the insurance company.—Porth v. Cadillac Motor Car Co., 198 Mich. 501.

¶ 411. Fraud in inducing defendant to subscribe to a contract for the purchase of a horse, by causing him to believe that plaintiff had subscribed and paid for two shares when in fact he had subscribed for only one, was not proven where it appeared that plaintiff subscribed for one share and obtained another by gift, and stated that he "owned" two shares.—Valade v. Masson, 135 Mich. 41.

¶ 412. Evidence of a grantor that deeds were made to place property out of reach contradicted by the attorney and two witnesses stating that it was done after consultation to dispose of the property, shows that grantor was not induced by fraud to execute deeds to his children.—Nichols v. Nichols, 94 Mich. 569.

¶ 413. On the question whether a deed to the wife of land for which he held a contract was made with his consent or in fraud of him by inducing him in ignorance to sign a consent indorsed on the land contract, the testimony of four witnesses positively that he consented establishes that fact against his uncertain denial especially where he acquiesced for 12 years, two of which were after he separated from his wife.—Merson v. Merson, 101 Mich. 55.

¶ 414. Knowing and intentional signing and delivery of a deed by a wife, who held the

title, is shown by proof that she and her husband were under charge of burning the premises to defraud the insurer, that the value of the premises over incumbrances was $1,500 to $2,000 but the house had been damaged by the fire, that while in jail she authorized her attorney in writing to sell the house subject to the mortgage and to pay over to her the proceeds, keeping $250 for his fees for defending her, that he did find a purchaser to whom the premises were conveyed for $700 in cash of which he paid over $450, that she gave a receipt to him for that portion of the $700, expressing it to be in full and stipulating that none of the $250 should apply on a debt owning the attorney and a colleague for a retainer or fees, and that after her acquittal she made admissions evincive of knowledge, though there was evidence that she also since release had paid taxes and a sum towards discharge of the mortgage on the premises as though believing that she still owned it, the value received by her being a fair value of her interest.—Burchell v. Collier, 148 Mich. 248.

¶ 415. A vendor of land sold by contract on instalment payments filed a bill to quiet title against the contract and a quitclaim deed given by the vendee to an assignee, both instruments being recorded, claiming that through fraud and deception she was led to believe the contract was an option which expired by its own limitation. She was a woman of some business experience and had executed the same kind of an instrument before and after the transaction in question. Held, relief could not be granted on the ground of fraud.—Donnelly v. Lyons, 173 Mich. 515.

¶ 416. Upon arriving home from another city shortly after the death of his wife, complainant was induced to convey realty and personalty of the value of $2,000 to defendant, more than $1,000 of which was money in the bank, the consideration given by defendant being seven hundred dollars. There was evidence that defendant brought about the drunken condition of complainant; employed one of his neighbors to help him procure the conveyance to the property; that the neighbor visited a scrivener without the knowledge of the complainant and procured the papers to be drawn; and that after the transaction was completed defendant paid the neighbor seventy dollars for what he had done. Held, a decree setting aside the conveyance on the ground of fraud should be sustained.—Scanlon v. Connor, 168 Mich. 133.

¶ 417. Complainant deeded her farm to defendant grandson, with a provision that if he failed to provide a home and livelihood for her, a life estate should revert to her. The defendant gave her the support and home specified, but some unpleasantness grew up between her and defendant and his wife, and she left. She brought a bill to have the deed set aside alleging that an executory agreement was intended to vest title at her death if the agreement was fully performed. The preponderance of the evidence showed she was a shrewd woman and knew the nature of the instrument she signed. Held, the bill should be denied.—Wilson v. Wilson, 160 Mich. 555.

¶ 418. In an action to set aside a deed by a mother conveying all her property to her children, subject to a life estate, her testimony was that it was represented to be only a division of rents opposed by evidence that the deed was drawn at her suggestion by a lawyer of her own selection, including the lawyer's testimony that it was read and explained to her, that subsequently she made a will wherein such deed was referred to. Held, inadequate to show that the instrument was fraudulently obtained by misrepresenting its character.—Appenzeller v. Appenzeller, 177 Mich. 303.

¶ 418a. That a trust deed was intelligently executed by the grantor, held established by the evidence of the holder and an attorney that it was signed in their presence opposed by grantor's that they did not sign knowingly.—Curtis v. Mueller, 184 Mich. 148.

¶ 419. In a bill to cancel notes, where complainant claimed that the notes were forwarded to the corporation defendant upon the representation that the bicycles for which they were given were completed and set apart as the property of complainant, when in fact they had not been so set apart, and that thereafter it was agreed that the notes were to be surrendered, but that within a few days a mortgage was given upon all its property by the corporation to secure its creditors, the facts did not show fraud in obtaining the notes.—World Mfg. Co. v. Hamilton-Kenwood Cycle Co., 123 Mich. 620.

¶ 420. Upon the dissolution of a partnership defendant made to plaintiff retiring partner a written guaranty that one Robinson, the other partner, would pay all demands against the partnership. Defendant testified that in the statement plaintiff made to him as to claims against the partnership nothing was said about a claim for certain boom sticks. There was no evidence of false statements made by plaintiff or his partner in plaintiff's presence, in order to secure defendant's signature. Defendant stated that he read with care the guaranty he signed, knew its contents, and would not otherwise have signed it; that he knew Robinson had purchased plaintiff's interest; that the partners explained to him the guaranty was for any debts; and that the substance of what was said was contained in the paper signed. The undisputed evidence indicated that at the time of the execution of the guaranty plaintiff did not know Robinson had converted the boom sticks. Held, in a suit to recover the amount of a judgment obtained by the owner of the boom sticks

against the partnership and paid by plaintiff, there was no evidence warranting the submission to the jury of the question of fraud in the securing of the guaranty.—Clark v. Clune, 172 Mich. 323.

¶ 421. A partnership agreement entered into by two business men will not be set aside in equity upon the ground of fraud and deceit in obtaining a signature of complainant except upon a clear preponderance of convincing testimony.—Lavigne v. Coyne, 188 Mich. 382.

¶ 422. On a bill in equity to set aside a partnership agreement entered into by two business men upon the ground of fraud and deceit in obtaining signature of complainant, evidence held insufficient to establish fraud and deceit.—Lavigne v. Coyne, 188 Mich. 382.

¶ 423. Defendant Brown sold a part of a block of land to defendant Algren, and reserved a right of way. Later he sold another part of the block and the right of way to complainant. There was evidence that defendant Algren then induced defendant Brown to persuade complainant to deed back to Brown the right of way; that Brown promised to give complainant a new right of way over another part of the block owned by him, and in consideration of this complainant made the deal; that Brown in turn deeded the right of way to Algren, and that at the time complainant did not know that Brown no longer owned the land over which it was agreed the new right of way should run. Held, in a bill to set aside the deed for fraud, the evidence was sufficient to support a decree in favor of complainant.—Brandt v. Brown, 160 Mich. 258.

¶ 424. A copy of a contract in the form of an order for the purchase of an engine and separator, in which the vendor stipulated for the retention of title until the purchase price should be paid, was left with the purchasers. Upon the delivery of the property, four notes were given for the purchase price, in each of which it was stated that the express conditions of the transfer of the possession of the property were such that the title did not pass from the vendor until the note should be paid in full. The fourth note was secured by a real-estate mortgage executed by one of the purchasers, and in the condition for payment reference was had to a "title-clause note" of even date, executed by the mortgagor to the mortgagee as collateral security. With this knowledge of the contents of the note and mortgage the mortgagor signed the securities, and, in company with one of his covendees took possession of the engine and separator, and used the same for two years, when he sold his one-third interest therein. In a suit by the purchaser of said interest against the vendor, who had seized the property, to recover the value of said interest, plaintiff, who claimed to have purchased without knowledge or notice of defendant's rights, sought to show that the mortgagor was induced to sign the contract by fraud, in that, before signing the same, the agent of the vendor read it over to him, as he did not have his glasses with him, and could not read without them, and that the agent did not read the printed stipulation as to title. Held, that it cannot be contended, under the facts stated, that the mortgagor did not know of this stipulation.—Pettyplace v. Groton Bridge & Mfg. Co., 103 Mich. 155.

¶ 425. Verdict finding that plaintiff, an attorney, had fraudulently procured the execution by defendant of certain notes for services sued on, held against the weight of the evidence, where the testimony of defendant and her son as to such fraud was contradicted on cross-examination and by averments conclusively showing the true state of facts contained in her answer to a certain bill.—Radford v. Gaukler, 196 Mich. 94. (Moore, J., dissenting.)

§ 51. ——Of fraud in sales and transfers.

Stock sales and transfers of corporate franchises, see post § 53.

Variances in proof from pleadings, see post § 93.

¶ 426. The detection of errors in weights in the case of three sales in 1885 would not support a presumption that there was fraudulent weighing over a period of dealings for the eight years prior thereto.—Reid v. Ladue, 66 Mich. 22.

¶ 427. Defendants' charge in support of a claimed rescission that their contract to furnish lumber to plaintiff corporation was procured by fraud, was held not sufficiently shown by the fact that plaintiff several months afterwards made an assignment for the benefit of its creditors, such assignment being caused by failure of a third party, and it not being probable that defendants would have lost thereby.—Dennis v. Leaton, 72 Mich. 586.

¶ 428. There is a plain case of fraud made out against both defendants, where a bill alleged that defendants, who were officers of a bank to which complainant owed a note, and also of a gas company, shares in which complainant had pledged collaterally to the note, after a parol agreement made before maturity to extend the time of payment of such note until after complainant's return from a contemplated absence, such extension being unsolicited by complainant, sold such stock and applied the proceeds to the payment of such note, no demand for the payment thereof having first been made upon complainant and no notice of intention to dispose of such stock having been given.—Hempfling v. Burr, 59 Mich. 294.

¶ 429. An allegation of an indorser of notes in an action by a bank to enforce pay-

ment, that there was a secret agreement between the maker and the president of the bank whereby such president should represent the maker as solvent for the purpose of inducing such indorsers to sell the maker goods and take its notes therefor, is not supported by the evidence where the only witnesses who testified upon such allegation besides defendant were the president of the bank and the president of the maker of such notes, both of whom denied any such agreement.—Alpena National Bank v. Greenbaum, 80 Mich. 1.

¶ 430. Where three days after the last of the goods sued for were delivered, the corporation gave a chattel mortgage covering its entire plant, and two days later it suspended business, if the jury found that the annual report filed and relied on as a basis of credit was false, they were not without warrant in finding that the mortgage was given in contemplation of a suspension of business, and that, even before the mortgage was given, it must have been known to the management that the business could not proceed, and that it would be beyond the power of the corporation to pay for the goods, and hence beyond its expectations.—Silberman v. Munroe, 104 Mich. 352.

¶ 431. In replevin for goods claimed to have been fraudulently purchased on a representation of a certain net worth it cannot be claimed that there is no evidence as to what the vendee, a merchant, is worth, and accordingly that proof of fraud has failed, where the evidence is that his property consists of a mortgaged stock surrendered to the mortgagee.—Brock v. Garson, 117 Mich. 550.

¶ 432. Fraud in the purchase of goods on credit may be established by showing that the entire transaction and subsequent conduct begets a well-founded conviction of the fraud. —Clark v. William Munroe Co., 127 Mich. 300.

¶ 433. Fraud on the seller of merchandise in the purchase of it may be inferred, where it appears that one of the buyers, a firm, established a credit with the seller by making considerable payments from time to time out of funds embezzled from another, that by means of credit he overstocked their store mostly with goods purchased from such seller, that the other partner became suspicious and quit the business, and that the embezzling one then sold the stock for 50 cents on the dollar and absconded.—Pinkerton Bros. Co. v. Bromley, 119 Mich. 8.

¶ 434. In an action to recover the value of goods fraudulently purchased, evidence that the defendant purchased several times more goods than he needed on credit from several dealers, that he failed to pay for any of them taken with admissions that he purposed to raise cash by disposition of the goods without paying for them, and thereafter buy for cash, is sufficient in the absence of contradiction to require a directed verdict for the plaintiff.—Fruit Dispatch Co. v. Russo, 125 Mich. 306.

¶ 435. In an action for a breach of contract to furnish all the tin cans necessary to the plaintiff's business for a given time, the defense that the plaintiff fraudulently misled the defendant as to the number of cans used in past years and the number probably necessary for the time covered by the contract is not supported by evidence tending to show that no definite estimates were made but that the defendant was familiar with the conditions, and was asked to rely thereon.—E. G. Dailey Co. v. Clark Can Co., 128 Mich. 591.

¶ 436. Where defendants, in selling a newspaper property to complainants, misrepresented the amount of circulation of the same, the fact that the complainants examined the books of the business to verify these statements, does not show that complainants did not rely on the misrepresentations and were not defrauded, where the examination was not exhaustive.—Smith v. Werkheiser, 152 Mich. 177.

¶ 437. Evidence, in an action by the purchaser of a moving picture business against the seller thereof for fraud, held sufficient to warrant the submission to the jury of the question whether or not the representations alleged to have been made by the seller as to the earnings of the theater were true or false.—Johnson v. Campbell, 199 Mich. 186.

¶ 438. Under the evidence, which included the circumstances of the sale of a rooming house and furniture to an experienced man of business and the fact that he was made acquainted with the name of the holder of the indebtedness for the unpaid price, held, that defendant did not conceal from complainant, who purchased certain furniture from him, the amount due on certain piano contracts and warrant them free of liens.—McKenzie v. Call, 176 Mich. 198.

¶ 439. In an action by the purchaser of a rooming house business against the owner, his broker, and the latter's clerk for fraudulent representations as to the character of the tenants and the rent receipts, evidence held sufficient to sustain a verdict against the owner.—Williamson v. Hannan, 200 Mich. 658.

¶ 440. In an action against the owner of the furniture and furnishings of a rooming house, a broker, and his clerk, for damages for fraudulent representations as to the character of the tenants and the rent receipts, evidence held insufficient to show any confederation between the owner and clerk to deceive plaintiff.—Williamson v. Hannan, 200 Mich. 658.

¶ 441. On a bill against executors and a bank to reopen an estate and for an accounting, there was an entire failure to establish the claim that a check by decedent of money in the bank to his stepdaughter, shortly before he died, was a collusive device to rob the decedent and lessen his estate to which the bank, through its officers, was a party; where the evidence showed that such stepdaughter, her sister and her mother had lived with decedent long and he had provided bountifully for them in life, that there was a warm affection between decedent and such stepdaughter, that there was nothing showing such a relation to the older children, also stepchildren, but of a former marriage of their mother, and that decedent left no children of his own.—Bangs v. Browne, 149 Mich. 478.

¶ 442. In an action to recover the unpaid price for lumber sold, where the defense was fraudulent representations, the testimony was clear that the plaintiff refused to sell the lumber by grade; that statements were made by and for him concerning quantity and quality; that defendant sent an agent to inspect the lumber. Held, that, having heard the statement of plaintiff, the agent must be presumed to have relied upon that if upon anything except his inspection, and plaintiff was excused from exercising his imagination upon the subject of what the agent supposed beyond or in addition to what the statement and inspection supported.—Redfield v. Engel, 171 Mich. 207.

¶ 443. The complainant bought a grocery business, giving in return therefor an equity in realty and certain promissory notes. The vendors represented that the stock was worth a certain amount and that the business was profitable, but did not tell the complainant that they were losing money and had been forced to compromise with their creditors. When the complainant took possession he found the stock worth much less than represented. Held, that the evidence justified a decree setting aside the sale for fraud.—Face v. Hall, 177 Mich. 495.

§ 52. ——Of fraud in conveyances and mortgages of land.

See also post ¶ 467.
Undue influence and implied frauds, see post II.
Variance from or conformity of proofs to allegations, see post § 93.

¶ 444. A deed conveying the right to flow so much of the grantor's land as would be flowed by raising the water of a stream by dam to a given height will not be canceled upon a bill for that purpose, alleging that the deed was procured by false representations of the grantee as to the quantity of land that would be flowed by thus raising the water, where the evidence shows that the parties acted on the assumption that the prospective flowage could be ascertained with sufficient accuracy by a personal inspection of the premises and vicinity; that neither of them pretended to possess any knowledge on the subject not thus obtainable, and that an agent of the grantor inspected the premises before the conveyance for this very purpose; and in the absence of any proof that the grantee, at the time of such inspection, did anything which did or was calculated to mislead such agent as to the real extent to which the land would be flowed.—Sanford v. Nyman, 23 Mich. 326.

¶ 445. Where a mortgage long past due was foreclosed, and two years after the sale the purchaser contracted to sell it to the mortgagor's administrator, who, it was claimed, though buying individually, used funds of his estate in making part payment, such facts showed no fraud or collusion between administrator and purchaser in reference to the foreclosure sale.—Harris v. Creveling, 80 Mich. 249.

¶ 446. Proofs held to establish the charge, made in complainant's bill, of fraud for which a deed executed to defendant on an exchange of farms is sought to be set aside.—Stevens v. Thompson, 98 Mich. 9.

¶ 447. Rejecting the husband's testimony as unworthy of credit because he avowed authorship of a fraud with the mortgagee as party thereto, a decree setting aside a mortgage on the property of a married woman for fraud alleged to have been perpetrated upon her by her husband and the mortgagee was reversed, the testimony of the mortgagee upon which it was rendered being more consistent with the theory that the mortgagor and her husband were conspiring to defraud the mortgagee out of his rights under the mortgage than her testimony of fraud on her.—Dooley v. Dooley, 112 Mich. 273.

¶ 448. A charge that fraud was practiced by a mortgagee in selling land to and taking security thereon from a corporation in process of formation, in which he was a stockholder and promoter, held not sustained by the evidence.—Turney v. Combination Brick Co., 184 Mich. 439.

¶ 449. An option to a corporation for a right of way for a street railway, given at a time when such a company could not condemn and on representations to the giver that if she did not give it she would be put to great expense and annoyance of condemnation, is fraudulent; where it further appears that the representations were made by a local justice of the peace and a right of way agent of the corporation, the justice pretending a friendship to the giver in order to procure it, and she being ignorant, a cripple, excitable, and dependent on the produce of a small tract through which the right of way was projected.—Grand Rapids, G. H. & M. Ry. Co. v. Stevens, 143 Mich. 646.

¶ 450. In an action by a husband against his wife to set aside a deed of their homestead alleged to have been obtained by fraud, the evidence shows by a fair preponderance that no fraud had been committed in the procurement thereof, where it was heavily incumbered at the time, they were then separated pending a bill for divorce by her, and where the attorney who drew the deed testifies that it was fully explained, and she desired the husband to return and share the home with her.—Lentz v. Lentz, 143 Mich. 190.

¶ 451. In an action by the purchaser of city lots against the vendor for fraudulently representing that the improvements were all in and paid for except the paving, held that a verdict for plaintiff was not against the weight of evidence.—State Security & Realty Co. v. Badger, 200 Mich. 104.

¶ 452. A skilled farmer, who is above the average in intelligence, has had a varied experience, and, before making an exchange of property, takes the precaution to examine the property and lives on the premises for three and a half months, and witnesses an overflow of the farm by a river bordering on the premises during a freshet, must be deemed to know or to have opportunity to know as to the falsity of representations by the seller that the farm was worth a certain value per acre, that there were no insects of any kind in the locality, except the cotton boll weevil, that were causing trouble in that section, that the gravel pits on the farm held the only available gravel in the country, that the soil was of a certain fertility and productiveness, and that there was no substantial overflow from such river.—Parkyn v. Ford, 194 Mich. 184.

¶ 453. The evidence in an action to cancel a conveyance of land made in consideration of the grantor's life support, held not to show that the conveyance was induced by fraud or undue influence.—Marsac v. De Ford, 184 Mich. 389.

¶ 454. A testator by his will bequeathed his wife three hundred dollars a year to be paid annually by the executor during her life. The remainder of the estate was given equally to his three sons. Defendant, one of the sons, contracted to purchase the interest in the estate of complainant, another son, and to pay therefor a fair valuation upon the property less complainant's share of the amount required to support the mother. Under a bill brought by complainant to cancel the contract on the ground of fraud, there was evidence that three days after the contract was executed the mother died; that at the time of the execution of the contract she was seriously ill; and that defendant was aware of such illness. The amount to be paid plaintiff for the property by defendant under the terms of the contract was based upon an expectancy of life upon the mother's part of thirteen years. Held, the decree of the circuit judge canceling the contract upon his finding of the existence of fraud should not be disturbed.—Bonz v. Bonz, 165 Mich. 45.

¶ 455. A mortgagor who had become so deeply involved that he was likely to have all his property swept away quitclaimed all to one of the three joint holders of a large mortgage on most of his land. Soon afterwards an arrangement was made between this grantee and others, looking to a continuation of the grantor's business on the land by a firm, and the payment of the incumbrances. The grantor denied that he agreed to this arrangement, and denied also that it conformed to a parol agreement contemporaneous with the execution of his deed, but in a suit by him against all concerned, based on charges of fraud and conspiracy, the court found the facts otherwise, found that there was no fraud, that the parties charged therewith made no profits, and that complainant—whose suit was therefore dismissed—had received all he could fairly claim.—Hunt v. Oliver, 118 U. S. 211, 30 L. ed. 128, 6 Sup. Ct. Rep. 1083.

§ 53. ——Of fraud in stock and franchise dealings.

Variance from or conformity of proofs to pleadings, see post § 93.

¶ 456. Complainant failed to establish his claim that certain stock, pledged as collateral to a note and mortgage, was fraudulently withheld from him upon the occasion of his taking an assignment of the mortgage, where his case was based mainly on testimony of the mortgagor's president, intrinsically appearing to be unreliable, and requiring the court to believe that by conspiracy a note was substituted to deceive the mortgagee and that embezzlement by the witness was connived at, as against credible witnesses testifying that the collateral was not to go with the mortgage, and that there were two notes, the one in question being used to avoid the mortgagee national bank's appearing to be carrying loans on mortgage.—Woodcock v. First Nat. Bank, 113 Mich. 236.

¶ 457. Upon a review of the evidence adduced in foreclosure proceedings on an issue as to fraud in sale of a franchise, held, that the mortgagees for the purchase price were not guilty of misrepresentation as to the duration of franchises and extent of corporate assets for the purchase price of which the mortgage in suit was given.—Lewis v. Weidenfeld, 114 Mich. 581.

¶ 458. It cannot be said that the purchasers and mortgagors for the purchase price of a gas plant relied on representations made, if any, as to the duration and nature of the franchises running with the plant, where it is shown that in the negotiations the purchaser said, "that is a question we

don't care to discuss here; we will leave that question to the lawyers to determine."—Lewis v. Weidenfeld, 114 Mich. 581.

¶ 459. In an action for the fraudulent conversion of corporate stock, where plaintiff claimed that such stock was obtained from him through conspiracy in inducing him to take worthless stock as part payment, testimony that the company, whose stock he was so induced to accept, passed into the hands of a trustee in the summer following the transaction in question and that at such time there was a mortgage on its real estate on which a year's interest was unpaid, and that there was a chattel mortgage running to the defendants as security for notes they had indorsed, and that at the time of the trial the property had been sold and no stockholder had been paid anything, and there was no reason to suppose that any ever would be, was evidence that the company was not paying dividends, and was not paying its debts promptly and that the stock was not worth from 75 cents to par.—McNaughton v. Smith, 136 Mich. 368.

¶ 460. Complainants conveyed a house and lot to defendant for 7,000 shares of mining stock. The complainants and two others testified that the defendant represented the stock to be worth $7,000 at the time of the trade, but that it had no present value, and none at the time of the trade. The mine was located far in the interior of Colombia, South America. In a bill to set aside the conveyance for fraudulent representations, held, the preponderance of the evidence sustained the charge of fraud and the bill should be allowed.—Keyes v. Quinn, 154 Mich. 668.

§ 54. ——Of fraud in settlements or releases.

Of fraud in obtaining execution of the instrument, see ante § 50.

Fraud in settlement with broker, see also Brokers ¶ 137.

¶ 461. On a bill to set aside a partnership settlement between plaintiff and defendant attorneys on the ground that defendant had fraudulently concealed the true value of services rendered by plaintiff in legal matters transacted by them where the testimony of the plaintiff was supported by nothing more than his own evidence, and all charges of fraud were met and denied by the defendant, and all matters arose and were founded upon what was said and done by the parties at the time the settlement of their affairs were made, the bill was dismissed on the ground that no fraud had been satisfactorily established.—Gilchrist v. Kelley, 85 Mich. 413.

¶ 462. Evidence that plaintiff, a woman, had suffered injury as a passenger, that afterwards the defendant carrier's agents, including plaintiff's uncle, visited her when she was sick and needy and urged a settlement, telling her that if she went into court she would be "disgraced," that she was ignorant of courts and believed what was told her, and that under the stress of these things she settled for $40 for injury so severe that it caused a miscarriage and that she repudiated it next day, is sufficient to sustain a finding that it was a fraudulent settlement.—Stone v. Chicago & W. M. R. Co., 66 Mich. 76.

¶ 463. Fraud upon the maker of a note given in settlement of litigation between the payee and the estate of the maker's husband is not shown on the testimony of the payee called as a witness for the maker's estate, whereby it appears that the maker was a large beneficiary under the first named estate and had given the note to compensate the payee for losses incurred by protraction of the litigation and by a settlement made with a third person in order to release property, that the maker of the note wrote it herself and for some years recognized it and notes which it renewed as valid, and where it also appeared that by reason of her relationship the maker must have fully known all the facts; and the facts that the payee after several years could not remember all the items that went into the amount of the note, and that at the request of the maker it was kept secret from the maker's coexecutor because of his opposition, do not make out any fraud.—Young v. Shepard's Estate, 124 Mich. 552.

¶ 464. On bill to cancel a quitclaim deed and a contract releasing all of complainant's claim to certain property on the ground of fraud, held that it cannot be said that there was fraud where the instruments in question were executed when a settlement was openly made pending proceedings by defendant to set aside a deed of the property in question to complainant and complainant who was of mature age was represented by counsel who informed her as to the matter of settlement and the extent of the property.—Van Syckle v. Thompson, 176 Mich. 112.

¶ 465. On a bill by the widow of a testator against the administrator of the estate of a former wife, the administrator of estate of decedent, and the heirs of decedent by the former wife to set aside assignments of insurance policies by decedent to the heirs and a release of a claim of decedent against the estate of the former wife in favor of the heirs, evidence held sufficient to establish fraud upon the part of the heirs.—Yalomstein v. Yalomstein, 190 Mich. 615.

¶ 466. No fraud is shown in an antenuptial agreement, by the wife's testimony that the husband represented that he owned only 40 acres of land worth $3000, where it was a marriage of convenience and under these facts she was willing to take a note and mortgage for two-thirds of the entire estate and where the contract was drawn by an attorney of ability and reputation who explained to her that she would receive more

property as his widow than she would under the agreement.—Koch v. Koch, 126 Mich. 187.

¶ 467. On a bill to cancel a mortgage and note upon the ground that it was procured as the result of the fraudulent representations by defendants that no contest of a will would be made by defendants or by anybody else, evidence held insufficient to sustain the allegations of the bill.—Sellers v. Perry, 191 Mich. 619.

§ 55. ——Of fraud in scales, inspection, valuations and the like.

Of responsibility for false valuation, see post § 56.

Conclusiveness of decision of scaler, inspector, or the like unless impeached for fraud, see Contracts § 185; Building Contracts §§ 11, 38, 39; Sales.

Conclusiveness of valuations made in adjusting insurance, see Insurance, XVI.

¶ 468. Plaintiff, a mill owner, contracted with defendants for the sale of 1,700,000 feet of lumber, to be inspected by their codefendants, and brought suit against all of said defendants, claiming a conspiracy on their part to defraud him in the inspection of said lumber. Held, that testimony introduced by plaintiff to show that the inspector was hired to be dishonest, that his scale was false by comparison with others, that request for another inspector was refused, and false reasons given for not allowing plaintiff's man to assist, upon its face made out a prima facie showing.—Turnbull v. Boggs, 78 Mich. 158.

¶ 469. Fraud is not shown in respect to the work of a person employed to grade lumber to be furnished to the plaintiff, if asserted by the defendants for the first time when sued for breach of the contract to furnish, and where it appears that they meantime have been employing him in carrying out other contracts.—Dennis v. Leaton, 72 Mich. 586.

¶ 470. Evidence in an action to set aside deeds and to establish title, held insufficient to show that a deed was procured by fraud and deceit respecting mineral values of the lands.—Demerse v. Mitchell, 187 Mich. 683.

¶ 471. In an action to recover the unpaid price for lumber sold, the defendant contended that the misrepresentation of plaintiff consisted in the concealment of the real quality of the lumber by piling in such a way that the quality could not be discovered by inspection. Held, that the testimony did not support this contention.—Redfield v. Engel, 171 Mich. 207.

¶ 472. Fraud justifying the rescission of a contract to furnish lumber to plaintiff was not shown in respect to the work of a certain person in grading the lumber; it appearing that defendants made no complaint that he was grading unfairly, that they allowed him to inspect other lumber outside of the agreement, and that they kept him assorting a long time after they knew he was grading unfairly.—Dennis v. Leaton, 72 Mich. 586.

§ 56. ——Responsibility for and complicity in fraud.

See also ante ¶¶ 191, 439, 440.

¶ 473. In an action upon a fraudulent sale of mortgages, the jury could properly hold the defendant liable for misrepresentations contained in certain appraisements upon which plaintiff relied, where the testimony tended to show that defendant was responsible for the delivery of the appraisements to plaintiff, either by handing them to plaintiff's agent or by assisting him to obtain them.—Simonds v. Cash, 136 Mich. 558.

¶ 474. In an action based on the fraud of one of the defendants in obtaining produce with intent not to pay therefor and conspiracy on the part of his codefendants, officers of a bank, in aiding and assisting him in the perpetration of the fraud, a judgment for plaintiff was reversed on the evidence for insufficiency to implicate the officers of the bank.—Schofield v. Clarke, 179 Mich. 681.

¶ 475. In an action by subcontractors to foreclose a mechanic's lien, evidence held insufficient to establish a charge of collusion between the contractor and plaintiff subcontractor by which the owner got a substantially different building from that contracted for, it appearing that no fault was found with plaintiff's work and that after knowing of a change in size defendant requested that work be completed.—Zilz v. Wilcox, 190 Mich. 486.

§ 57. ——Of laches, waiver or affirmance.

Effect of laches or waiver or affirmance, see post §§ 82, 83.

Propriety of directing verdict on evidence of lack of diligence, see post ¶ 514.

Evidence of waiver of breach or cause for damages on contract, see Contracts § 330; Sales, VIII, IX.

¶ 476. In an action to recover the value of goods fraudulently purchased, a waiver of the fraud cannot be inferred from testimony that the defendants agreed to send a draft for $500 immediately and to pay the balance on receipt of the next carload of goods where no money was sent and no goods were shipped.—Fruit Dispatch Co. v. Russo, 125 Mich. 306.

¶ 477. In an action upon a fraudulent sale, improper delay in tendering back the mortgages purchased in July, 1892, after discovery of fraudulent misrepresentations in their sale was not shown, where after January 25, 1894, the purchaser fully learned of the fraud and on February 7th his son

called on the seller who lived in another state and the seller thereupon corresponded regarding the matter, and on March 12th the purchaser wrote to the seller giving the facts and offering to reassign the mortgages, and a formal tender was made on May 25th.—Simonds v. Cash, 136 Mich. 558.

§ 58. Court and jury questions.

Materiality as jury question, see also post ¶ 519.

Sufficiency of evidence to go to jury, see post § 59.

¶ 478. Fraud is a question of fact and not of law where there is no statute to the contrary, and where an honest construction is admissible.—State Bank of Bay City v. Chapelle, 40 Mich. 447.

¶ 479. Fraud is a question of fact to be deduced from all the circumstances.—Cortland Mfg. Co. v. Platt, 83 Mich. 419.

¶ 480. The question of fraudulent intent, or of fraud in fact, is one of fact, not of law.—Jackson v. Dean, 1 D. 519; Orr v. Lacey, 2 D. 230; Snook v. Davis, 6 Mich. 156; Nye v. Van Husan, 6 Mich. 329; Oliver v. Eaton, 7 Mich. 108; Bagg v. Jerome, 7 Mich. 145; Gay v. Bidwell, 7 Mich. 519; Baldwin v. Buckland, 11 Mich. 389.

¶ 481. Whether a judgment on a bond was secured by fraud and collusion is a question to be submitted to the jury under proper instructions in an action by one who signed the bond against one who had agreed to indemnify him.—Knickerbocker v. Wilcox, 83 Mich. 200.

¶ 482. In an action for fraudulent representations by the vendor on the sale of goods, it is for the jury to determine whether the opinion expressed is false and known to be so to the vendor, and to what extent it is relied on by the purchaser without negligence.—Collins v. Jackson, 54 Mich. 186.

¶ 483. Where there was parol evidence given that a party on transferring a note represented the note to be "as good as cash, and that the maker was perfectly responsible," and also that it was understood that the note was not to be presented at once, and the evidence of solvency was conflicting, it was properly left to the jury to determine the meaning and extent of these representations to ascertain whether they were true or not.—Abell v. Munson, 18 Mich. 306.

§ 59. ——Sufficiency of evidence to go to jury.

See also ante ¶ 437, post ¶ 552.

Sufficiency on particular questions of fact, see also ante §§ 46-57.

Direction of verdict, see post § 60.

¶ 484. Where the evidence as to whether an alleged settlement was or was not fraudulent is conflicting, an instruction leaving the determination of the fact to the jury is proper.—Baumier v. Antiau, 79 Mich. 509.

¶ 485. Where there is any evidence tending to show it, fraud is a question for the jury.—Morgan v. Andrews, 107 Mich. 33.

¶ 486. An issue of fraud should be submitted to the jury if there is any substantial conflict of evidence.—McMillan v. Reaume, 137 Mich. 1.

¶ 487. Fraud, like any other fact, may be proved by facts and circumstances which satisfy the mind of its existence, and it is a question for the jury when there is any evidence to warrant the finding.—Ferris v. McQueen, 94 Mich. 367; Ross v. Miner, 67 Mich. 410.

¶ 488. Where vendor's alleged fraudulent intent is not admitted, nor to be deduced as a legal consequence from conceded facts, the question of its existence is one of fact for the jury.—Carney v. Mosher, 97 Mich. 554.

¶ 489. Where there is testimony tending appreciably to show fraud, the weight of it is a question of fact for the jury.—Redpath v. Brown, 71 Mich. 258.

¶ 490. In an action on a bond by the appellants from the probate of a will, evidence tending to show that its execution is fraudulent is for the jury, especially if the fact is not conceded or beyond dispute.—Woodin v. Durfee, 46 Mich. 424.

¶ 491. In trover for goods sold upon representations by the purchaser as to his solvency, the jury have no right to assume that the plaintiff did not rely on the representations in making sale, if there is testimony to support his claim that he did, and none to the contrary.—Heineman v. Steiger, 54 Mich. 232.

¶ 492. An action for causing worthless paper to be sold to plaintiff should not be taken from the jury if there is evidence that defendant suggested and was concerned in getting up the paper; that he purposed using it to get money; that he let the person who made the sale have it, without consideration, in order to trade it off, and that he expected part of the proceeds.—Adams v. Bowman, 51 Mich. 189.

¶ 493. In an action for trespass on the case where it was alleged that defendant had sold plaintiffs 100 pounds of peppermint oil representing it as good and genuine when in fact it was dementholized oil, the question as to whether there had been a dementholization of the oil was one for the jury on the evidence.—Durfee v. Newkirk, 83 Mich. 522.

¶ 494. Belief in a state of facts induced by the other party is for the jury, where there is evidence that no representations

were made by plaintiff through his agent and an admission by defendant that he did not believe the fact but did not know and did not want to take chances, but where the fact (forgery of a power of attorney) appears from an entry of record disclaiming a deed and on an abstract of title which defendant had.—Walton v. Mason, 109 Mich. 486.

¶ 495. Where the circumstances are such as to justify an inference of good faith on the part of the owner, who claimed and received pay for goods taken by the payer's daughter without right while clerk in the owner's store, whether a recovery should be had on the ground of fraud and overreaching is a question for the jury, under proper instructions.—Francis v. Hurd, 113 Mich. 250.

¶ 496. In an action on a contract, where the defendant pleaded fraud in the sale of plaster lands, because of his reliance upon statements of the plaintiff, as to the land containing plaster rock, the evidence though conflicting warranted submission to the jury, it appearing that a large part of the land had no plaster upon it, and the presence of such rock was not ascertainable by a casual inspection.—Norman v. Harrington, 118 Mich. 623.

¶ 497. The good faith of defendant purchaser at 50 cents on the dollar of a merchandise stock from one who was himself a purchaser in fraud of the original seller is for the jury, though the case was submitted without taking evidence on behalf of the defendant; where it was shown on behalf of the original seller (plaintiff in replevin) that defendant had admitted that he had suspicions and knew that the goods were nearly all bought from plaintiff, but after waiting a time and making no inquiries of plaintiff concluded to take his chances and make the purchase.—Pinkerton Bros. Co. v. Bromley, 119 Mich. 8.

¶ 498. In replevin of goods obtained by fraudulent representations, testimony that in 1895 the defendant was shown by his report to a mercantile agency to have been worth over $15,000, and that in June, 1896, he stated that he was in just as good standing as in the year before, and in October of the same year made a chattel mortgage to two of the defendants for over $20,000 covering all of his property and giving the mortgagees immediate possession of the property, was sufficient to go to the jury on the question of misrepresentation as to the financial standing of the debtor.—Kirschbaum v. Jasspon, 119 Mich. 452.

¶ 499. In a suit for damages for fraud and deceit in the sale of motor trucks to plaintiffs, who were inexperienced in handling the same, the evidence indicated that defendant represented the cars to be made and assembled only by skilled workmen, and that they had gone beyond the experimental stage in making same and had produced cars capable of standing the severest tests. Defendant, in its literature shown to plaintiffs at the time of sale, stated the particulars of such tests. The cars sold plaintiffs were not properly assembled and failed utterly to meet the purposes for which they were intended. Held, the evidence was sufficient to require submission of the case to the jury.—Hall v. Duplex-Power Car Co., 168 Mich. 634.

¶ 500. The evidence held to raise a question for the jury whether a false financial statement was made for the purpose of obtaining credit.—Krolik v. Lang, 187 Mich. 286.

¶ 501. In an action for fraudulent representations in the sale of city lots that all the improvements were in and paid for except the paving, where the evidence was conflicting, held that it was a question for the jury whether such representations were made and that the court erred in subsequently directing a verdict for defendant.—State Security & Realty Co. v. Badger, 200 Mich. 104.

¶ 502. In an action for damages for fraudulent representations as to the value of a business sold by defendant to plaintiff and as to an offer therefor by a third person, where such third person denied that he made any offer for the business, and defendant admitted that he did not do the stated volume of business, but denied he made the statements attributed to him by plaintiff, and it appeared that plaintiff had formerly worked for defendant, held, that the question of fraud was for the jury.—Miller v. Du Val, 191 Mich. 886.

¶ 503. In an action by purchasers of land under contract to recover damages for fraudulent representations as to the character of the farm purchased where it appeared that plaintiffs saw defendant's advertisement in a farmer's magazine in which it was stated among other things that the soil was clay and sandy loam which would produce any crop and was not sandy or rough, that one of the plaintiffs, who was unacquainted with the soil of the land, went to the land in winter when the ground was covered with snow, that defendant's agent represented that the land which plaintiff so selected was a good farm, as good as any in the state, that it was sandy clay loam, and the clay in such soil was all right for farming, and that the piece selected was, in his estimation, the best piece from the tract from which it was taken, and it further appeared that the land was worthless for producing crops due to the sandy character of the soil, held that it was a question for the jury whether the representations made by defendant and his agent were true.—Houder v. Reynolds, 195 Mich. 256.

¶ 504. In an action by one of two joint holders of an option, in which there is evi-

dence that the plaintiff, being unable to read and write, has been deluded, by the defendant, the other joint holder, into signing a contract or receipt whereby he accepts, after sale, less than his share of the price paid by the purchaser, such evidence is proper to go to the jury as tending to show fraud in obtaining such contract or receipt from plaintiff.—Christmas v. Frei, 78 Mich. 386.

¶ 505. In an action on a claim by a son against his mother's estate for services rendered deceased, evidence held to present a jury question as to whether claimant participated in the fraudulent purpose with his mother to defeat his wife's rights by the giving of a receipt for services.—In re Teller's Estate, 200 Mich. 181.

¶ 506. Defendant sold plaintiff shares of corporate stock, representing that the capital stock was all paid up. Defendant admitted the representation in substance and gave evidence that though when the company was formed only 60 per cent was paid in on the stock, afterwards, before plaintiff bought, 40 per cent was paid in by stock dividends or by adding the profits of the business to the capital stock, thus increasing it to its full face value. Held, that there was sufficient evidence in the case to warrant submission to the jury of the falsity of the representation.—Kryger v. Andrews, 65 Mich. 405.

¶ 507. In a suit against the receiver of an insolvent corporation to recover the value of goods alleged to have been fraudulently purchased by the corporation shortly before it suspended business, it appeared that the inventory filed by the receiver showed a shrinkage in value of $100,000 in personal property and credits from about $135,000, and of $140,000 in real estate from $201,000, the valuations placed upon such property by the corporation in its annual report having been filed eight months prior to the filing of the inventory. Held, that it was a question of fact as to whether the discrepancy could be accounted for on the theory consistent with the honesty of the representations made in the report.—Silberman v. Munroe, 104 Mich. 352.

¶ 508. In an action on a stock subscription, evidence that the defendant could not read, that he was induced to sign the subscription under the representation that it contained no such promise, and that subsequently the plaintiff's assignor gave him a paper promising to release him, is sufficient to go to the jury on the question of fraud.—Chicago Building & Mfg. Co. v. Yell, 129 Mich. 517.

§ 60. ——Direction of verdict.

See also ante ¶ 434.

Sufficiency of evidence for the jury, see ante § 59, also ante §§ 46-57.

General law of directing verdict, see Directing Verdict.

Direction of verdict on opening statement stipulated to stand as evidence, see Directing Verdict ¶ 99.

¶ 509. Where the evidence is conflicting it is error for the court to take the question of fraud from the jury and to decide that plaintiff has been defrauded.—Davidson v. Bennett, 84 Mich. 614.

¶ 510. Plaintiff purchased a "bond" in a company, operating a banana plantation in South America, on representations that it had the title to a thousand acres of land, and that transportation facilities were good. In an action against the directors for fraud it appeared that the company held an executory contract for the land, which had been nearly paid for, and that a navigable river had thereafter been rendered non-navigable by a tornado. Held, that a judgment on a directed verdict for defendant should be affirmed.—Kelly v. Clements, 175 Mich. 98.

¶ 511. In an action on a contract, positive and uncontradicted evidence that it was obtained on a representation by the plaintiff that he had an option on certain lands involved while as a matter of fact he did not then have nor did he subsequently obtain a valid option, and that the defendant believed this representation and relied upon it and objected to the plaintiff's default, is sufficient to entitle the defendants to a directed verdict.—Sherk v. Holmes, 125 Mich. 118.

¶ 512. In an action by a bank against a former director, for fraud in obtaining the discount of a note, a directed verdict for the defendant was set aside, where the testimony for plaintiff showed that the proceeds of the note passed to defendant's principal's credit, and there was testimony tending to show that defendant represented that the maker was good and the indorser was worth $75,000, and the evidence showed that the maker was greatly embarrassed when the original note was given and the renewals were made, and that the indorser instead of being worth the amount stated, was greatly embarrassed and did not even have railroad fare.—St. John's Nat. Bank v. Steel, 135 Mich. 165.

¶ 513. Where in an action on the case for fraud, the declaration alleges that defendant purchased plaintiff's goods with the intent on his part at the time of the purchase, not to pay for them, in pursuit of a general scheme to buy fruit and defraud the vendors of their pay, and the evidence introduced tends to support such allegations, it is error for the trial court to direct a verdict for the defendant.—Longo v. Crachiola, 165 Mich. 509.

¶ 514. In a suit by plaintiff vendee of land to recover damages for false representations made by defendant vendor, the defendant introduced evidence that plaintiff was advised by his own attorney and others not to pur-

chase the land. Held, the court properly refused to instruct as requested by defendant that as a matter of law plaintiff did not exercise due diligence and could not therefore recover, since the question of plaintiff's diligence was one of fact for the jury.—Yanelli v. Littlejohn, 172 Mich. 91.

¶ 515. Where a corporation's financial statement made as a basis for credit valued the personal property and accounts receivable at $46,024, and where in trover for the value of goods bought by the corporation from plaintiff and subsequently sold to the defendant bank, there was testimony that the sole basis for an item of $2,000 among the accounts receivable was certain goods in a third person's possession which afterwards sold for $300, and that in the personal property was an item for $5,000 for a patent which had been bought some years before for $2,000, it could not be said that there was a total lack of evidence tending to show fraud in the purchase of the goods.—Whitaker Iron Co. v. Preston Nat. Bank, 101 Mich. 146.

§ 61. Instructions.

On requirements and tendencies of proofs, see post § 62.
Applicability of instructions to the issues and proofs, see post § 63.
General law of instructions, see Instructions.
Necessity for and sufficiency of requests, see Instructions, III; Saving Questions.
Propriety of judge's remarks in ruling on instructions and motions, see Trial, II.
Instructions or denial of requests as harmless error, see Harmless Error.

¶ 516. It is the duty of the court, in leaving the question of fraud or fraudulent representations to the jury, to explain to them what they can consider in determining it, and to point out what false or fraudulent representations are, and what constitutes such fraud as authorizes relief.—Klein v. Bayer, 81 Mich. 233.

¶ 517. In leaving to the jury the question of fraud in the settlement of a lawsuit, the court should explain to them what they can consider in determining the question, and what would constitute such fraud as would authorize a rescission; also what diligence is required of the party defrauded in making investigation and in complaining of the fraud when discovered.—Lewless v. Detroit, G. H. & M. R. Co., 65 Mich. 292.

¶ 518. In an action for false representations, where the making of the representations necessarily involves the fact that they were made with knowledge of their falsity, the jury should be charged that, if they were found to have been made, the intent to deceive was proved and plaintiff should recover.—Hudnut v. Gardner, 59 Mich. 341.

¶ 519. The materiality of representations upon which a party claims to have relied in purchasing property is a question of fact for the jury, and it is error to instruct them to find whether the representations were deemed by the party to be essential.—Davis v. Davis, 97 Mich. 419.

¶ 520. Where in a suit brought to recover the purchase price of milk cans sold to defendants for creamery purposes, with the right to use them in certain designated territory, defendants claim that they purchased the cans in reliance upon the representations of the plaintiffs that they had a perfect title, and in the belief that defendants would have the exclusive right to the territory, and seek to recoup damages on account of the alleged failure of the title of plaintiffs to the territory, it would not be error for the court to instruct the jury that the representations as to title, if made, were material, and hence the instruction that the jury shall determine whether the representations were deemed by defendants to be material cannot prejudice the plaintiffs' rights.—Davis v. Davis, 100 Mich. 162.

¶ 521. Defining fraud, in a charge, "as a false statement or statements made for the purpose of inducing another to part with money or other valuable things, which statements are calculated to influence the person to whom they are made, and which do actually deceive the person to whom they are made, and thereby induce him to part with money or other valuable things" is sufficient as informing the jury that the statements must be material.—McDonald v. Smith, 139 Mich. 211.

¶ 522. Reversal will not be granted for a technical failure of the court to instruct the jury that fraudulent statements must always relate to facts where the definition given was substantially correct.—McDonald v. Smith, 139 Mich. 211.

¶ 523. In an action on a promissory note where defendant sets up fraud as a defense, it is not error to refuse to instruct that if defendant at the time he signed the note, "believed" he had been defrauded, he waived the fraud, where the court properly charged that if defendant "knew" at the time that he had been defrauded, plaintiff should recover.—Smith v. McDonald, 139 Mich. 225.

¶ 524. In an action of assumpsit for money obtained by fraud and deceit through the sale of mining stock, it is error to charge that if both plaintiff and defendant acted honestly yet where one of the two, neither of whom acted dishonestly, must suffer, he shall suffer who by his own act had obtained the confidence and caused the injury to the other; there being danger that a jury may misapply so broad a proposition.—Krause v. Cook, 144 Mich. 365.

¶ 525. The defense to a suit on a written contract for putting up lightning rods was

that the defendant's signature was obtained by fraud. Evidence was admitted of a conversation between the parties in which defendant consented to plaintiff taking the job at an agreed price; it was also shown that plaintiff afterwards presented to defendant for his signature a paper which defendant, who could not read very well, did not read at all, but which he understood from plaintiff was a recommendation of the job, and, as plaintiff professed to be in a hurry, only a little of it relating to its being satisfactory was read to defendant. The jury was instructed that the question of fraud depends on the circumstances of each case, and they must determine whether they were such as to mislead this defendant into signing the paper when he would not have done it if he had known the facts. Held, that there was no error in the charge.—Hobbs v. Solts, 37 Mich. 357.

¶ 526. A request to charge that, if the defendant, sued for fraud in exchanging lands in Arkansas to which he had no title for lands in Michigan belonging to plaintiff, requested plaintiff to go to Arkansas and look at the lands and satisfy himself as to their value there would be no fraud, was properly refused; where the circumstances of the misrepresentations of the value of the Arkansas lands were such that an invitation to plaintiff to look at them might have been designed to allay suspicion. It was sufficiently favorable to defendant to let the matter go to the jury.—Woolenslagle v. Runals, 76 Mich. 545.

¶ 527. In an action upon a fraudulent sale of mortgages, where the value of the land had been represented to be three or four times the value of the loans, it was not error to charge that if the land was not worth three or four times the amount paid, plaintiff had the right to rescind the entire transaction; as if the land was worth materially less than represented, it materially affected the value of the security and entitled plaintiff to rescind.—Simonds v. Cash, 136 Mich. 558.

¶ 528. An instruction in an action for obtaining credit by means of a false financial statement, held to properly submit the issues to the jury.—Krolik v. Lang, 187 Mich. 286.

¶ 529. In an action by contract purchasers of farm land, after rescission of the contract, to recover damages for fraudulent representations by defendant and his agent as to the productivity of the soil, an instruction that if the jury found that the defendant made false statements as to the quality of the property to the plaintiffs and that they were ignorant of the quality of the property under the circumstances indicated and trusted that such statements were to be relied upon, and that plaintiffs had no opportunity to examine the soil, the defendant was guilty of fraud and plaintiffs could recover, held to be correct.—Houder v. Reynolds, 195 Mich. 256.

¶ 530. In an action by the purchaser of city lots against the vendor for fraudulently representing that the improvements were all in and paid for, an instruction that where fraud is used as a basis of an action the fraud should be established by clear proof before a verdict is returned against one charged with such fraud and that if the proof satisfied the jury that plaintiff was defrauded as alleged in the declaration plaintiff was entitled to recover, but if they were not, defendant was entitled to a verdict, held to be as favorable to defendant as he was entitled to have.—State Security & Realty Co. v. Badger, 200 Mich. 104.

¶ 531. In a suit by plaintiff vendee of land to recover damages for false representations made by defendant vendor, the defendant introduced evidence that plaintiff was advised by his own attorney and others not to purchase the land. Held, the court properly refused to instruct as requested by defendant that as a matter of law plaintiff did not exercise due diligence and could not therefore recover, since the question of plaintiff's diligence was one of fact for the jury.—Yanelli v. Littlejohn, 172 Mich. 91.

¶ 532. Plaintiff, a member of an association formed for the purpose of buying a stallion, sued defendant for damages for fraud and deceit in making representations about the horse and in pretending himself to be a bona fide member of the association when in fact he was secretly representing the owner as selling agent. In his charge the court did not cover the questions whether defendant in fact made the representations charged or whether they were true, but assumed that they were made and were false. He did point out, however, the defendant's liability if a secret agreement existed between defendant and the vendor, though failing to instruct that one material false representation, if made and relied on, would justify a verdict for plaintiff. Held, the instructions were sufficiently favorable to plaintiff despite the omissions mentioned.—Wilson v. Bray, 171 Mich. 685.

¶ 533. Where plaintiff bought a horse from defendant when he knew it was sick, and defendant, who withheld nothing he was asked and acted in good faith, stated that it had a cold, in an action to recover back the purchase price, it is not error to charge that plaintiff, to recover, must show false statements upon which he relied, and if he acted solely on his own judgment, knowing that the horse was sick, it cannot be said that he was deceived by representations made.—Wineberg v. Porter, 176 Mich. 120.

¶ 534. It is not error to refuse to instruct that there is no evidence of collusion between the defendant and the agent where in an ac-

tion for the purchase price of a team of horses it is shown that the defendant's agent had been an employee of the plaintiff, that the unsound condition of the horses was known to both the complainant and the agent and the testimony of the agent and the defendant were in direct conflict as to the agent's authority.—Schofield v. Conley, 126 Mich. 712.

¶ 535. It is competent to leave to the jury the question whether a chattel mortgage was obtained under promises which the persons conducting the negotiations had a well-defined intention not to perform to the injury of the defendant.—Crowley v. Langdon, 127 Mich. 51.

¶ 536. In an action against a wife upon a note signed by her for a debt of her husband, where plaintiff claimed that the note was given to prevent the taking of proceedings by plaintiff to set aside a conveyance of realty by the husband to the wife in fraud of plaintiff and other creditors, and defendant claimed that the only consideration was the past due debt of her husband and that she signed the note after being importuned to do so and upon being promised by plaintiff that he would never make her any trouble, a charge which taken as a whole fairly stated the respective claims of the parties, but which placed upon plaintiff the burden of proving all of the elements of his case, was not open to objection by him.—Whelpley v. Stoughton, 119 Mich. 314.

§ 62. ——Upon requirements or tendency of proof.

General rules as to instructions on weight, sufficiency and requisites of proof, see Instructions, V.

¶ 537. Where one who had sold certain property and taken a mortgage on land in payment tendered it back and brought replevin for the property, claiming that the giver had falsely represented it to be a first mortgage and good, it was held error to charge that the mere proof of the existence of a prior mortgage describing the same land, and proof of the sheriff's deed of foreclosure, without any showing that the prior mortgagor ever had any connection with the real title, made a prima facie case that there was a prior incumbrance upon the land, and threw upon the defendant the burden of proving that it did not affect the title. The burden of proof, on the contrary, was upon the plaintiff throughout to show that it did affect the title.—Bristol v. Braidwood, 28 Mich. 191.

¶ 538. In an action for fraudulent representations the court, having been asked to charge that fraud should not be presumed under slight circumstances, and that everything should be so clear and convincing as to leave no rational doubt, repeated the request, adding, "the rule is that fraud must be clearly proven, not by lightly inferring it." Held prejudicial, as conveying the impression that the language of the request repeated in the charge was adopted by the court.—Sweeney v. Devens, 72 Mich. 301.

¶ 539. It is error for the court to instruct the jury that proof of fraud should be of such a character as to be inconsistent with any other view than that the accused party is guilty of the fraud charged; nor is such error cured by a further instruction to "deal with that question precisely as with any other question of fact, viewing it reasonably, weighing it and acting upon it upon the same testimony, and using the same reason in arriving at results, as upon any other branch of the case."—Morley v. Liverpool & London & Globe Ins. Co., 85 Mich. 210.

¶ 540. In a suit against indorsers whose defense was false representations made by plaintiff's president as to the solvency of the maker of the indorsed notes, where it appeared that the maker had good credit and was conducting an apparently prosperous business, that an unimpeached statement of its condition after the representations showed a large excess of assets over liabilities, and that during the same year the plaintiff bank and its president lent it money without security, it was error to charge that it was undisputed that the representations, if made, were untrue.—Alpena Nat. Bank v. Greenbaum, 80 Mich. 1.

¶ 541. It is error to charge that fraud may be proved by circumstances "but they must not be slight, and the inference can only be drawn from strong presumptive circumstances, which must amount to clear proof."—Ferris v. McQueen, 94 Mich. 367.

¶ 542. An instruction in a civil action that, where fraud is sought to be proved by circumstantial evidence, "all of the circumstances must point to the one thing claimed, and admit of no other reasonable explanation," is erroneous, in that it requires such fraud to be established beyond a reasonable doubt.—Knop v. National Ins. Co., 107 Mich. 323.

¶ 543. It appeared that the corporation which fraudulently bought goods had been in the habit of paying two of its directors $500 a year each as compensation for indorsing and guaranteeing its notes given to the defendant bank, which claimed to be a bona fide purchaser, and to other banks. Held, that it was proper to modify a request for an instruction that this fact should not be taken as evidence of bad faith in the purchase, by adding that the jury had a right to consider it with all the other evidence in determining whether or not the debt was fraudulently contracted with the intent not to pay for the goods.—Whitaker Iron Co. v. Preston Nat. Bank, 101 Mich. 146.

¶ 544. In replevin of goods claimed to have been fraudulently obtained, it was error

to make a letter from defendant corporation stating its expectation as to doing business and promising to accept 30-day drafts, the basis of an instruction that if at the time of the making of the contract the buyers asserted themselves to be solvent, and were in fact insolvent, the intention not to pay will be presumed.—Skinner v. Michigan Hoop Co., 119 Mich. 467.

¶ 545. In an action for the fraudulent conversion of corporate stock, a request to charge that the circumstances must be such as to amount to clear proof and that the circumstances from which a presumption of fraud arises must be irresistible before the party can be held liable in fraud, was properly refused as requiring too great a degree of proof.—McNaughton v. Smith, 136 Mich. 368.

¶ 546. In an action for damages for fraud based on misrepresentations and on promises not performed, an instruction that the jury might consider the promise and its nonperformance as evidence is not equivalent to saying that the breach of the promise, standing alone, was evidence of fraud.—McDonald v. Smith, 139 Mich. 211.

¶ 547. It is error to charge that fraud must be proved by "clear" and satisfactory evidence.—Walsh v. Taitt, 142 Mich. 127.

§ 63. ——Applicability to issues and proofs.

General rules as to application of the instructions to the issues and evidence in the case, see Instructions, IV.

¶ 548. It was error for the court, in an action based upon alleged misrepresentations, in instructing the jury, to advance the theory of possible mistake or misunderstanding between the parties, where under the testimony of the plaintiff there was no room for a mistake, and the testimony of the defendant did not tend to prove that a mistake had been made.—Hudnut v. Gardner, 59 Mich. 341.

¶ 549. Where a jury is authorized to pass upon alleged false representations made to induce the execution of a contract, an instruction based upon a part of such representations as shown by the testimony is properly refused.—Busch v. Wilcox, 82 Mich. 315, affirmed on rehearing 82 Mich. 336.

¶ 550. Where, in replevin for goods sold on credit, the testimony tends to show that the defendant firm had, up to the time of the purchase, paid all of its obligations at maturity; that its assets were equal to, if not in excess of, its liabilities; and that it was expected that one of the partners, who had just been taken into the firm, would contribute an amount in cash equal to one-third of the capital,—plaintiff sellers are not entitled to an instruction that a condition of absolute insolvency of the buyer existed.—Ross v. Miner, 101 Mich. 1.

¶ 551. Where plaintiff bought a horse knowing that it was sick, and the seller, who withheld nothing he was asked and acted in good faith, told plaintiff that it had a cold, in an action to recover back the purchase price, it is proper to refuse to charge that as the horse was afflicted with an incurable disease, the purchase was void and plaintiff is entitled to recover.—Wineberg v. Porter, 176 Mich. 120.

¶ 552. In an action to recover for the value of a new line of goods which defendant claimed were on consignment and were bought without authority and which plaintiff claimed were sold unconditionally to a clerk having authority to purchase, and that the act of the agent was ratified by the principal, held that the question of fraud in procuring the purchase was properly withdrawn from the jury.—Acorn Refining Co. v. Knowlson, 188 Mich. 123.

¶ 553. An instruction in an action where a defendant pleaded fraud in the sale of land, stating that he would not be allowed to recover unless he relied solely on the plaintiff's representations, sufficiently confined the defendant to the issues raised, there being some evidence of fraud outside of that claimed by the pleadings.—Morman v. Harrington, 118 Mich. 623.

¶ 554. Defendants in an action for deceit in the sale of mining stock, were not entitled to an instruction that the mining company in question had full and exclusive title to the property for the purpose of mining, where their own testimony showed that at the time of plaintiff's purchase, the company had but a two-thirds interest in the mining rights.—Hasse v. Freud, 119 Mich. 358.

II. FRAUD AND UNDUE INFLUENCE IMPLIED FROM RELATIONSHIP, CONDITIONS OR NATURE OF TRANSACTION.

§ 64. In general; elements and nature.

Effect and operation of the fraud on rights of the parties, see post III, A.

Undue influence by one party on other to bring about action, see post §§ 65, 66.

Dealings violative of or obnoxious to relations of confidence and trust, see post §§ 67, 68.

Abuse of official functions or process of law, see post § 69.

Unconscionable and overreaching bargains, see post § 70.

Taking advantage of necessity, ignorance or fear, see post §§ 71, 72.

Frauds on third persons, see post § 73.

Falsification or clouding of titles, see post § 74.

Unfair competition or trade practices, see post § 75.

Subsequent fraud or imposition, see post § 77.

Fraud recognizable in equity, see ante ¶ 2.

Suggestions and silence or equivocation and half-truth as actual fraud, see ante §§ 19, 20.
Silence in circumstances amounting to tacit representation of facts, see ante § 19.
Contractual and testamentary incapacity, see Insane Persons, I; Incompetents; Wills, II; Infants, I, III, IV; Husband and Wife, IV (disability of coverture).
Unfairness in will as affecting its validity, see Wills, I.
Fraudulent or preferential assignments for creditors, see Assignments for Creditors §§ 9-16.
Fraud in obtaining signatures to instruments without knowledge, consciousness or volition of parties, see Execution of Instruments §§ 13, 14.
Withholding evidence from arbitrators as fraud, see Arbitration ¶ 89.
Mistake on one side and fraud on other, see also Mistake.

¶ 555. That which has the effect of fraud on people who are practically helpless is subject to the same consequences as if it were deliberate and actual fraud.—Cripe v. Towsley, 73 Mich. 395.

¶ 556. A transaction that, as carried out, results in a woman's being fraudulently deprived of her dower rights in land, implies a fraudulent intent by those participating in it.—Bear v. Stahl, 61 Mich. 203.

§ 65. Undue influence.

Persuasion to fulfil duty or promise, see post § 66.
Effect of time for reflection and advice to dispel influence, see post § 76.
Cure or waiver of fraud by subsequently making voluntary transfer, see post § 87.
Burden of proof and presumptions of fact, see ante § 30.
Admissibility of evidence of relations of the parties, see ante § 40.
Weight and sufficiency of evidence, see ante § 48.
Undue influence in obtaining will or testamentary provision, see Wills, III.
Undue influence affecting gifts, see Gifts, IV.
Influence exerted by duress, see Duress.

¶ 557. In determining the question of undue influence allowance must be made for the right of every true owner, when not hindered by personal incapacity or particular regulations, to dispose of his own property according to his own free choice, whether it be guided by friendship, benevolence, gratitude or relationship.—Wallace v. Harris, 32 Mich. 380.

¶ 558. To establish undue influence there must be threats, misrepresentation, undue flattery, fraud or physical or moral coercion sufficient to overpower volition, destroy free agency and impel the party upon whom it is practiced to act against his inclination and will; motive, opportunity or even ability to control, in the absence of affirmative evidence that it was exercised, is not sufficient.—Nelson v. Wiggins, 172 Mich. 191.

¶ 559. Confidence in and respect for and the desire to please another, or the influence of long association, affection or gratitude, are neither coercion nor undue influence.—Nelson v. Wiggins, 172 Mich. 191.

¶ 560. If a person by reason of having "the blues" is considered unfit to attend to his business, and passively surrenders it to the control of others, his condition justifies equitable investigation into the justice of any bargain which those who have charge of his affairs may have made with him.—Jacox v. Jacox, 40 Mich. 473.

¶ 561. A decree setting aside a deed for undue influence, will be sustained where it appeared that the conveyance was made by a man of advanced age after persistent and unreasonable solicitation by the grantees, the consideration being an undertaking by grantees to support the grantor.—Olk v. Shugars, 137 Mich. 114.

¶ 562. A conveyance by a woman about seventy-four years old made about a week after her husband's death, transferring all of her real estate to a person not a relative in consideration of her being supported, will be set aside where the evidence shows that there was no separate agreement as to support, and where the husband of the grantee was not obligated to care for the complainant, who was so overcome by grief that she could not understand the transaction.—Thomas v. Crawford, 118 Mich. 253.

§ 66. ——Persuasion or request to fulfil promise or duty.

¶ 563. A sane man's oral promise to a woman to deed her a farm if she will marry him justifies the woman, after the marriage, in inducing him to redeem the promise, provided she does not resort to fraud or pressure which he cannot resist; the facts present no case of undue influence.—Manke v. Manke, 75 Mich. 435.

¶ 564. Influence obtained by arguments addressed to one's understanding, or by mere appeal to his convictions of right doing, does not constitute undue influence in a legal sense. So held with reference to a deed executed by a mother to her daughter.—Hammond v. Welton, 106 Mich. 244.

§ 67. Dealings in confidential or fiduciary relations.

See also ante ¶ 560.
Confidence invited and abused, see post § 68.
Burden of proof of fairness and good faith, see ante § 30.
Inferences of fact and presumptions from relationship, see ante §§ 30, 48, 49.
Sufficiency of evidence, see ante § 48.

Sufficiency of evidence of the relationship, see ante § 49.
Silence or concealment as actual fraud on one reposing confidence or trust, see also ante §§ 19, 20.
Procuring signature of instrument without reading, see ante § 11.
Agent buying from or selling to principal, see Agency § 92.
Dealings by attorney with client as fraud, see also Attorneys § 31.
Liability of attorney to client for fraud, see Attorneys § 59.
Fraud on copartners, costockholders, joint adventurers, and partnership associates, see Corporations, VI, XXIV; Partnership, V; Joint Adventures; Joint Stock Companies.
Overvaluation or secret profiting by promoters as fraud on corporation or subscribers, see Corporations §§ 38, 39.
Scrutiny of contracts between corporations with common directors, see Corporations § 114.
Requirement of good faith from corporate directors, see Corporations §§ 113, 168.
Presumptions and burden as to fairness of bargain by officer with his corporation, see Corporations § 175.
Fraud in corporate relations by stockholding majority, see Corporations, XXIV, D.
Liability of bank officials for fraud on stockholders or buyers, see Banking § 64.
Relation of building association officers to borrower as element in fraud, see also Building Associations § 14.
Purchase by representative at his own sale of estate lands, see Estates of Decedents §§ 271-274.
Dealings by trustees and guardians with trust estate, see Trusts, VIII; Guardianship, VI.
Between parent and child, see Parent and Child, IV.
Between husband and wife, see Husband and Wife, II, D.
Fraudulent alienation of homesteads, see Homesteads, VI.

¶ 565. Parties in fiduciary relationship may, if both are of lawful age and sound mind, make amicable settlements of their accounts. Settlements of fiduciary matters, though scrutinized more closely than others, are not void.—Hooper v. Hooper, 26 Mich. 435.

¶ 566. Those standing in a confidential relation to a person of feeble intellect are under a clear legal and moral duty, if not to call to his attention all the considerations and details which bear upon the propriety of the transaction, at least to avoid any effort to prevent such considerations from occurring to or having their due weight upon his mind.—Seeley v. Price, 14 Mich. 541.

¶ 567. One occupying a confidential and fiduciary relation to another is held to the utmost fairness and honesty in dealing with the party to whom he stands in that relation.—Pikes Peak Co. v. Pfuntner, 158 Mich. 412.

¶ 568. Equity will not usually allow one to profit by any instrument or conveyance which he has extorted by exciting false alarms or by threats of legal consequences, when there is such a relation of confidence as gives him a special power over the grantor. This principle was applied where one was persuaded by the grantee to make a fraudulent conveyance to avoid a liability that did not, in fact, exist.—Barnes v. Brown, 32 Mich. 146.

¶ 569. Intentional concealment between persons in confidential relations is fraud.—Robbins v. Barron, 33 Mich. 124.

¶ 570. A mortgage given by a woman of feeble intellect to a person in a confidential relation as a security for a debt of her son was set aside as presumptively fraudulent on the ground that the mortgagor did not fully understand what she was doing.—Wartemberg v. Spiegel, 31 Mich. 400.

¶ 571. The sole devisee under a will executed a trust deed at the solicitation of a priest without knowing that the priest had information from an attorney that a paper accompanying the will and expressing a desire that the property be used in trust by the priest for a school, was invalid because not attested as a will. It was on the day of the testator's funeral, and the attorney drew the trust deed without advising the devisee that the accompanying paper was void as a will. The priest was the confessor of testator and devisee. Held, that the deed was invalid for undue influence.—Finegan v. Theisen, 92 Mich. 173.

¶ 572. A deed procured by a brother from his sister of her property, reserving merely a life estate to herself, was set aside on the ground of undue influence, where it was made after a separation of grantor from her husband and in order to cut him off from any interest in it, where he did not show that she understood its terms and it appeared that she thought the deed was only an instrument to protect her against the husband, and where it was made on the brother's suggestion and he was her confidential adviser and alone had influence with her.—Smith v. Cuddy, 96 Mich. 562.

¶ 573. Complainant, seventy years old, had been a servant in the Frisbee family for many years, and had been left a legacy of $2,000 by one Amy E. Frisbee. Defendants, a nephew and niece, were asked by her to invest the same. A contract was drawn up which stated that complainant had great confidence in the honesty of the defendants, and, being old and infirm, wished them to invest the money for her. The contract then went on to assign complainant's interest in

the will to defendants, and provided that defendants should pay complainant ten dollars a month, and should settle all doctor's bills standing against her, and, in case of a prolonged sickness, should meet her necessary expenses. There were no such doctor bills. On a bill by complainant to set aside this contract and assignment, held, the defendants were in a confidential relation with complainant and had overreached her in not informing her of the purport of the instrument. Bill allowed.—Witham v. Walsh, 156 Mich. 582.

¶ 574. An agreement between a Michigan administrator and another party to buy for their joint benefit, and at a price agreed on, the claim of the estate to lands in Illinois, is not necessarily fraudulent and void on the ground that it places the administrator in a relation where his self-interest conflicts with his duty, for he has no control over Illinois lands.—Sheldon v. Rice, 30 Mich. 296.

§ 68. Abuse of invited confidence.

¶ 575. Where A. intentionally and fraudulently leads B., whose estate is incumbered, to believe that he (A) will furnish means to enable him (B.) to redeem, whereby B. abstains from seeking aid elsewhere, while A. buys up the incumbrance himself and cuts off the redemption, A. is guilty of fraud and may not enforce his advantage. The remedy in such case is by way of redemption.—Wilson v. Eggleston, 27 Mich. 257.

§ 69. Abuse of official capacity or process of law.

When conduct of county drain commissioner amounts to such fraud as to entitle to equitable relief from assessments, see Drains § 103.

Letting public contract to highest bidder, see Public Contracts II, IV.

Public policy as to contracts affected by interest adverse to public, see Contracts, IV, B.

¶ 576. Mortgage given to avoid levy threatened by sheriff under justice's attachment to enforce claim he has undertaken to collect for part of proceeds is invalid for fraud, he having concealed his interest.—Van Dusen v. King, 106 Mich. 133.

¶ 577. It is fraud in law, whatever the intent, for a guardian to petition in a ward's name, without the latter's authority, for leave to sell lands for the payment of claims against the estate of the ward's ancestor; and to include an invalid claim; and to represent the sale, when made, as a cash sale, when no cash is paid.—Wohlscheid v. Bergrath, 46 Mich. 46.

¶ 578. Where a mortgagor's widow bid off the premises on foreclosure sale and paid with funds belonging to decedent's estate, taking the deed in her own name simply to vest the title in her as against an infant son and heir at law of the deceased, the proceeding was in legal effect fraudulent and void, whatever her intentions as to her son's right, and could not prejudice his right to the land. The payment made on foreclosure operated as if voluntarily paid from the same fund without foreclosure, and the foreclosure gave her no rights as against the son.—Terry v. Tuttle, 24 Mich. 206.

¶ 579. Where, without the knowledge and consent of the father or friends of the child, one procures from a probate court the appointment of guardian to a minor, for the purpose of secretly obtaining title for his own benefit to the minor's lands, such probate proceedings, not being on behalf of or in the interest of the child, are a fraud upon such minor's rights.—Tong v. Marvin, 26 Mich. 35.

¶ 580. The fact that at a sale by a guardian whose appointment was fraudulently procured by the vendee for the purpose of procuring title the lands brought their full value does not affect the ward's equitable right to have the sale set aside.—Tong v. Marvin, 26 Mich. 35.

¶ 581. The sole consideration of a chattel mortgage was a present loan of money, the payment of which and effective delivery of the mortgage were to be simultaneous acts. One of the mortgagees took the mortgage across the street to examine the record, and, finding it clear, left the mortgage to be recorded, and returned to his office, where the mortgagor was waiting, and while a check was being drawn in payment of the loan the mortgagees were garnished at the suit of a creditor of the mortgagor, such action being taken by collusion between such mortgagees and the creditor. Held, that the practice resorted to did not create contract relations between the parties, and that equity has jurisdiction to cancel the mortgage.—Cogswell v. Mitts, 90 Mich. 353.

§ 70. Overreaching and unconscionable bargains.

Taking advantage of necessity to exact onerous contracts or sales, see post § 71.

Taking advantage of fear to obtain bargain, see post § 72.

Want of substantial consideration, see also ante ¶ 398.

Burden of proof of fairness, see ante § 30.

Burden of proof of good faith where one party is of unequal mentality, see ante § 30, ¶ 225.

Lesser quality of proof required in cases of overreaching bargains, see ante § 46.

Validity of assignments of expectancies and distributive shares, see Assignments, I, III; Estates of Decedents, X, A, XIII, A.

¶ 582. Where one, intending to commit a fraud, practices such acts as are designed to overreach the person he deals with, and the latter, without fault or unreasonable neglect, is actually defrauded, redress will not be denied to the party injured.—Swimm v. Bush, 23 Mich. 99.

¶ 583. The law scrutinizes closely the dealings between borrowers and lenders, and refuses to enforce them where they are unjust and unconscionable.—Dorrill v. Eaton, 35 Mich. 302.

¶ 584. Where no creditors are complaining it is lawful to include in an agreement, whereby A. undertakes to indorse certain paper for B., a provision that should B. refuse to secure, on demand, the amount for which A. should become liable, such amount shall be treated as a sum due and payable from B. to A.—May v. Newman, 95 Mich. 501.

¶ 585. "Mere inadequacy of consideration, not accompanied by other elements of bad faith, is not a sufficient ground for rescission of a contract or for refusing specific performance of it, unless so excessive as to furnish satisfactory evidence of fraud."—Van Norsdall v. Smith, 141 Mich. 355.

¶ 586. Wherever a contract is entered into with an aged and infirm person to be enforced after death, to the disinheriting of lawful heirs, such contract should be regarded with grave suspicion and close scrutiny, and should be permitted to stand only when established by the strongest evidence.—Noban v. Shoup, 171 Mich. 191.

§ 71. Taking advantage of necessity.

Taking advantage of fear, see post § 72.

¶ 587. An alleged compromise may be contested by showing that the party relying on it had acted unfairly or oppressively, and asserted claims which he knew to be wrongful, for the purpose of getting the terms which have been nominally assented to.—Headley v. Hackley, 50 Mich. 43; and see Converse v. Blumrich, 14 Mich. 109; Sanford v. Huxford, 32 Mich. 313.

¶ 588. There is no legal fraud or duress in ordinary cases in refusing to pay or settle a just claim without litigation; and one who, in consequence of such refusal, submits to an unjust compromise, must abide by it.—Mayhew v. Phœnix Ins. Co., 23 Mich. 105.

¶ 589. A settlement voluntarily sought and made without concealment of facts or misrepresentations, and where there has been an honest difference of opinion as to the subject-matter compromised, the seller refusing to accept lumber shipped by plaintiffs claiming it was not of the quality contracted for, furnishes no ground for an action for fraud even though the sellers alleged that they accepted the money offered in compromise, because of business necessities.—Johnson v. Fisher & Wilson Co., 80 Mich. 431.

¶ 590. A sale of land for an exorbitant price may be set aside in equity even though the purchaser bought with full knowledge of its value, if the vendor had compelled the sale by taking advantage of the possession of a fictitious claim against him.—Storrs v. Scougale, 48 Mich. 387.

¶ 591. A dissolute spendthrift of twenty-five gave a mortgage on all the real estate to which he was entitled as his father's heir to a man who knew all about the circumstances, to secure the payment of an alleged loan of $5,000 for which he gave his note, and which was made up of the following items: $1,000 in cash; a former due-bill for $47, given up; $199 interest credited on a previous mortgage; $110.35 paid as premium upon an insurance policy assigned to the mortgagee; $566.75 withheld by the latter to pay annual premiums thereafter as they should fall due; and $3,200 as the purchase price of one hundred and sixty acres of land worth but little more than $1,000, and which the mortgagee required him to buy as a condition of lending him any money, though he had no use for the land and knew nothing about its value. Held, an unconscionable transaction which a court of chancery could not sustain, and that the mortgagor should have leave to reconvey the land, though his mortgage should be held good for the other amounts, provided the insurance policy were reassigned to him.—Butler v. Duncan, 47 Mich. 94.

¶ 592. A mortgage given for a large sum by a dissolute spendthrift upon real estate to which he was entitled as heir, to secure payment of small sums of money and the purchase price of lands of little value for which the mortgagor had no use, but which the mortgagee required him to buy as a condition of lending him any money, was held not sustainable in equity though colorably fair.—Butler v. Duncan, 47 Mich. 94.

§ 72. Taking advantage of ignorance or fear.

See also ante ¶ 398.

Infancy or ignorance of hearer as factor in fraud by expression of opinion, see also ante ¶¶ 125, 127.

Nature and elements of duress and effect of duress, see Duress.

¶ 593. Where a conveyance of land was obtained in exchange for property of about half its value, by taking advantage of the grantor's ignorance and unfounded apprehensions that if he did not convey it would be taken on a judgment, the transaction was held to be unconscionable and the conveyance was set aside.—Wooley v. Drew, 49 Mich. 290.

¶ 594. A deed made by a woman 65 years of age, without the advice of counsel, executed in the office of the grantee's attorney, in purported settlement of a groundless claim of the grantee based on a contract with the grantor's husband, since deceased, by which the husband agreed to convey land held by him and his wife jointly, will be set aside

at the instance of the grantor.—Hubert v. Traeder, 139 Mich. 69.

¶ 595. Where the simplicity and credulity of parties are taken advantage of by the shrewdness, overreaching, and misrepresentation of the other party, and they are thereby induced to do, unwittingly, something the effect of which they do not intend, foresee or comprehend, and which, if permitted to culminate, would be shocking to equity and good conscience, a court of equity may interpose.—Sorge v. Dickie, 199 Mich. 251.

§ 73. Fraud on third persons.

Fraud on person by inducing third person to break contract or duty, see ante § 24.
Making financial statement to be relied on by general public as fraud, see ante § 23.
Persons entitled to complain of fraud, see post § 78.
Intended fraud on third persons as ground for denying relief, see post § 85.
Frauds on creditors and subsequent takers, see Fraudulent Conveyances; Notice and Record of Title, I.
In issuance of corporate stock for property or services at false valuation, see Corporations §§ 266-268, 322.
In assignments for creditors, see Assignments for Creditors §§ 9-16.
Fraud on the public or public officers as rendering contract obnoxious to public policy, see Contracts § 49 et seq.
Public policy as to agreements contemplating or tending towards fraud on third persons, see Contracts §§ 70-72.

§ 74. Falsification or clouding of titles.

See also ante ¶¶ 423, 568.
Procuring third person to impair or becloud title, see ante § 24.
Lien or transfer obtained through advantage taken of fear, see also ante § 72.
Procuring guardianship to defraud ward, see ante ¶¶ 579, 580.
Causing sale of land to pay debts or causing foreclosure to cut off rights of infant heirs, see ante ¶¶ 577, 578.
Inducement to abstain from redeeming by abusing invited confidence, see ante ¶ 575.
Slander of title, see Libel, II, D.
Implication of trust or constructive trust in favor of person defrauded, see Trusts, IV.

¶ 596. Where the owner of land, on being applied to for its purchase, disclaims title and represents another to be the owner, with whom he encourages dealing, also giving it to be understood that the latter will convey, a court of equity will treat such conduct as a fraud on the purchaser.—Beatty v. Sweeney, 26 Mich. 217.

¶ 597. A quitclaim deed from a person of the same name as the actual owner of the land has the legal effect of a constructive fraud, and if dishonest resembles forgery.—Blodgett v. Dwight, 38 Mich. 596.

§ 75. Unfair competition or trade practices.

Relief by injunction, see Injunctions, II, F.
Trade conspiracies, see Conspiracy.
Unlawful combinations and monopolies, see Combinations.
Unfair competition promotive of monopoly, see Combinations.
Misuse or infringement of trade-marks and trade names, see Trade-Marks, III.

¶ 598. Harassing salesmen and customers of rival business concerns amounts to unfair competition.—Attorney General ex rel. James v. National Cash Register Co., 182 Mich. 99.

¶ 599. Bringing and prosecuting a multitude of infringement suits against business rivals for the purpose of harassing, annoying, intimidating, and to financially embarrass them in order to drive them from business, amounts to unfair competition.—Attorney General ex rel. James v. National Cash Register Co., 182 Mich. 99.

¶ 600. Both members of the firm are liable in an action on the case for malicious destruction by defendants of plaintiff's business, where defendants conducted under a new firm name the business which they had appropriated and where all the circulars and correspondence injurious to plaintiff were sent out in the name of such firm, plaintiff's orders being canceled and new orders substituted and filled by the firm.—Oliver v. Perkins, 92 Mich. 304.

§ 76. Bargain after time for reflection or advice.

Presumption where deed is made after long negotiations, see ante ¶ 233.
Evidence of previously declared purpose as rebutting undue influence, see also ante ¶ 394.
Subsequent conditions affecting validity of dealings, see post § 77.
Making voluntary transfer after unduly influenced one as extinguishment of the fraud, see post § 87.

¶ 601. The fact that some delay occurred between the conclusion of negotiations for a settlement procured by undue influence, and the execution and delivery of securities thereunder, does not affect the rights of the parties where it appears that the effect of such influence was not meanwhile removed.—Briggs v. Withey, 24 Mich. 136.

§ 77. Fraud or imposition after the bargain.

¶ 602. Subsequent dissensions between the parties to a contract, arising out of new facts, cannot affect the validity or fairness of the original bargain.—Van Donge v. Van Donge, 23 Mich. 321.

III. REMEDIES AND RIGHTS OF INJURED PERSONS.

A. RIGHTS IN GENERAL AND ACTIONS FOR DAMAGES.

Measure and elements of damages, pleading, evidence and instructions on damages, see Damages.
Action for fraud committed outside of state, see also Conflict of Laws § 33.
Civil arrest of fraudulent debtors, see Civil Arrest.

§ 78. Right to complain and succession in right.

Optional right of contract party to complain of fraud, see post § 79.
Nonassignability of causes of action or defenses, see post §§ 80, 81.
Right of heirs to annul conveyance, see also post ¶ 691.
Denial of relief to wrongdoers, see post § 85.
Variance by proof of statement made to third person, see post § 93.
Survivability of action, see Abatement § 16.
Fraud as ground for relief of party to illegal contract, see Contracts § 90.
Disability of defendant corporation to urge inequitable conduct of plaintiff towards controlling corporation, see also Estoppel ¶ 69.
Right of third person to complain of illegality in contract, see Contracts § 92.
Who may complain of frauds on creditors or have relief from same, see Fraudulent Conveyances, II, III.
Protection of bona fide holders and takers, see Notice and Record of Title, I; Negotiable Instruments, XIII; Sales, XI.
Right to have reformation, see Reformation, I.
Right to rescind for fraud or undue influence, see Rescission, I, III.

¶ 603. Only the party injured by a fraud can complain of it.—Crane v. Reeder, 25 Mich. 303; Spoon v. Gilbert, 44 Mich. 535; Richardson v. Welch, 47 Mich. 309; Lewis v. Rice, 61 Mich. 97; Waterbury v. Andrews, 67 Mich. 281.

¶ 604. An adverse claimant cannot raise a question of fraud in a conveyance to which he is a stranger.—Crane v. Reeder, 25 Mich. 303.

¶ 605. A complaint of fraud is of no significance if made by a stranger to the suit in which it is involved, and if the party acquiesces in it without any attempt to set aside the fraudulent arrangement.—Hall Lumber Co. v. Gustin, 54 Mich. 624.

¶ 606. A complainant owner of land has no right of action against a defendant for the latter's fraudulent misrepresentations in the sale of said land to complainant's predecessor in title.—Fuller v. Bilz, 161 Mich. 589.

¶ 607. Complaint of false representations can be made only by the one to whom they were made with intent that he should act on them, or by one to whom the person making them intended and expected that they would be communicated.—De Grasse v. Verona Min. Co., 185 Mich. 514.

¶ 608. A husband persuaded his wife to execute a note and mortgage for the purchase of a patent-right sold to him, and falsely represented by the vendor to be valuable, by repeating to her such representation. Held, that she could complain of the vendor's fraud, being the party most injured by it.—Waterbury v. Andrews, 67 Mich. 281.

§ 79. Effect of fraud.

Right to sue for fraud without restoring things received, see post § 84.
Validity of contracts in general and legality of object, see Contracts, IV.
As ground to avoid accord, see Accord and Satisfaction § 14.
Impeachment of acknowledgments for fraud, see Acknowledgments § 20.
As ground for vacation of award, see Arbitration § 17.
Affecting validity of execution sales, see Executions § 92.
Fraud vitiating foreclosure sale of chattel mortgage, see Chattel Mortgages § 137.
Fraud or undue influence as vitiating release of dower, see also Dower ¶ 48.
As affecting right to be discharged in bankruptcy or as affecting particular debt, see Bankruptcy §§ 10-13.
Effect of fraud or undue influence on delivery of instruments, see Execution of Instruments § 40.
Effect of fraud on right to recover for improvements, in ejectment, see Ejectment ¶ 259.
Annulment of marriage for fraud, see Marriage.
Fraud as ground for relief (but not what constitutes such fraud), see Rescission, II; Reformation, I; Injunctions, II.
Fraud as ground for relief against judgments or decrees, see Judgments, VI.
Implication and establishment of trust ex maleficio, see Trusts, IV, XII.
Alternative remedies and recourses of defrauded party to contract or sale, see Contracts, VII, D; Sales, VIII, IX.
Treating false warranties as fraud, see Sales, VI.
Taking goods from possessor by fraud as a conversion, see Conversion § 3.
Fraud in commingling property or changing its form as affecting rights, see Accession and Confusion.
Inefficacy of fraudulent service to gain jurisdiction, see Courts § 61.
Effect of collusion to destroy conclusiveness of adjudication as res adjudicata, see also Former Adjudication ¶ 30.
Fraudulent concealment of cause of action as suspending limitations, see Limitations, III, A.

¶ 609. Fraud vitiates all contracts at the election of the party injured.—Carroll v. Rice, W. 373.

¶ 610. Fraud does not render a contract void, but only voidable at the option of the defrauded party.—Galloway v. Holmes, 1 D. 330; Jewett v. Petit, 4 Mich. 508.

¶ 611. A fraudulent settlement is voidable only, and that by a party thereto and not by a stranger.—Hall Lumber Co. v. Gustin, 54 Mich. 624.

¶ 612. A conveyance obtained by fraudulent representation is not void, but voidable. The person defrauded may, if he chooses, still treat the contract as valid.—Dunks v. Fuller, 32 Mich. 242.

¶ 613. A. agreed to sell pine lands to B., a deed to be made when the purchase price was paid, no timber to be cut in the meantime without A.'s permission. B. assigned the contract to C., to whom A. gave permission to cut and remove the timber upon his guaranteeing the payment of the purchase price. Held, that false and fraudulent representations made to C. by B.'s agent (in which A. did not participate), as to the quantity of timber on the lands, would not release C. from his guaranty.—Mason Lumber Co. v. Buchtel, 101 U. S. 638, 25 L. ed. 1072.

¶ 614. In an action for the value of goods sold, evidence that they were sold to defraud the vendor's wife is irrelevant; the sale might be fraudulent as to her but good as between the parties, and the question of fraud must be left to be raised by the party defrauded, who waives it by taking no proceedings to obtain redress.—Cool v. Snover, 38 Mich. 562.

¶ 615. A bill of sale, not absolutely void, but voidable at the will of the party defrauded, because procured by fraud, is binding upon the party committing such fraud until repudiated by the party defrauded; and if ratified by such party, upon becoming advised of the facts constituting the fraud, becomes as binding upon both parties as if it had not been tainted with fraud.—Rall v. Cook, 77 Mich. 681.

¶ 616. Where plaintiff claims in ejectment under a deed from the board of escheats, evidence is not admissible on behalf of defendants, claiming adversely thereto, to show that the state was defrauded in the board's sale and conveyance to plaintiff.—Crane v. Reeder, 25 Mich. 303.

¶ 617. A settlement of conflicting claims procured by material misstatement of facts cannot be sustained.—Converse v. Blumrich, 14 Mich. 109.

§ 80. Assignability of action or defense.

Assignability or transferability of property or right to which the fraud is incident, see post § 81.

Illegality in tax consequent on fraud as affecting assignability of right to recover taxes paid under protest, see Taxes, VIII.

¶ 618. An assignee of a contract cannot insist upon fraud used in the making of the contract on the party under whom he claims. —Carroll v. Potter, W. 355.

¶ 619. An action for fraud is personal, and not assignable.—Cochran Timber Co. v. Fisher, 190 Mich. 478.

¶ 620. A cause of action for deceit cannot be sued by the assignee thereof.—Dayton v. Fargo, 45 Mich. 153.

¶ 621. A right of action for fraud is not assignable.—Dickinson v. Seaver, 44 Mich. 624; Lewis v. Rice, 61 Mich. 97.

¶ 622. The right to complain of a fraud is not assignable.—Smith v. Thompson, 94 Mich. 381; Davis v. McCamman, 168 Mich. 587.

¶ 623. A right of action in trespass on the case for damages from deceit is not assignable.—Roger Williams Ins. Co. v. Carrington, 43 Mich. 252.

¶ 624. Equity will not enforce an assignee's claim of a right to sue for a fraud to his assignor if that is the sole ground of the action.—Dayton v. Fargo, 45 Mich. 153.

¶ 625. The right to sue in equity to have a conveyance or other act set aside for fraud is not assignable.—Morris v. Morris, 5 Mich. 171; Brush v. Sweet, 38 Mich. 574.

¶ 626. Equity will not permit one to buy up stale claims and then seek to establish frauds committed against his assignors.—Dickinson v. Seaver, 44 Mich. 624.

¶ 627. An administrator's statutory right to institute proceedings to avoid his intestate's fraudulent dispositions of property is not assignable.—Morris v. Morris, 5 Mich. 171.

¶ 628. An action on the case for fraudulent representations whereby the owner of corporate stock was induced to part with it in order that defendants might control and wreck the corporation cannot be maintained by such owner for the use of his assignee, the right to complain for fraud not being assignable.—Smith v. Thompson, 94 Mich. 381.

¶ 629. The right of action by assumpsit for damages for fraud and deceit may be assigned; since it is survivable under Pub. Acts 1897, No. 195, § 2 (Comp. L. 1897, § 10422). —Hicks v. Steel, 142 Mich. 292.

§ 81. ——Fraud incident to property assigned or devolved.

Incidental right of action to reclaim goods as passing with transfer of business, see Assignments § 18, ¶ 76.

Effect of transfer of chattels as carrying right of action for fraud respecting them, see also Chattel Mortgages ¶ 325.

¶ 630. The rule that a right of action for fraud is not assignable does not apply to an assignment of something that is tangible and deliverable, and that involves a right of property.—Sweet v. Converse, 88 Mich. 1.

¶ 631. The rule that the right to complain of a fraud is not assignable does not apply where the right to enforce a claim that is in itself assignable depends upon showing fraud incidentally.—Howd v. Breckenridge, 97 Mich. 65; Hicks v. Steel, 126 Mich. 408.

¶ 632. The rule that a right to sue in equity for a fraud is not assignable does not apply to prevent an assignee of railroad bonds from enjoining the collection of past-due coupons which had been detached before the bonds were sold to his assignor.—Chicago & G. T. R. Co. v. Turner, 79 Mich. 133.

¶ 633. The holder of a quitclaim deed who procures such deed subsequent to the alleged fraudulent transfer by warranty deed of the property to another, cannot maintain an action to set aside such warranty deed upon the ground of fraud practiced upon the grantor, as such action for fraud is personal, and not assignable.—Cochran Timber Co. v. Fisher, 190 Mich. 478.

¶ 634. A foreclosure purchaser under a mortgage given by one who has no title to the lands described is not entitled to relief against a third person on the ground that the latter has obtained title from the actual owner fraudulently, notwithstanding the owner may have intended, without consideration, to put the title where it would have enured to the purchaser's benefit, but was deceived into giving it to the third person.—Waterman v. Seeley, 28 Mich. 77.

§ 82. Waiver, laches and estoppel.

Propriety of reliance on other's statements and diligence to know truth or to follow up notice, see ante §§ 9-12.
Estoppel to impute negligence to other in placing reliance as invited, see also ante § 9, also ante ¶ 49.
Option of defrauded party to avoid or affirm contract affected with fraud, see ante § 79.
Rescission of contract or reliance on it as waiver of the fraud, see post § 83.
Merger of the fraud in subsequent agreement, see post § 86.
Instructions on laches, diligence and waiver or affirmance, see ante § 61.
General law of laches, see Equity, IV.
Negotiations for settlement as excusing delay in suing, see Equity § 52.
Limitations of actions for fraud, including effect of concealment to extend period of limitation, see Limitations.
Election of one remedy on contract or sale as waiver of inconsistent remedy for fraud, see Contracts, VII, D; Sales, VI, VIII, IX.
Statutory assumpsit for money obtained by fraud as election barring action of deceit, see Election and Waiver ¶ 22.
Laches and waiver as affecting right to rescind or reform, see Rescission, III; Reformation, I.
Receipt of dividend as estoppel to sue for fraud, see Assignments for Creditors ¶ 183.
Waiver or estoppel of minority stockholders to complain of frauds by majority, see Corporations § 309.
Estoppel of fraudulent debtor to claim fraud as against bona fide purchaser, see Fraudulent Conveyances ¶ 516.
Laches in relying on partnership settlements, see Partnership, VII.

¶ 635. A defrauded party does not owe to the party who defrauds him an obligation to use diligence to discover the fraud.—Lewis v. Jacobs, 153 Mich. 664; Yanelli v. Littlejohn, 172 Mich. 91.

¶ 636. A defense of fraud set up in an action on a promissory note is available though defendant by the exercise of ordinary care and prudence might have known of the fraud at the time he signed the note.—Smith v. McDonald, 139 Mich. 225.

¶ 637. In the case of one aggrieved by a fraudulent purchase of personalty from him, and a conversion, delay alone, while it may have some bearing on the fraud as affecting his conduct, cannot bar an action at law by him against the offending person, unless coming within the statute of limitations.—Dayton v. Monroe, 47 Mich. 193.

¶ 638. Equity will lend its aid to detect and redress a fraud notwithstanding the lapse of time.—McLean v. Barton, H. 279.

¶ 639. Parties who have been defrauded must use diligence to obtain redress within some reasonable time after discovering it.—McLean v. Barton, H. 279; Craig v. Bradley, 26 Mich. 353; Bumpus v. Bumpus, 59 Mich. 95; Merrill v. Wilson, 66 Mich. 232.

¶ 640. One who seeks redress for a fraud should not wait until all those who were cognizant of the transaction have died, and until no one is left to deny or explain the allegations, unless satisfactory excuse can be given for the delay.—McLean v. Barton, H. 279.

¶ 641. Delay in suing for fraud does not of itself necessarily bar the suit, if it does not come within the rule or analogy of the statute of limitations.—McClintock v. Laing, 22 Mich. 212; Dayton v. Monroe, 47 Mich. 193.

¶ 642. One who consents to the absolute conveyance of a legal title for trust purposes,

or who finds that another has fraudulently obtained his legal title and put it in the market, cannot, after silently seeing third parties acquire rights thereon, ask for purely equitable relief. His rights are cut off by laches.—Ford v. Loomis, 33 Mich. 121.

¶ 643. A delay of eight or nine years after gaining knowledge of facts upon which complainant bases a charge of fraud in transactions between husband and wife is too great to justify relief.—Buhl v. Peck, 70 Mich. 44.

¶ 644. To obtain relief from a contract on the ground of fraud the defrauded party must have made proper complaint when the facts came to his notice.—Brooks v. Culver, 168 Mich. 436.

¶ 645. Unexcused delay bars complaint of fraud.—Beal v. Congdon, 75 Mich. 77; Dailey v. King, 79 Mich. 568.

¶ 646. Where a party admits, by writings covering a period of three years, the existence of a contract, and acts upon it, he cannot, after the lapse of five years and four months from its execution, be permitted to raise the question of fraud in its procurement.—Sullivan v. Ross' Estate, 98 Mich. 570.

¶ 647. One who purchases stock in a corporation and after holding several years unites with other shareholders to dispose of the property is held to have waived the defense of fraudulent representations in the sale of the stock to him and cannot set it up as a defense in an action on a note indorsed by him to the sellers of the stock and several times renewed by the maker and the defendant.—Morgan v. Nowlin, 126 Mich. 105.

¶ 648. Where under a contract providing that in certain contingencies the partnership agreed to be entered into might be terminated and that in such case the money paid was to be returned, plaintiff gave notice of his desire to terminate and agreed to take a lesser sum in settlement of the controversy, whereupon part of the amount so agreed on was paid, and the jury found specially that the balance was never tendered, plaintiff acted with sufficient promptness in instituting suit, and had not waived the fraud in the original transaction.—Rambo v. Patterson, 133 Mich. 655.

¶ 649. An option procured by complainant, a go-between after the defendants had discovered he had no original option, but it was in the name of a third party, is not confirmed by the fact that the defendants after they had learned the true facts wrote the owner notifying him that his terms of sale were accepted and directing the deeds be made in the name of one of the defendants alone, nor does it amount to a waiver or forgiveness of the deceit practiced by the complainant so as to entitle him to maintain his bill to establish an interest in the lands purchased.—Barrett v. Miller, 144 Mich. 454.

¶ 650. A purchaser of farm land must be deemed to have waived whatever rights he had to complain of fraud in making false representations as to the number of fruit trees on the farm and the freedom of the fruit trees from disease, where he is aware of the untruthfulness of the representations before the expiration of the first year of his occupancy of the farm and pays the first instalment note, and makes only a mild protest at the time of such payment, places a second mortgage on the premises running to third persons, and also makes permanent improvements on the premises, and takes no steps towards the rescission of the purchase until suit is brought to foreclose the mortgage, and it appears that he would have paid the second note if it had not been for lack of funds.—Draft v. Hesselsweet, 194 Mich. 604.

¶ 651. In an action for the purchase price of a set of books, defendant not having returned the books is not precluded by laches from interposing the defense of fraud where he notified plaintiff that he would not accept the books and offered to return them.—J. B. Millett Co. v. Andrews, 175 Mich. 350.

¶ 652. Where a farmer residing on exchanged property knows or has had ample opportunity to know that the representations of the seller were untrue when he signed a receipt which purported to be a full and complete compromise settlement of all differences on the land and other trades and makes no complaint or protest, he must be deemed to have affirmed the trade and waived his right to complain of fraud.—Parkyn v. Ford, 194 Mich. 184.

¶ 653. A dealer, claiming to have been defrauded by the substitution of the term "great gross" for "gross" in an order for goods, is not concluded by an acknowledgment that the order as described in a letter of the seller is correct; where such acknowledgment is explained by the fact that it was in printing contained in the seller's letter, the written portion of which was designed to transmit a proposed advertisement, and the buyer testified that he supposed he was merely approving the advertisement and gave no attention to anything further in the letter.—Shrimpton & Sons v. Rosenbaum, 106 Mich. 68.

¶ 654. Damages may lie for an injury done by deceitfully introducing an unprofessional assistant into a sick room when its full extent is discovered, though long after the act from which it springs, and though assent was given supposing him to be an assisting physician.—De May v. Roberts, 46 Mich. 160.

¶ 655. Plaintiff was induced by fraud in July, 1908, to exchange a stock of goods for

land. He discovered the fraud in March, 1909, and began an action at law for damages in April, 1909. Held, he was not barred by laches from maintaining his suit.—Wegner v. Herkimer, 167 Mich. 587.

¶ 656. The trustee in bankruptcy of a firm of private bankers cannot recover from a bank in which by fraud of one of the partners a deposit was made to the credit of a corporation other than the depositary bank; where such bank was not a party to the fraud, though the deposit consisted of a draft payable to it and drawn by the private bank and the draft was originally intended to transfer a reserve fund previously kept in another bank, and though the payee passed the draft to the credit of the corporation on the partner's suggestion and his personal indorsement without the indorsement of the drawer, where also the partner immediately notified his copartners that he had caused the deposit to be made as a loan to the corporation on its notes and such action was ratified by them by renewing the notes from time to time without objecting to the diversion of the draft from its intended use.—Knisely v. People's Savings Bank of Saginaw, 199 Mich. 501.

§ 83. ——Effect of rescission of or reliance on contract.

General law of election of rights and remedies, see Election and Waiver.

Alternative rights and remedies under contract, see Contracts, VII, D; Sales, VIII, IX; Vendors and Purchasers, XII.

Right of tenant to recover for fraud notwithstanding waiver of right to surrender, see Landlord and Tenant, V, C.

Conditions on which rescission is allowed, effect of retention of benefits or reliance on contract, see Rescission, III.

¶ 657. A party cannot repudiate a contract as fraudulent and at the same time claim the benefit he has received from it.—Merrill v. Wilson, 66 Mich. 232; Pangborn v. Continental Ins. Co., 67 Mich. 683.

¶ 658. Recovery of distinct damage caused by deceit or fraud is not precluded by plaintiff's having, on the ground of the fraud, repudiated his contract or repossessed himself of property obtained from him.—Warren v. Cole, 15 Mich. 265; Lenox v. Fuller, 39 Mich. 268.

¶ 659. By filing with the assignee of an insolvent debtor a claim for goods sold, and by receiving a dividend thereon, the creditor does not waive his right of action against the debtor for procuring such goods by fraudulent representations, where the claim states that the goods were so procured and that an action has been brought therefor.—Hinchman v. Weeks, 85 Mich. 535.

¶ 660. Where the plaintiff had entered into an optional contract with the defendants, officers of a corporation, for the sale of property which they claimed they had authority to sell, the fact that on the expiration of the option he made a formal demand for the execution of the contract, knowing the inability of the defendants to comply and at the same time demanded the return of the money paid by him does not estop him from asserting a fraud practiced upon him in entering into the contract, and there was no waiver of his rights where it does not appear that the defendants were in any way misled.—Gubbins v. Ashley, 146 Mich. 453.

§ 84. Conditions and prerequisites to action.

Right to sue without waiting until damage is complete, see ante ¶ 103.

Restoration of benefits received as condition to rescission, see Rescission, III.

¶ 661. Rescission of contract or tender of reconveyance is unnecessary before vendee taking by quitclaim sues vendor for false representations as to title.—Stockham v. Cheney, 62 Mich. 10.

¶ 662. Rescission or restitution of property acquired as the result of the owner's misrepresentation or fraud, is not a condition precedent to the maintenance against him of an action for fraud and deceit.—Merlau v. Kalamazoo Circuit Judge, 180 Mich. 393.

¶ 663. A defrauded party need not give up the personal unsecured obligation of those who defraud him, as a condition of suit for the fraud.—Dayton v. Monroe, 47 Mich. 193.

¶ 664. The note of a third person, which may be needed as evidence in a suit to recover money alleged to have been fraudulently obtained of the plaintiff, need not be surrendered to the defendants before bringing suit.—Stubly v. Beachboard, 68 Mich. 401.

¶ 665. The doctrine that one cannot set aside part of a transaction as a fraud and insist on the benefit of the residue does not apply to transactions to which a party has not assented, who cannot, while insisting on his rights, place everything in statu quo.—Tong v. Marvin, 26 Mich. 35.

¶ 666. One who has been defrauded into giving notes need not, in order to entitle him to redress, contest the notes before payment in the hands of a presumably innocent holder, upon information received from the party who defrauded him or upon any other information short of a certainty, concerning the holder's good faith.—Knight v. Linzey, 80 Mich. 396.

¶ 667. Where the plaintiff, by an exchange of land, acquired property the defendant had agreed to sell to a third person, and took an assignment of the contract as part of the consideration for the exchange, it is not necessary, in order to permit the plaintiff

to maintain an action against the defendant for fraud and deceit practiced upon him, that the vendee under such contract should be in default.—Merlau v. Kalamazoo Circuit Judge, 180 Mich. 393.

§ 85. Denial of relief or hearing to fraudulent party.

Maxim of equity as to wrongdoers, see Equity § 5.

Denial of relief on invalid contract to parties in equal wrong, see Contracts § 89 et seq.

That one cannot urge his own fraud in avoidance of his accord, see Accord and Satisfaction ¶ 83.

¶ 668. Courts will not extricate parties from a situation in which, by their own acts, they have placed themselves in perpetrating or attempting to perpetrate a fraud on others.—In re Teller's Estate, 200 Mich. 181.

¶ 669. Courts will not aid parties in taking advantage of their own wrongs, but will rather leave them where, by their wrongful and fraudulent conduct, they have placed themselves.—Eldredge v. Sherman, 79 Mich. 484.

¶ 670. A chattel mortgagor may show, as a defense in a suit to recover the property by an agent of the mortgagee under the mortgage, that he was induced to execute the mortgage by the false representations of the mortgagee that the property was in danger of seizure by the mortgagor's creditors, though he could not be relieved from his own fraudulent mortgage.—Eldredge v. Sherman, 79 Mich. 484.

¶ 671. If A., acting on B.'s representations and suggestions, gives his notes in a transaction which he knows to be fraudulent and into which he goes solely to make money, and afterwards has to pay the notes to an innocent holder, he has no redress against B., even though he may not have been equally guilty with the latter.—Knight v. Linzey, 80 Mich. 396.

¶ 672. If a contract executed for the purpose of defrauding a third party is executory, it will not be enforced; and if executed, it will not be relieved against. If it has been performed in part, the law gives it effect in so far as executed, and holds it void in so far as it remains unexecuted.—Williams v. Clink, 90 Mich. 297.

¶ 673. One who by defendant's fraudulent representations has been induced to give his note for the purchase at an exorbitant price of Bohemian oats, the only consideration being an agreement and bond of a fictitious corporation to sell a larger quantity of oats for plaintiff at the same price on commission, is not in pari delicto so as to preclude recovery for the fraud.—Hess v. Culver, 77 Mich. 598.

¶ 674. Where plaintiff sued defendants for obtaining by fraudulent representations his note for oats bought by him of them at $15 per bushel in return for an agreement and bond of a fictitious corporation to sell twice as many bushels for plaintiff at the same price on commission, it was error to direct judgment for defendants on the theory that the parties were in pari delicto in an illegal transaction.—Pearl v. Walter, 80 Mich. 317.

¶ 675. Although equity ordinarily refuses relief to one implicated in a fraud, yet a deed by two adult sons to their father, who exerted a strong influence over them and with whom they had always lived, may be set aside at their instance; where it is shown that he procured them to execute it on the false representation that it was wanted only to exhibit to another child to induce her to convey her share in the same property, and that it would be destroyed when it had served such purpose; and where the father, grantee, caused it to be recorded, the land being a homestead which had stood in the name of the mother then dead.—Peek v. Peek, 101 Mich. 304.

¶ 676. One who has given a mortgage to be sold for a fraudulent purpose cannot set up the fraud as a defense to the mortgage in the hands of a bona fide purchaser.—Bloomer v. Henderson, 8 Mich. 395.

¶ 677. Where the holder of a note knowing its fraudulent character sells it by fraudulently representing that it is good and collectible, he cannot, when sued by the vendee for the amount paid, take advantage of his own fraud by claiming that the note is good in plaintiff's hands as an innocent purchaser, nor can he object to the admission of evidence showing that the note is invalid.—Evans v. Stuhrberg, 78 Mich. 145.

¶ 678. Where a son and his mother, for the purpose of working a fraud upon the son's wife, entered into a scheme whereby mutual receipts for all demands were executed for the purpose of furnishing fraudulent evidence of a settlement between them, the son is estopped to assert fraud for the purpose of defeating the receipt.—In re Teller's Estate, 200 Mich. 181.

¶ 679. While there are some illegal transactions where a party, though acting unfairly, may defend on grounds of public policy, yet falsehood and deception are not, usually, as between the parties using them, any answer to each other's claims.—Crawford v. Osmun, 70 Mich. 561.

§ 86. Merger or extinction of fraud by subsequent agreement.

See also ante ¶ 649.

Affirmance or waiver of the fraud, see ante §§ 82, 83.

Splitting cause by settling part and suing on remainder, see post ¶ 725.

Accord and satisfaction of claim for fraud, see Accord and Satisfaction.
Subsequent compromises as waiver of fraud by defrauded party, see Election and Waiver ¶ 53.
Merger of prior parol negotiations in written agreement, see Contracts, VIII; Evidence, V.
Immateriality of fraud on assent to contract, where contract was rejected because of it and another contract was made, see Contracts ¶ 168.
Alternative remedies and recourses of party to contract or sale affected by fraud, see Contracts, VII; Sales, VI-IX; Vendors and Purchasers, XII.

¶ 680. Representations made by a vendor at the time of a sale as to the quality of the article sold are merged in an express warranty; and an action of fraud cannot be based on such representations unless the vendor knew them to be false when made.—Horner v. Fellows, 1 D. 51.

¶ 681. Fraud in the making of the original contract cannot be complained of by one of the parties, who after full knowledge of it and in the course of negotiations entered into a further contract to rectify the wrong by changing the property and adding thereto, in respect to which the misrepresentations had been made.—Western Electric Co. v. Hart, 103 Mich. 477.

¶ 682. Where an electric light and power company, fully knowing the falsity of representations that were made by the agent of an electric company as an inducement to the persons who effected its organization, enters into a contract with such company for the enlargement of its plant and a change in its system of lighting, and where its president, with full knowledge of the facts, guarantees the notes given in payment for materials furnished under said contract, the fraud is waived, and the president when sued upon such guaranty cannot show such representations as a defense.—Western Electric Co. v. Hart, 103 Mich. 477.

¶ 683. Where a machine is sold under an express warranty the purchaser cannot show that the contract was vitiated by the fraudulent representations of the seller as to the capacity of the machine.—Linderman Machine Co. v. Shaw-Walker Co., 187 Mich. 28.

¶ 684. Where a machine was sold under a written warranty, the purchaser cannot show in an action for the purchase price, that the contract of sale was vitiated by the fraudulent representations of the seller as to the amount of money that the use of the machine would save.—Linderman Machine Co. v. Shaw-Walker Co., 187 Mich. 28.

¶ 685. Representations in the nature of warranties antecedent to a contract of sale cannot be urged as fraud in cases where the contract is in writing and contains specific warranties.—Bates Tractor Co. v. Gregory, 199 Mich. 8.

¶ 686. Fraudulent representations bearing on the value of corporate plant and the authority of the persons making them to dispose of the corporate property are not merged in a contract giving an option on consideration to purchase the property of the corporation. The making of such contract is the injury done by the fraud.—Gubbins v. Ashley, 146 Mich. 453.

¶ 687. It is immaterial, as affecting the right of the purchaser of a rooming house business to recover for fraudulent representations by the owner, his broker and the latter's clerk making the sale as to the character of the tenants and the rent receipts, whether the purchaser did, or did not disaffirm the contract.—Williamson v. Hannan, 200 Mich. 658.

¶ 688. A purchase-money mortgagee who had been in possession of the land for five years before mortgaging cannot reduce the amount of his mortgage by showing that he was defrauded in the purchase by false representations concerning the land and the crops thereon.—Wright v. Peet, 36 Mich. 213.

¶ 689. One who after exchanging a farm for a stock of merchandise, executes a deed in order to correct an error in the description contained in the original conveyance, with knowledge of the unauthorized insertion in the bill of sale of a clause binding him to save the seller harmless from liability on the covenants of the lease of the building where the stock was located, thereby ratifies the insertion of such clause.—Harlow v. Jaseph, 183 Mich. 500.

§ 87. ——Voluntary transfer after unduly influenced one.

¶ 690. No equitable interest exists in children of a grantor merely by reason of their relationship which will entitle them to attack his deed for undue influence, though it was practiced to obtain a deed under a void parol promise to hold the land in trust for the heirs of the grantor, and though in time by his death they became his heirs, but after he had parted with the legal title to the grantee by another unimpeachable deed.—Thompson v. Marley, 102 Mich. 476.

¶ 691. Where a daughter by means of fraud and undue influence procured from her father a deed of his lands upon the understanding that she should hold them in trust and after his death distribute them among his heirs at law according to the statute of descent, and where the daughter, not having recorded such deed, procured some time after execution thereof a second deed from her father of the same lands, which deed was not procured by fraud or connected with any trust, it was held that while no resulting trust arose in favor of the heirs at law, yet in view of the fact that the father was in

possession of the land when he executed the first deed and so continued until his death, and of the fact that said deed was procured by undue influence with the intent not to carry it into effect, the parol agreement made at the same time was such a fraud as vested in the father an equitable title to the lands; that he might have filed a bill at any time to set aside such deed; that if he had died with the lands in that situation his rights in the premises would have devolved upon his heirs or personal representatives; but that the second deed under the circumstances vested an absolute title in the grantee.—Thompson v. Marley, 102 Mich. 476.

§ 88. Form of action.

[Note. The rule, that one who has been defrauded in a contract or sale may at his option enforce the contract or sue for the deceit or sue on quantum meruit or quantum valebat or other common count in assumpsit or may await action by the other party and urge the fraud as a defense or matter of recoupment, or may resort to any other available means of redress, depends on the law of contract as much as on the nature of the various actions and remedies. It is therefore treated in Contracts, VII, D; Sales, VIII, IX; Vendors and Purchasers, XII.

The correlative rule, that one may waive a tort and sue in assumpsit, involves torts other than deceit and is treated in Assumpsit, I.]

Insufficiency of common counts in assumpsit, see post ¶ 704.

Joining, splitting and separateness of causes, see post § 92.

Remedies in equity, see post § 95.

Concurrent powers of law and equity to relieve, see post § 95.

Ground for attachment, see Attachment § 8.

Arrest of fraudulent debtors, see Civil Arrest, II; Constitutional Law § 193.

Capias in action for fraud, see Civil Arrest, I.

Practice and procedure in actions of trespass on the case and assumpsit, see Trespass; Assumpsit.

General law as to waiver of tort to sue in assumpsit, see Assumpsit, I.

Practice and procedure in trover, see Conversion.

Practice and procedure in ejectment for recovery of lands, see Ejectment.

Replevin for recovery of chattels, see Replevin.

Assumpsit for recovery of money passed or paid or for value of property, see Assumpsit; Implied Contracts; Contract, VII, D; Sales, VIII, IX.

Election and waiver of rights and remedies, see Election and Waiver.

Elective remedies and defenses under contract affected with fraud, see also Contracts § 275.

Case or assumpsit as remedy for failing to become cosigner after inducing plaintiff to sign on that understanding, see also Contracts ¶ 1119.

Right to sue in deceit for omitting terms fraudulently from contract, see also Contracts ¶ 1122.

What contract right may be enforced on waiving tort, see Assumpsit § 5.

Assumpsit against agent for deceit, see also Agency ¶ 485.

Recovery of price on renouncing subscription for corporate stock, see Corporations § 60.

Propriety of action on the case by stockholder against other stockholders conspiring to wreck corporation, see Corporations § 339.

Available and optional remedies of landlord and tenant against each other, see Landlord and Tenant, V, C.

Issues in forcible entry and summary proceedings of invalidity of title by reason of fraud, see Forcible Entry § 37.

Construction of declaration to ascertain nature of cause pleaded, see Pleading, II, IX.

Impropriety of trying question of fraud in procuring discontinuance on affidavits to vacate discontinuance, see Discontinuance ¶¶ 27, 28.

¶ 692. Where property is obtained by fraud or undue influence, an action for fraud will lie.—Powell v. Pennock, 181 Mich. 588.

¶ 693. An action for fraud and deceit as well as assumpsit will lie against an attorney for fraudulently inducing plaintiff to convey property to him for which she received no compensation, although there was a promise by him to pay or reconvey, he having conveyed to a stranger.—Trumbull v. January, 123 Mich. 66.

¶ 694. An assignee of a state bank which was the successor of a national bank may sue in assumpsit for damages sustained by his assignor in consequence of fraudulent representations of defendant as director of the national bank and of a violation of his duty as a director of said bank under Pub. Acts 1897, No. 195 (Comp. L. 1897, §§ 10421, 10422), providing that an action of assumpsit may be brought for injuries produced by fraudulent representations or conduct in place of an action for fraud or deceit, and that a promise shall be implied to pay all such damages.—Hicks v. Steel, 142 Mich. 292.

¶ 695. One not the owner of personalty who does not receive any portion of the purchase money, but who makes false and fraudulent representations concerning it to the purchaser, is not answerable to the latter for the consideration paid by him; where the action sounds in assumpsit on the fraud and not in tort.—Patterson v. Kasper, 182 Mich. 281.

¶ 696. Trover lies to recover the value of goods obtained from plaintiff by false representations recklessly made, without knowing of their truth or falsehood, for a fraudulent purpose.—Beebe v. Knapp, 28 Mich. 53.

¶ 697. Ejectment lies against a party who claims under papers and conveyances that show fraud on their face; the remedy can be administered in such case as well at law as in equity.—McKay v. Williams, 67 Mich. 547.

¶ 698. Deeds prima facie void on their face for fraud cannot sustain a defense in ejectment.—McKay v. Williams, 67 Mich. 547.

§ 89. Parties and joinder.

General law of parties, see Parties.
Joining counts and causes, see Pleading, II.
In reformation and rescission suits, see Reformation, III; Rescission, VI.
Joining tort feasant agent with corporation, see also Corporations § 187.

¶ 699. Parties who combine in a fraud can be sued jointly at law as well as in equity.—Bay City Bridge Co. v. Van Etten, 36 Mich. 210.

¶ 700. Defendant negotiated with plaintiffs Painter and Wilgus for the sale of land, and knew that said plaintiffs were acting together in considering the purchase of the land. Defendant later made false and fraudulent representations to Wilgus, knowing that he would communicate the same to Painter. In an action on the case for such fraud, held, Painter was properly joined with Wilgus as a party plaintiff.—Painter v. Lebanon Land Co., 164 Mich. 260.

§ 90. Pleading the fraud.

Detailing the representations, see also post § 93.
Issues made by the pleading and variances in proof, see post § 93.
Pleading in equity, see post § 96.
Sufficiency of chancery pleadings without averments of details or manner and means of fraud, see post § 96.
Pleading the defense, sufficiency of general issue, see post § 98.
Sufficiency of notice of defense or of special plea, see post § 98.
General law of pleading, see Pleading.
Amendments of pleadings, see Pleading, VI.
Pleading in justice's court, see Justices of the Peace, IV, D.
Pleading damages from deceit, see Damages § 254.
Necessity of alleging the fraud in trover for goods obtained by fraud, see Conversion § 23.
Sufficiency of averments in affidavit for capias, see Civil Arrest § 7.

¶ 701. A declaration for false pretenses must show (1) what they were; (2) that defendants made or authorized them; (3) that they were material; (4) that they were false and fraudulent and deceived plaintiff; (5) what defendants obtained by them. Nothing outside of this belongs to the issue, whatever force it may have as circumstantial evidence.—Parker v. Armstrong, 55 Mich. 176.

¶ 702. In a declaration for fraud consisting in false representations it should be alleged that they were believed by plaintiff to be true, and that so believing he relied on them and that they induced him to take action which resulted in damage to him.—Pforzheimer v. Selkirk, 71 Mich. 600.

¶ 703. The declaration in an action for fraud must definitely and issuably set forth the facts complained of and relied upon for recovery.—Pforzheimer v. Selkirk, 71 Mich. 600.

¶ 704. A special count is necessary in order to recover damages for fraud and deceit; there can be no recovery therefor under the common counts in assumpsit.—Burchy v. Carpenter, 181 Mich. 78.

¶ 705. One who seeks to recover damages for being falsely and fraudulently induced to part with his property while he was "mentally incapable of reasonably and properly managing and conducting his own affairs" must, in order to maintain an action, allege and prove, in the absence of fraudulent representations, that his mental incompetency was such as to avoid a deed.—Devereaux v. Hubbard, 117 Mich. 119.

¶ 706. The sole allegation that one defendant told plaintiff that the other defendant deemed certain land to be worth a stated sum where as it was in fact worth more, is insufficient to sustain a charge of fraudulent misrepresentation as to the value of the land.—Schmoltz v. Schmoltz, 116 Mich. 692.

¶ 707. When A. sues B. for fraudulently misrepresenting the value of a note made by C. but used by B. in paying A., a declaration in tort which does not describe the note nor sufficiently identify it, nor allege that the representations were not true when made or were untrue afterwards, is insufficient.—Stoflet v. Marker, 34 Mich. 313.

¶ 708. A declaration in a case for false warranty may be sustained without allegations that defendant "falsely and fraudulently warranted" and "falsely and fraudulently deceived" the plaintiff, if the substantial averments show the false warranty and the fraudulent sale, and deception of the purchaser.—Hopkins v. O'Neil, 46 Mich. 403.

¶ 709. In pleading fraud as a ground for trover by the seller against the buyer plaintiff need not count on any precise words.—Heineman v. Steiger, 54 Mich. 232.

¶ 710. In an action on the case to recover damages for the transfer of plaintiff's note to a bona fide purchaser without notice, a declaration which states that a bond given was a part of the contract on which the note

was given, and that defendant obtained no right to enforce the collection of the note until the conditions of the bond were performed does not state an averment of fact, but is the mere conclusion of the pleader, and is vulnerable on demurrer.—Leland v. Goodfellow, 84 Mich. 357.

¶ 711. A declaration alleging in effect that one of the defendants, claiming to be and acting as an agent, received money from plaintiff which was due his pretended principal for property sold to the plaintiff, and, upon paying it over to such principal, falsely represented that the property had not been paid for, and that he, defendant, owned it, and requested and thereby fraudulently procured a deed of such property to be made to his codefendant, and that all this was done falsely and with intent to wrong, cheat and defraud the plaintiff, and with full knowledge and connivance of all the defendants, is held sufficient to authorize the plaintiff to recover upon proof of the facts alleged.—Whitman v. Johnston, 35 Mich. 406.

¶ 712. In an action for fraudulent representations, a declaration charging a conspiracy of three defendants to defraud plaintiff in the sale of certain goods, and alleging that such goods belonged to a particular defendant and were delivered by him, and that he first called on plaintiff and stated that the other defendants were selling the goods for him, was sufficient to show that plaintiff relied upon representations made by the other two defendants as those of the first defendant.—Pearl v. Walter, 80 Mich. 317.

¶ 713. In an action for fraudulent representations as to his financial condition by which it is alleged defendant procured from plaintiffs merchandise on credit, a declaration alleging that defendant falsely and fraudulently represented his financial condition in making a report to a commercial agency, that plaintiff sold in reliance upon this report, and that such report was false, was sufficiently specific.—Hinchman v. Weeks, 85 Mich. 535.

¶ 714. A declaration in an action on the case to recover damages for the transfer of his note given for Bohemian oats to a bona fide purchaser without notice, whereby plaintiff was forced to pay the note, was held defective on demurrer for want of a sufficient averment of defendant's complicity with the false representations of another person in the transaction upon which the note was based.—Leland v. Goodfellow, 84 Mich. 357.

¶ 715. A declaration which alleges that defendant made certain representations of the width of a platted way or street to plaintiff as an inducement to him to purchase land of defendant, that plaintiff believed and relied upon such representations and purchased the land, that the representations were false, and that plaintiff was damaged thereby, sufficiently states a cause of action for deceit and does not sound upon a covenant in the deed, although it is alleged that a covenant was broken.—Merrill v. Newton, 109 Mich. 249.

¶ 716. Plaintiff's declaration alleged that he suffered a loss by fire; that defendant wholesalers and defendant fire insurance adjusters wrongfully intending to injure plaintiff and deprive him of his money, under the guise and pretense of befriending and assisting him and protecting his interest, and in collecting the moneys due on his insurance policies, induced plaintiff to place said policies with defendant adjusters to collect and receive the money thereon; that said defendant adjusters and wholesalers represented to plaintiff that the money when so collected by defendant adjusters would be promptly deposited in a certain bank to plaintiff's credit; that defendants acting in concert caused plaintiff to indorse and deliver to defendant adjusters drafts given by the insurance companies in payment of said policies; that they collected the money thereon, and wrongfully intending to deprive plaintiff of such money, neglected and refused to deposit same to plaintiff's account, whereby plaintiff suffered damage, etc. Held, in the absence of demurrer said declaration sufficiently stated a cause of action in trespass on the case for fraud.—Dillon v. Craig, 168 Mich. 216.

¶ 717. A declaration averring that the plaintiff was responsible for an undertaker's bill, that the attending physician secured a bill from the undertaker so that he might present it with his own bill for payment, that he presented a bill for more than the amount due the undertaker and obtained a check payable to the same, that he represented to the undertaker that the check included the physician's charges for professional services, and that he thus secured the amount above the true charges of the undertaker, with appropriate averments that all the representations of the defendant were false and fraudulent, that they were believed and relied on by the plaintiff and that as the result he was defrauded, states a good cause of action.—Blanksma v. King, 172 Mich. 666.

¶ 718. A count in a declaration charging defendant with purchasing produce with intent not to pay for the goods in pursuance of a general scheme to defraud sellers of their pay, held sufficient to support a judgment in tort against defendant.—Schofield v. Clarke, 179 Mich. 681.

¶ 719. A declaration charging a fraudulent scheme by one of defendants to obtain produce from plaintiffs with intent not to pay therefor, and conspiracy on the part of his codefendants, officers of a bank, to aid and assist him in the perpetration of the fraud, held if not good, to be at least amendable.—Schofield v. Clarke, 179 Mich. 681.

§ 91. ——Participation in or responsibility for fraud.

See also ante ¶¶ 711, 712, 714.

Coliability of agent with principal, see Agency §§ 52, 85.

¶ 720. One who complains that he was induced to buy goods by defendant's fraudulent statements cannot prove the acts and sayings of other persons as inducements, unless he avers a conspiracy and enumerates the false statements.—Jackson v. Collins, 39 Mich. 557.

¶ 721. It is not necessary to allege a partnership in order to bind, as joint tort-feasors, parties who join in, and knowingly assist in, the fraudulent disposition of goods fraudulently obtained.—Banner v. Schlessinger, 109 Mich. 262.

¶ 722. A declaration based on fraud, which although indicating that defendants took no part in making the contract which led to plaintiff's loss, did indicate that the fraudulent representations of defendants were made for the purpose of inducing such contract and did induce it, showed sufficient connection on the part of the defendants to make them liable.—First Nat. Bank of Ovid v. Steel, 136 Mich. 588.

¶ 723. A declaration in an action for fraud and deceit, which alleges that false representations were made to plaintiff and that he paid his money, is sufficient though the representations were made to, and the money was paid by his agent and the transaction was ratified by plaintiff.—Sudworth v. Morton, 137 Mich. 575.

§ 92. Joining and splitting causes.

Joining counts for different causes in one declaration, see Pleading, II.

¶ 724. Where fraudulent purchases are made on different occasions, each constitutes a distinct and separate act of fraud, for which the seller may maintain a separate action.—Reid, Murdoch & Co. v. Ferris, 112 Mich. 693.

¶ 725. A fraud cannot be separated into two causes of action, and one settled for and the other left open; it is and must be an entirety. And a demand for the fraudulent selling by defendants to the plaintiff of property not their own, which has been paid for partly in plaintiff's own money and partly with obligations of another, the transaction being a single one, cannot be split up, and the fraud settled so far as it applied to the cash purchase, and the controversy left open as to the residue.—Allison v. Connor, 36 Mich. 283.

§ 93. Issues and variance as to the fraud.

See also ante ¶ 248.

Necessary proofs to conform to issues, see post § 94.

Sufficiency of notice or special plea to form issues, see also post § 98.

Admissibility of prior and subsequent facts as bearing on the fraud alleged, see ante § 34.

Admissibility of other frauds as bearing on the fraud alleged, see ante § 33.

Evidence as to facts at times other than of pleaded deceit, see also Evidence § 94.

General law as to issues and variances, see Pleading, IX, X.

Manner of making and presenting issues before justice, see Justices of the Peace, IV, D.

Issues and variance as to person suffering damages, see also Damages § 286, ¶ 1067.

Variance as to fraud alleged as part of conspiracy, see Conspiracy § 5.

Direction of verdict for variance as to representation alleged, see also Directing Verdict ¶ 40.

¶ 726. Under a count for a false and fraudulent representation of the value of an article sold by defendant, plaintiff may prove false statements made by defendant at the time, as to the value of particular parts of the article, notwithstanding such statements are not detailed in the declaration.—Picard v. McCormick, 11 Mich. 68.

¶ 727. It was error to allow testimony tending to show that there were not as many trees on a farm as represented by the vendor, in an action to recover payments made upon a fruit farm under a contract, abandoned because of fraud in the sale, where the declaration does not state that there were not as many as were represented, nor does it state that reliance was placed upon such representation, though it alleges what the representation was.—Mestler v. Jeffries, 145 Mich. 598.

¶ 728. Under a declaration alleging that land sold to plaintiff was represented by defendant to be of a certain value, representations that it was of that value for any purpose, e. g., farming, may be shown.—Holcomb v. Noble, 69 Mich. 396.

¶ 729. A declaration in case charging defendant with having procured plaintiff to sell and deliver goods to him by making false representations as to his own credit is not supported by evidence that defendant, by making false representations of solvency and prompt payment, had obtained an extension of time on a debt already matured.—Jones v. Kemp, 49 Mich. 9.

¶ 730. In an action against the owner of pine lands by a contractor for cutting the pine, a declaration which alleges that defendant falsely represented the quantity and quality of the pine, and that plaintiff relied thereon, admits proof of whatever representations were made, whether expressly in words or by reference to writings.—Busch v. Wilcox, 82 Mich. 315, aff'd on rehearing 82 Mich. 336.

¶ 731. Plaintiff sued in assumpsit to recover on the ground of fraud money advanced to defendant for goods. Plaintiff's declaration alleged that defendant fraudulently represented that he intended to open a permanent branch at Des Moines, Iowa; that he represented himself to be the largest manufacturer of his line of goods; that the goods were of the highest standard; and that experience on plaintiff's part in selling same was unnecessary. Held, these allegations were broad enough to admit evidence of fraudulent representations.—Ward v. Cook, 158 Mich. 283.

¶ 732. Where a declaration for obtaining money on false pretenses is so amended as to describe the fraudulent representations differently, and add to them, as by differently stating localities and amounts of payments made by the plaintiffs, the variance is material.—Fish v. Barbour, 43 Mich. 19.

¶ 733. In an action brought by a purchaser for fraudulent representations by the vendor, proof that the consideration for the sale was paid for the goods and the good will of the business is fatally variant from a declaration which only states that it was for the goods.—Collins v. Jackson, 54 Mich. 186.

¶ 734. In an action for trespass on the case where the plaintiffs claimed that peppermint oil sold them represented to be good and genuine was in fact dementholized oil, they can recover if in fact the oil was dementholized and they had relied upon the representations that it was good and genuine, but if the oil was not dementholized then the verdict must be for the defendants, whether the oil was "weedy" or not.—Durfee v. Newkirk, 83 Mich. 522.

¶ 735. A declaration for false representations in inducing one to buy corporate stock averred that defendant was the owner of the stock purchased; that plaintiff purchased it from him, and paid therefor to him the sum of $500. It appeared from the evidence that the stock which plaintiff received was unissued stock of the corporation, in which defendant had no interest except as a stockholder, and that he never received personally any portion of the purchase money, but that the same was paid directly to the bookkeeper of the corporation. Held, that there was a fatal variance between the proofs and the averments of the declaration.—Hubbard v. Long, 105 Mich. 442.

¶ 736. A declaration which alleges that defendant was indebted in a certain sum for horses obtained from plaintiffs at his request, that he promised to pay that sum for them, and that he afterwards delivered in payment a note which plaintiffs were induced to accept by his false representations, whereby they were injured, does not sustain evidence that defendant agreed to sell certain horses for plaintiffs, and to return to the latter $60 in money if sold for cash, and the same amount in good, bankable paper if sold on time, that he afterwards delivered to plaintiffs the note described in the declaration, representing the same to have been received in payment for the horses, and to be good and bankable, and that it was not such paper as defendant well knew.—Bilsborrow v. Warner, 117 Mich. 506.

¶ 737. In an action for fraud, specific acts of misconduct, if relevant to the issue, may be shown though not averred in the declaration, since plaintiff is not required to plead his evidence.—McDonald v. Smith, 139 Mich. 211.

¶ 738. A declaration in an action for false representations made on the sale of certain corporate stock, which alleged that a fraudulent representation was made to plaintiff, is not supported by proof of a statement made in a letter written to a third person.—Fisher v. Radford, 153 Mich. 385.

¶ 739. There is no variance between the declaration in an action for deceit in the sale of mining stock, and the proof, where the declaration averred that plaintiff was induced by the defendant to purchase the stock, while the proof showed a purchase from another party, and where the declaration did not state of whom the stock was purchased and the testimony tended to show that the payments were made to the defendants or some of them.—Hasse v. Freud, 119 Mich. 358.

§ 94. Necessary proofs under the allegations.

Presumptions, burden of proof, and evidence of the fraud, see ante, I, B.

Weight and sufficiency of the evidence and rule requiring clear proof, see ante §§ 46-57.

Under declaration sounding alternatively in fraud and incompetency, see ante ¶ 705.

Instructions on requirements of proof, see ante § 62.

General rule that proof of substance of the issue or of one of several complete frauds suffices, see also Pleading, IX.

¶ 740. Where fraud is alleged in the declaration in an action for damages, the facts which are made the basis of the wrong should be proved as stated.—Collins v. Jackson, 54 Mich. 186.

¶ 741. The fact that a declaration for damages for misrepresenting the value of land sold to plaintiff charges fraudulent and deceitful purposes on defendant's part does not necessitate proof of such purposes.—Holcomb v. Noble, 69 Mich. 396.

¶ 742. In an action for deceit all the false representations imputed to a defendant need not be proved.—Pinch v. Hotaling, 142 Mich. 521.

¶ 743. In an action for damages by a vendee of land for fraudulent representations as to title, it is not necessary for plaintiff to prove all of the representations alleged in his declaration; and if any material fraudulent representations are charged which resulted in the injury complained of, he is entitled upon proof of same, to recover.—Wegner v. Herkimer, 167 Mich. 587.

¶ 744. In an action against a land agent to recover money paid on a land contract based upon alleged fraudulent representations as to the nature and value of the soil, a recovery may be had if any material fraudulent representation is charged which resulted in the injury complained of, and is proven, although the declaration charges other acts which are not proven.—Haener v. McKenzie, 188 Mich. 27.

B. REMEDIES IN EQUITY.

§ 95. In general.

Burden of proof and evidence of the fraud, see ante, I, B.

Rights of assignees to complain of or sue for fraud, see ante §§ 80, 81.

Survivability of causes of action, see Abatement § 17.

[Note. No attempt is made to treat here the practice and procedure in the various suits in equity which are available as proper forms of equitable relief. See specific topics, e. g., Accounting Suits; Creditors' Suits; Fraudulent Conveyances, V; Indemnity and Contribution, III; Injunctions; Quieting Title; Reformation; Rescission; Receivers; Specific Performance; Subrogation; Trusts, XII.]

General rules of equity practice, jurisdiction and pleading, see Equity.

Maxim of equity as to wrongdoers, see Equity § 5.

Equitable relief to person at fault but overreached by other's fraud, see also Equity § 5.

General rules as to adequacy of legal remedy and necessity of primary resort thereto, see Equity, III, B.

Laches, waiver or affirmance barring right to claim fraud, see ante §§ 82, 83; and see generally Equity, IV; and specific equitable topics, e. g., Rescission; Injunctions.

Instances when equity will decree compensation in money, see Equity § 217.

Suits for relief from judgments and decrees on ground of fraud, see Judgments, VI; Equity, XI.

Fraud of commissioners of court as ground for bill of review, see Equity ¶ 952.

Establishment of lien to work out equities, see Liens; Rescission, VI.

Injunctions against unfair competition or trade practices, see Injunctions, II, F.

Remedy by bill to redeem from mortgage, see Mortgages, IX.

Suits to declare title and interest in public land patented, see Public Lands, III; Trusts, XII.

Grounds for rescission and conditions upon having relief, see Rescission, II, III.

Bills to establish lost or destroyed papers, see Restoration of Papers and Records.

Relief against fraud in tax sales and purchases, see Taxes, XII, C.

¶ 745. Equity has general jurisdiction in cases of fraud.—Wright v. Hake, 38 Mich. 525.

¶ 746. Courts of equity have concurrent jurisdiction with courts of law where fraud is charged.—Wheeler v. Clinton Canal Bank, H. 449; Wyckoff v. Victor Sewing Mach. Co., 43 Mich. 309; Tomkins v. Hollister, 60 Mich. 470.

¶ 747. In cases of fraud, where it is doubtful whether the defense would be good at law, equity will entertain jurisdiction.—Ankrim v. Woodworth, H. 355.

¶ 748. In cases of actual fraud a court of equity has jurisdiction notwithstanding that the complainant may have a remedy at law.—Cogswell v. Mitts, 90 Mich. 353.

¶ 749. Equity has jurisdiction in all cases of fraud where the complainant is entitled to relief specifically equitable, and it does not in all cases depend upon an absence of legal remedy.—Fred Macey Co. v. Macey, 143 Mich. 138, per Hooker, McAlvay, and Montgomery.

¶ 750. False representations are a basis for equity jurisdiction only in cases where relief cannot be obtained in proceedings at law.—Heffernan v. Burns, 175 Mich. 457.

¶ 751. Where plaintiff purchased from defendant the furniture in a rooming house, under an instalment contract providing for forfeiture on default in payment, a bill claiming that the contract is fraudulent, and seeking to have defendant enjoined from enforcing it, will be dismissed, it appearing that the fraud alleged is available in defending or prosecuting an action at law.—Heffernan v. Burns, 175 Mich. 457.

¶ 752. Courts of law and equity have concurrent jurisdiction in cases of fraud, and a suit may be planted on the chancery side of the court where complainant is shown entitled to relief especially equitable.—Laubengayer v. Rohde, 167 Mich. 605.

¶ 753. Courts of equity have concurrent jurisdiction with the law courts to grant relief from the consequences of fraud and misrepresentation where one party has obtained an executory contract by fraud, and the injured party asks for a cancellation of it, for an equitable lien upon property for money paid on such a contract, and for an accounting.—Culver v. Avery, 161 Mich. 322.

¶ 754. Equity will grant relief from a sale of personalty and realty when induced by

fraudulent representations of the seller.—Schwier v. Hurlburt, 184 Mich. 698.

¶ 755. Equity is the proper forum wherein to adjust the relative rights of a defrauded vendor and of the vendee's bona fide mortgagee whose mortgage covers both previous debts and new advances, and who has taken possession and sold under foreclosure.—Zucker v. Karpeles, 88 Mich. 413.

¶ 756. Equity takes jurisdiction of frauds discovered in the action of trustees.—Morrison v. Mayer, 63 Mich. 238.

¶ 757. The principle that equity has jurisdiction in all cases of fraud is subject to the limitation that it be confined to transactions in which the mode of action or kind of aid or relief sought is not practicable in a court of law, but is allowable in equity.—Teft v. Stewart, 31 Mich. 367; Hagenbuch v. Howard, 34 Mich. 1.

¶ 758. Equity does not have concurrent jurisdiction with courts of law in cases of fraud unless the relief sought is of an equitable character.—Mack v. Village of Frankfort, 123 Mich. 421.

¶ 759. A combination by which one was defrauded into giving a conveyance of land on the faith of an agreement to transfer to him an interest in a stock of goods, which transfer was afterwards refused, was held to present a case that did not call for equitable cognizance, but for which the remedy at law was adequate.—Teft v. Stewart, 31 Mich. 367.

¶ 760. The existence of a legal remedy will not prevent resort to equity to have the agreed consideration or the value of premises out of which the complainant has been cheated declared an equitable lien on the lands.—Merrill v. Allen, 38 Mich. 487.

¶ 761. False representations are a basis for equity jurisdiction only where the resulting injury is not remediable at law.—Smith v. Walker, 57 Mich. 456.

¶ 762. Where the transactions stated in the bill, by which certain notes were obtained, presented a case of fraud, although, from the case made, it was doubtful whether the complainant could defend successfully the full amount of the notes, and a general demurrer was interposed, the court refused to sustain the demurrer and required the defendant to answer.—Ankrim v. Woodworth, H. 355.

¶ 763. In cases of fraud or breach of trust equity will retain jurisdiction even though a court of law might take cognizance of the matters.—McKinney v. Curtiss, 60 Mich. 611.

¶ 764. Equity is without jurisdiction of an action by one partner against his copartner and a third person to recover a sum of money of which the complainant alleges he was defrauded as the result of a conspiracy between the defendants, since his remedy at law was adequate.—Lannin v. Lynn, 184 Mich. 325.

¶ 765. A bill against a village and its trustees to reimburse complainants for money paid for village bonds which the bill alleges were issued through fraud, and calling for a money judgment, will not lie, the remedy at law being adequate.—Mack v. Village of Frankfort, 123 Mich. 421.

¶ 766. When property is obtained by fraud or undue influence, the injured person may proceed in equity for an accounting.—Powell v. Pennock, 181 Mich. 588.

§ 96. Pleading in equity.

General law of equity pleading, see Equity, VII.

Chancery pleadings in bills for rescission and cancellation, reformation, quieting title, or impressment of trusts, see Rescission, VI; Reformation, III; Quieting Title, III; Trusts, XII.

Sufficiency of jurisdictional allegations of fiduciary fraud, see also Equity ¶ 317.

Multifariousness of bill for distinct frauds, see Equity § 75.

Pleading in double aspect, see Equity ¶ 301.

Averments of fraud or concealment in chancery bill to anticipate plea of limitations, see also Equity § 89.

Bills to rescind and cancel, see Rescission, VI.

Bills to establish trusts arising out of fraud, see Trusts, XII.

¶ 767. Where an act, alleged in the bill to have been done, does not of itself import a fraud, a fraudulent intent must be charged; but no such averment is requisite where from the statement of facts fraud is plainly to be inferred.—Hale v. Chandler, 3 Mich. 531.

¶ 768. The circumstances which tend to establish fraud need not be detailed in the bill. It is sufficient if the facts which constitute the fraud are set forth with an averment of the injurious result; and a detail of the circumstances which tend to establish a dishonest intent in defendant's action is more properly left to the evidence.—Tong v. Marvin, 15 Mich. 60; Hubbard v. McNaughton, 43 Mich. 220.

¶ 769. In a bill all the details of an alleged fraud need not be set out but the substance of the transaction and its results must be alleged.—McMahon v. Rooney, 93 Mich. 390.

¶ 770. One who complains of fraud need only set forth in his bill the substance of the transaction and the result; evidence that the mode of consummating the fraud varied

in some respects from the manner charged is no reason for denying relief.—Merrill v. Allen, 38 Mich. 487.

¶ 771. Where a bill is grounded on fraudulent intent, technical formality in its averment will not be exacted, in the absence of demurrer, if the complainant's substantial rights appear and the grounds of equitable relief are stated. Nor will a demurrer make any difference unless it is brought to a hearing or relied on upon the argument.—Reeg v. Burnham, 55 Mich. 39.

¶ 772. An allegation in a bill that complainants had been induced to purchase on representations by the seller which were untrue, there being no charge of actual fraud, is not sufficient to bring the action within the jurisdiction of equity.—Linn v. Gunn, 56 Mich. 447.

¶ 773. A bill charged fraud on the part of defendant vendee in representing to complainant that a certain strip of land was a part of the land sold, and stated that he relied on the representations made and was thereby induced to forego any examination of the records, fully believing from such representations that the deed of the property executed and delivered to him contained all the lands lying between the corners, lines, courses, and distances pointed out and shown him by defendants; that immediately on discovering the fraud he rescinded and tendered a reconveyance, with demand for return of the purchase price and the money he had honestly invested in improving the property. Held, the bill was not demurrable for failure to state a case of actionable fraud.—Laubengayer v. Rohde, 167 Mich. 605.

¶ 774. A bill by a life insurance company to cancel certain policies on the ground of fraud, was dismissed upon demurrer, where it was alleged that the policies were merely held for inspection and were never accepted; that no premium was ever paid and no credit or extension was given, and that the necessary revenue stamps were not attached and canceled until after the insured's death; such allegations not of themselves showing fraud.—Northwestern Mut. Life Ins. Co. v. Amos, 136 Mich. 210.

¶ 775. A complainant in a bill to set aside a probate sale of land to pay a claim allowed against an estate alleged that the claim was fraudulent, and its allowance was obtained by perjured evidence. Held, the allegations of fraud were too indefinite and general.—Andrews v. Osborn, 159 Mich. 77.

C. REDRESS BY DEFENSE OR BY ACT OF PARTY.

§ 97. In general; right to make defense.

See also ante ¶ 617.

Right to complain of fraud and succession in right, nonassignability and personal nature of the wrong, see ante §§ 78-81.

Merger of fraud on buyer in express warranty of thing sold, see ante § 86.

Burden of proof and evidence of fraud as defense, see ante I, B.

Sufficiency of evidence of the fraud, see ante §§ 46-57.

Direction of verdict on the defense, see ante § 60.

Questions for the jury, see ante §§ 58, 59.

Instructions, see ante §§ 61-63.

Concurrent cognizance of frauds in law and by equity, see ante § 95.

[Note. The appropriateness and availability of a given defense, such as fraud, pertains rather to the specific action or right of action than to the fact of the defense. The defense of fraud is therefore so treated in this digest, and the specific topics should be consulted. See references to them ante §§ 79, 95.]

Right of party to rescind or repudiate and leave other party to sue, see Contracts, VII, D; Sales, VIII, IX; Vendors and Purchasers.

Fraud as infecting equitable right, see also Equity ¶ 37.

Exclusion of equitable defenses in law actions, see Ejectment § 19; Replevin.

Sufficiency of legal title in ejectment where fraudulently obtained, see Ejectment ¶¶ 80-82, 84.

Fraud as defense to actions on contracts, see Contracts, IV; Sales; Vendors and Purchasers.

Defenses open in suits on negotiable instruments, either as against original party or as against bona fide holder, see Negotiable Instruments, III, XIII, B.

As defense to attorney's contract for compensation, see also Attorneys ¶ 159.

As defeating right to commissions, see Brokers §§ 27-29.

Rescission by act of party, see Rescission; and see also Contracts, VII, D; Sales, VIII, A, IX, A.

Rights of seller or buyer after electing to rescind and doing all necessary acts to accomplish it, see Sales, VIII, IX.

Replevin for goods based on theory of accomplished rescission, see Replevin.

¶ 776. In an action of ejectment it cannot be shown as an equitable defense that the title of the plaintiff is based on a deed the delivery of which was surreptitiously obtained, as the deed is voidable for the fraud, but not void, and cannot be questioned in an action at law.—Harrett v. Kinney, 44 Mich. 457.

§ 98. Pleading fraud as defense; general issue.

Sufficiency of issues on contract to present fraud as defense, see also Contracts § 297.

Pleading fraud in assessment as answer to petition to sell for taxes, see Taxes, XI, A.

¶ 777. A defense arising out of fraud or misrepresentation cannot be shown under the

general issue without notice.—Miller v. Finley, 26 Mich. 249.

¶ 778. Testimony of misrepresentation and fraud in procuring the note sued on is inadmissible under a plea of the general issue with notice merely that no consideration was given for the note.—McCabe v. Caner, 68 Mich. 182.

¶ 779. Where a traveling salesman sues for his salary, defendant cannot, under the general issue, show representations made by plaintiff as to his ability to sell goods, and show what other agents of defendants had done.—Champlain v. Detroit Stamping Co., 68 Mich. 238.

¶ 780. The defense of fraudulent misrepresentations is as available under a notice of special defense, stating the falsity of the representations and that the plaintiff thereby deceived the defendant in the purchase, as under a notice stating in addition precisely and technically that the plaintiff knew the representations to be false when he made them; an allegation of a scienter is unnecessary.—Browne v. Moore, 32 Mich. 254.

¶ 781. Evidence of fraudulent representations was inadmissible in defense in assumpsit on a bond, where defendants' notice failed to set forth plainly the facts upon which such defense is based, as provided in Cir. Ct. Rule 7, subd. c., and contained no statement of any particular representation.—Stauber v. Ellett, 140 Mich. 271.

¶ 782. Averments in a notice of special defense attached to a plea of the general issue, that plaintiff and certain named associates had procured the organization of a corporation "for the pretended purpose of manufacturing hog cholera medicine" and that the stock issued by such corporation was of no value, warrant the introduction of testimony tending to prove fraud in the formation of such corporation.—Smith v. McDonald, 139 Mich. 225.

¶ 783. A notice of special defense attached to a plea of the general issue which sets up in detail representations of plaintiff that he had investigated certain stock and was willing to buy it at $150, that such representations were false and fraudulent, and intended to deceive defendant and did result in his deception is sufficient to warrant introduction of evidence to show fraud.—Smith v. McDonald, 139 Mich. 225.

FRAUDS, STATUTE OF.

TREATS of the statutes corresponding to the Statute of Frauds of England (Stat. 29 Car. II, c. 3), by which a writing or a payment of part or a partial delivery is required to make a contract enforceable, and by which a deed is required for the transfer of interest in lands; also of the effect of the statutes and of noncompliance with them and of the pleading and proof of compliance or noncompliance. It excludes the offer and acceptance of contracts and their operation and effect (see Contracts; Sales), the effect and construction of deeds (see Deeds), and the use of documents as evidence (see Evidence).

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§ 13. Guaranty of another's title.
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I. AGREEMENTS AND TRANSFERS WITHIN THE STATUTE.

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¶ 1. An oral agreement by A. to pay a specified sum to B. if the latter will perform certain services for C., extending over a period of more than one year, is void under the statute of frauds.—Bristol v. Sutton, 115 Mich. 365.

¶ 2. An oral contract of employment for three years is within the statute of frauds as one not to be performed within a year. —Smith v. Chase & Baker Piano Mfg. Co., 175 Mich. 371.

¶ 3. A contract whereby A., fifteen years old, is to work for B. until he, A., comes of

age, B. to supply schooling in the winter and clothing, and at the end of the service certain articles of personalty, is void under the statute.—Burroughs v. Morse, 48 Mich. 520.

¶ 4. Under Comp. L. 1897, § 9515, subd. 1, an oral contract whereby one party delivers sheep to be returned double in number in four years is wholly within the statute of frauds.—Dietrich v. Hoefelmeir, 128 Mich. 145.

¶ 5. A contract that in consideration of the plaintiff's procuring the defendant to be admitted as a partner, having a certain interest in a joint venture and in the business to be carried on and the profits to be made by it, the latter would at the end of three years pay whatever the business as then developed would show that interest to have been fairly worth when the contract was entered into, is within the statute (Comp. L. 1871, § 4698, How. St., subd. 2).—Whipple v. Parker, 29 Mich. 369.

¶ 6. An agreement to rent a telephone for the term of three years at the stipulated rental is within the statute of frauds.—Co-operative Tel. Co. v. Katus, 140 Mich. 367.

¶ 7. An executed oral agreement for the sale of the good-will of one's professional practice is not void under the statute as one not to be performed within a year. When the practice is transferred, paid for and entered upon, the parties have done what they could to make the transaction complete, even if the purchaser does not, within the year, reap all the benefits he expects from it.—Doty v. Martin, 32 Mich. 462.

§ 2. Agreements which call for performance within a year.

¶ 8. A contract to insert an advertisement for a period of one year does not come within the statute of frauds and need not be in writing.—Mail & Express Co. v. Wood, 140 Mich. 505.

§ 3. Agreements capable of being performed within a year.

¶ 9. The statute of frauds does not apply to contracts the terms of which are such as to leave it uncertain whether they may or may not be performed within a year.—Barton v. Gray, 57 Mich. 622.

¶ 10. Where it is possible that a contract may be performed within the year, although it may run over the year, it is not within the statute of frauds.—Robinson v. Western U. Tel. Co., 169 Mich. 503.

¶ 11. An oral agreement between father and son that the latter shall support his parents during their lives is not one that by its terms may not be performed within one year.—Carr v. McCarthy, 70 Mich. 258.

¶ 12. The provision of the statute of frauds that every agreement that, by its terms, is not to be performed within one year from the making thereof shall be void unless in writing, is not applicable to a contract which may, by any possibility, be performed within the year, although the parties may have intended that it should, and it does in fact, extend over a longer period. So held where a daughter orally agreed to pay for the care of her aged father, and to allow the person furnishing the support to occupy lands belonging to her until the services should be paid for.—Smalley v. Mitchell, 110 Mich. 650.

¶ 13. A merchant's parol promise to supply a customer, on specified terms, with what goods he may want, is not within the provision of the statute of frauds declaring void every oral agreement that, by its terms, is not to be performed within one year from the making.—Durgin v. Smith, 115 Mich. 239.

¶ 14. Under the statute the right to sell goods found does not accrue until a year from the finding. It not appearing that property found in the St. Clair river was found in that part which lies in Michigan, an agreement for division of the proceeds could not be held void under our statute of frauds, as not in writing, and—because of the statute—not capable of performance in one year.—Commings v. Stone, 13 Mich. 70.

¶ 15. An agreement to build a side track to the plaintiff's warehouse upon his moving and remodeling it is not within the statute of frauds as it may be performed within a year.—Thomas v. South Haven & Eastern Railroad Co., 138 Mich. 50.

¶ 16. Where one promised to pay for services rendered, improvements made, etc., out of his estate after his death, the promise was not within the statute, for at the time of its making it was possible that it might be performed within a year.—Sword v. Keith, 31 Mich. 247.

¶ 17. A contract by a railroad company to furnish permanent employment for an injured brakeman as long as satisfactory is not within the statute of frauds; since it may be performed within a year.—Sax v. Detroit, G. H. & M. R. Co., 125 Mich. 252.

¶ 18. Where, by the terms of a logging contract, performance thereof may be demanded within a year from the making thereof, such contract is not within the statute of frauds.—Herron v. Raupp, 156 Mich. 162.

¶ 19. The statute of frauds, Comp. L. 1897, § 9515, does not apply to a contract of employment as captain of a tug made at the close of one season's work on November 14th, for the next season of navigation, although the general accepted meaning and also the custom is, that the "season of navi-

gation" begins April 1st and ends December 5th, where there was evidence that the previous season of that tug ended on November 13th.—De Land v. Hall, 134 Mich. 381.

§ 4. Contract to be performed one year from future date.

Leases for one year to commence at future date, see post § 69.
Agreement to make a lease for a year from future date, see post § 71.
Memorandum of contract of employment for a year from future date, see post § 87.

¶ 20. A parol contract of hiring for a term of one year, to begin at a future day, is within the statute of frauds and void.—Carroll v. Palmer Mfg. Co., 181 Mich. 280.

¶ 21. An oral contract to employ one at $1,000 a year is within the statute of frauds and hence unenforceable where the testimony of the plaintiff is that there was but one conversation and that occurred several days before he was to begin his work.—Davis v. Michigan Mut. Life Ins. Co., 127 Mich. 559.

§ 5. Parol extension of agreement.

Extension of time for performance of contracts, in general, see Contracts, VII.
Inefficacy of parol agreement to modify earlier agreement if not performable within a year, see also Contracts ¶ 1067.
Parol extension of lease, see post ¶ 246.

¶ 22. An unwritten contract to be performed within a year is not made void, under the statute of frauds, by parol extension from time to time for periods of less than a year.—Donovan v. Richmond, 61 Mich. 467.

¶ 23. A contract to cut, haul and deliver afloat in a certain stream all the logs that can be cut from specified lands "at the rate of two million feet, board measure, every winter, and as much more as the owners of said timber shall desire," is not one by the terms whereof performance cannot be made within one year; and an agreement extending the time of the annual cutting from year to year need not be in writing.—Barton v. Gray, 48 Mich. 164; Barton v. Gray, 57 Mich. 622.

¶ 24. The statute does not defeat a contract made originally for a year's service and allowed by the parties to run on from year to year thereafter.—Sines v. Superintendents of the Poor for Wayne County, 58 Mich. 503.

B. AGREEMENTS TO ANSWER FOR ANOTHER.

§ 6. In general.

Promise by executor or administrator to answer personally, see post I, D.
Representations as to credit of another, see post I, H.
Requisites and sufficiency of writing, see post § 86.
Void oral promise to pay debt of another as consideration for subsequent promise, see post § 128.
Parol evidence to aid written agreement to answer for another, see post § 153.
Questions of law and fact as to agreement to answer for another, see post § 155.
Necessity of writing to extend chattel mortgage to cover debts of another, see Chattel Mortgages ¶ 98.
Provisions of the statute, see Comp. L. 1915, § 11981, ¶ 2.

¶ 25. The statute of frauds applies only to promises that are in the nature of guaranties for some original or primary obligation to be performed by another.—Gibbs v. Blanchard, 15 Mich. 292.

¶ 26. An oral promise to pay another's debt is void and not enforceable where nothing appears to remove it from the operation of the statute.—Pratt v. Bates, 40 Mich. 37; Ruppe v. Edwards, 52 Mich. 411; Schoch v. McLane, 62 Mich. 454.

¶ 27. The provision of the statute of frauds (Comp. L. 1897, § 9515) that "every special promise to answer for the debt, default, or misdoings of another person" must be in writing, has no application to an agreement between the trustee and preferred creditor under a trust mortgage, with another trustee that if the latter accepted the trust, the bank of which he was president should share equally in the trust funds.—Wolff v. Alpena Nat. Bank, 131 Mich. 634.

¶ 28. An agreement by a partnership and the seller and a consignee that certain machines sold on commission shall be held by the firm and not be delivered to the consignee until the purchase price is paid, is valid though not in writing.—Brown v. Foster, 137 Mich. 35. [Note. It cannot be told from the opinion which provision of the statute was invoked, but apparently it was that relating to promises to answer for another's debt. Editor.]

§ 7. Existence and relation of debt to the promise.

¶ 29. The statute of frauds does not apply where plaintiff, suing for the price of logs sold by another to defendant was to be paid direct by the buyer, though plaintiff claimed to have loaned money to the seller which was to be repaid direct by the buyer on such purchases, where the relations of plaintiff and the seller were such that the jury could find that the nominal seller was plaintiff's agent.—Colburn v. I. Stephenson Co., 133 Mich. 437.

¶ 30. A promise to the holder of another's promissory note to pay it at maturity is one which is collateral to such note, and is within the statute.—Halsted v. Francis, 31 Mich. 113.

§ 8. Promise merely beneficial to another.

¶ 31. In an action against the majority stockholder of a corporation for extra services claimed to have been rendered in the performance of a contract with such stockholder defendant cannot claim that such extras having been for the benefit of the corporation the implied agreement to reimburse plaintiff was within the statute of frauds.—Hapke v. Davidson, 180 Mich. 138.

§ 9. Suits based on other grounds than the promise.

¶ 32. It is not a promise to answer for the debt of another for one, who has given the sheriff a receipt for goods taken on execution, to say when the goods are demanded that he will pay the execution and keep the goods; where the action sounds in trover for nondelivery of the goods for the amount of the execution as damages, since such action is not on the statement as a promise but on the receipt and duty to redeliver.—Bowen v. Culp, 36 Mich. 224.

§ 10. Novation or substitution of obligors.

See also post § 17, ¶ 80.

Effect of novation generally, see Novation.

¶ 33. The statute of frauds does not apply to an agreement to pay the debt of a third person where, as part of the agreement, such person is discharged from his original indebtedness.—Mulcrone v. American Lumber Co., 55 Mich. 622.

¶ 34. The oral promise of a tenant of a mortgagor to pay rent to the mortgagee, to be applied on the mortgage, is void as a promise to answer for the debt of another, if the mortgagee has not released the mortgagor.—Hogsett v. Ellis, 17 Mich. 351.

¶ 35. A mere oral promise to pay another's debt, without any understanding with the latter or any independent contract for the promisor's account, the original debt being kept alive, is void.—Gower v. Stuart, 40 Mich. 747.

¶ 36. An oral promise by A. to pay B. the amount of an account which B. holds against C., there being no agreement between all three that A. should be substituted as the debtor and C. discharged, is void, as a promise to answer for the debt of another.—Pfaff v. Cummings, 67 Mich. 143.

¶ 37. Where A. orally promises B. to pay him for such goods as he may furnish C., the promise is not so taken out of the statute as to make A. liable unless B. has thereupon absolutely discharged C. from liability, and looks only to A. for payment; B. cannot hold each liable severally at his option.—Welch v. Marvin, 36 Mich. 59.

¶ 38. The provision requiring written agreement to bind one for another's debt, does not apply to dealings between plaintiff and a new firm whereby his account for services to the old firm was carried into account of its successor, and was finally paid by applying moneys received from the latter, leaving a balance due for subsequent services.—Armitage v. Saunders, 94 Mich. 482.

¶ 39. While in many cases the test, whether a promise is within the statute of frauds as a promise to pay the debt of another, is whether the original debtor remains liable on his undertaking and the promise is only collateral thereto, yet where the third party is himself to receive the benefit for which his promise is exchanged, it is not usually material whether the original debtor remains liable or not.—Calkins v. Chandler, 36 Mich. 320.

¶ 40. A promise to pay the debt of another in liquidation of the party's own debt constituted a novation and the statute of frauds had no application.—Martin v. Curtis, 119 Mich. 169.

¶ 41. A firm of lumber dealers made a contract with a firm of manufacturers whereby the latter were to convert the timber on certain premises into shingles and siding. The manufacturers made an independent contract with a logger to cut the timber and haul it to the mill; but as they were slow in making payment the logger went to the dealers for payment, and they orally agreed to pay him on orders from the manufacturers. Several payments were made in this way, but when the logger tried to obtain a final settlement they refused to pay him the balance, and he brought suit on the agreement. Held, that it could not be maintained. There was no novation except so far as the orders were actually given; and the oral agreement was a promise to pay another's debt.—Preston v. Young, 46 Mich. 103.

§ 11. Contract of suretyship, guaranty and indemnity.

¶ 42. An unwritten agreement of suretyship is void.—Johnston v. Township of Kimball, 39 Mich. 187; Bonine v. Denniston, 41 Mich. 292.

¶ 43. One is not collaterally liable as guarantor or surety where he has not made a written agreement.—Ingersoll v. Baker, 41 Mich. 48.

¶ 44. A contractor having abandoned the building he was erecting resumed work and did certain extra labor on the promise of defendant—a third person—to pay him. But the evidence showed that he still looked to the original debtor for payment, and to defendant only as guarantor; and the promise of defendant was held within the statute.—Bresler v. Pendell, 12 Mich. 224.

¶ 45. A mortgagee's oral promise to indemnify a third person from loss if he will become cosurety with him in a bond given

by the mortgagor on replevying the mortgaged chattels from attaching creditors of the mortgagor's vendor who attack the sale as fraudulent, is an original undertaking not within the statute.—Boyer v. Soules, 105 Mich. 31.

¶ 46. An oral agreement whereby partners buy out the interest of a copartner, and agree in consideration of his surrender to them of his interest to indemnify him against the partnership debts, is not within the statute.—Bonebright v. Pease, 3 Mich. 318.

§ 12. Guaranty incidental to transfer of debt or note.

See also post § 19.

Parol consent of indorser to alteration of paper, see Negotiable Instruments.

Validity and effect of parol acceptance of draft or bill of exchange, see Negotiable Instruments, VI.

¶ 47. Where the guaranty of another's debt is merely incidental to a principal contract made by the guarantor himself on his own account, it is then regarded as in effect a promise to pay his own debt, and it need not, therefore, be in writing.—Huntington v. Wellington, 12 Mich. 10.

¶ 48. The statute was held not applicable to a parol guaranty that certain notes sold by defendant to plaintiffs were good and collectible and the makers responsible; that the maker of a certain mortgage sold at the same time was responsible; that the land mortgaged was ample security, and the title perfect and unincumbered.—Huntington v. Wellington, 12 Mich. 10.

¶ 49. A. is bound by his oral guaranty that a note offered by B. as part of the purchase price of a farm that C. is selling to B. is as good as gold or as good as money; since this is not a guaranty that the note is collectible.—Taylor v. Soper, 53 Mich. 96.

§ 13. Guaranty of another's title.

¶ 50. A town treasurer sold a pump on a tax levy, and the purchaser sold it to third parties, who claimed that the treasurer promised verbally, and without receiving any consideration, to be responsible for the title. Held, that the promise was a collateral undertaking involving no liability until the failure of the latter contract, under which a warranty of title was implied by rules of law.—In re Tozer's Estate, 46 Mich. 299.

§ 14. Promise made directly to debtor.

¶ 51. An oral promise to pay his debt made directly to the debtor is not void.—Pratt v. Bates, 40 Mich. 37.

¶ 52. An agreement between an employer and an employee whereby the employer agrees to pay the employee's board which agreement is known and acted upon by the party furnishing the board is not within the statute of frauds.—Stevenson v. Sterling, 138 Mich. 300.

¶ 53. The statute does not avoid an oral contract whereby one who claimed to have an interest in a patent under which he was about to organize a company to deal in rights promised another that if he would become a member, subscribe for shares, and give his promissory note therefor, the shares would cost him nothing, and as soon as the company should be organized, another man should be found to take the shares off his hands and pay him the amount of his note, and that he should be put to no expense on account of the shares and note.—Green v. Brookins, 23 Mich. 48.

§ 15. Agreements to share profits and losses of corporation or firm.

¶ 54. An oral agreement made between two persons, at or before the organization of a corporation, to share the profits or losses of the business, is not invalid under the statute of frauds as an agreement not in writing to answer for the debt of another, but is valid as an agreement to answer for the contracting party's own debt.—Lowitz v. Kimmerle, 221 Fed. 857. Writ of certiorari denied 238 U. S. 639, 59 L. ed. 1501, 35 Sup. Ct. Rep. 901.

§ 16. Firm or corporation agreement to pay member's debts.

Parol agreement to assume partnership debts, see ante ¶¶ 38, 46.

¶ 55. The statute does not apply to an understanding by which the dealings of individual partners with another firm shall be treated as a matter of account between the two firms in their mutual dealings; purchases and sales made on the faith and in strict pursuance of it can be considered as original transactions on the part of the members of the firm charged, who may bind themselves by such an agreement if no rule of law or policy or other disability prevents.—Davis v. Dodge, 30 Mich. 267.

¶ 56. An oral promise to pay the debt of a partner incurred in his individual capacity made when the promisee gave the promisor a receipt for payment for services rendered the partnership is within the statute of frauds where there is nothing to indicate that the promise had for its object a benefit accruing immediately to the promisor, the partner has not been discharged from the debt, and it has not become an obligation of the partnership.—Smith v. Sheridan, 175 Mich. 391.

¶ 57. A corporation's liability for money lent to its president upon his own credit is collateral if it exists at all, and is not enforceable unless supported by the corporation's written promise, duly signed.—Baumann v. Manistee Salt & Lumber Co., 94 Mich. 363.

§ 17. Original and direct promises to pay.
See also ante § 6.

¶ 58. An arrangement by which A. is to cash for B. orders drawn on B. by B.'s contractor in payment of the contractor's employees, and B. was to reimburse A. for the moneys so advanced by him, is an original and direct, not a secondary or collateral, undertaking, and is not within the statute.—Comstock v. Norton, 36 Mich. 277.

¶ 59. A.'s promise to B. at C.'s request to pay out of a fund which should come into A.'s hands belonging to C. the amount of C.'s debt to B. is an original promise not within the statute.—Mitts v. McMorran, 64 Mich. 664.

¶ 60. Where a contract has been assigned as security for advances agreed to be made in aid of its performance, a promise made at the assignor's request by the assignee, to a mechanic, to pay the latter out of the surplus received the amount due him from the assignor for work on the contract, is an original promise not within the statute of frauds.—Mitts v. McMorran, 85 Mich. 94.

¶ 61. Where parties are engaged in a joint undertaking to purchase logs and manufacture lumber, a promise by one whose duty it is to make advances to pay a laborer employed by the other is not a promise to answer for another's debt or default but is a promise to pay his own debt.—Dumanoise v. Townsend, 80 Mich. 302.

¶ 62. The statute of frauds does not cover the oral promise of the sureties on the bond of a public contractor, given to secure the payment of labor and material claims, to repay to a third person the money realized from the discount of the contractor's note on the strength of such third person's indorsement, which money the sureties receive and agree to apply in payment of said claims.—Sweet v. Colleton, 96 Mich. 391.

¶ 63. The statute does not require a writing of an agreement between attorney and client that the former shall prosecute the latter's suit and pay all costs, receiving half the recovery if successful.—Wildey v. Crane, 69 Mich. 17.

§ 18. ——Credit extended to promisor.
See also post § 23.

¶ 64. An oral promise to repay money furnished to a third party solely upon the credit of the promisor, is not within the statute of frauds.—Ford v. McLane, 131 Mich. 371.

¶ 65. An original promise to pay the existing debt of a third party, where based upon a present consideration, is not within the statute of frauds.—Bennett v. Knowles, 111 Mich. 226.

¶ 66. The statute of frauds does not apply to sales made entirely upon the credit of a third person, with his knowledge of such fact, and with the expectation that he would pay for the goods.—Hagadorn v. Stronach Lumber Co., 81 Mich. 56.

¶ 67. A writing is not necessary on a promise to pay for goods furnished to another, where it was made to induce delivery after credit to such other had been refused.—Michigan Slate Co. v. Iron Range & H. R. Co., 101 Mich. 14.

¶ 68. A contract by which A. was to erect a building for B. provided that if A. failed to furnish material B. could supply it and deduct its cost from the money due A. C., after furnishing material on A.'s credit, refused to do so longer, and B. agreed to make payments for material directly to C. Held, that this agreement was not within the statute as a promise to pay another's debt.—Bice v. Marquette Opera House Building Co., 96 Mich. 24.

§ 19. ——Existence and relation of promisor to the consideration.
See also ante § 10.
Necessity and sufficiency of consideration to support contracts generally, see Contracts, V.

¶ 69. When the owner of negotiable paper sells it and accompanies the sale by a guaranty, his undertaking, being founded on a new consideration inuring to his own benefit, is an original one and is not within the statute.—Jones v. Palmer, 1 D. 379; Thomas v. Dodge, 8 Mich. 51.

¶ 70. A promise by a debtor, who by means of fraudulent representations has induced the creditor to accept as part payment of his claim a note and mortgage owned by the debtor, that if the creditor fails to collect the note he (the debtor) will pay the creditor the amount of the same, is not within the statute of frauds since the benefit of the promise accrues immediately to the promisor.—Bryant v. Rich's Estate, 104 Mich. 124.

¶ 71. A parol agreement to pay the debt of a third person is not void under the statute of frauds where there is a consideration passing to the promisor.—Durgin v. Smith, 115 Mich. 239.

¶ 72. One may make a valid oral promise to pay another's debt without releasing the original debtor by payment, if the consideration does not move to the original debtor alone. The promise cannot be said to be within the statute merely because the debt will remain that of the original promisor.—McLaughlin v. Austin, 104 Mich. 489.

¶ 73. A promise to become a cosigner with the promisee of a note of third persons and to pay the same at maturity is not a promise to

pay the debt of another within the statute of frauds, where the purpose of giving the note is to borrow money which is to go into such promisor's hands, though the ultimate purpose was to make use of the money to aid one of the third persons who were first signers of the note, and for which such promisor was to obtain security in his own name and for his own benefit as for an advance made by him personally.—Potter v. Brown, 35 Mich. 274.

¶ 74. The statute does not apply to a promise to make payments on the debt of another of sums which the promisor should become liable to pay to the debtor for services to be performed by the latter for him, there being a consideration moving to him which was the inducement for making the promise.—Calkins v. Chandler, 36 Mich. 320.

¶ 75. An oral promise by an indorser of a note to the bank holding it, that if the bank would send the note to said indorser he would deposit its value to the credit of the bank with its correspondent bank in another city, is void under the statute of frauds unless it is shown that the note was actually delivered pursuant to such promise.—Crawford v. Steel, 137 Mich. 610.

¶ 76. Defendant orally promised a debtor of plaintiff to pay the debt on condition that the debtor would relinquish his tenancy of plaintiff's farm to defendant and deliver defendant a certain cow. Later while the debtor was leaving the farm and to prevent any opposition on the part of the plaintiff thereto, defendant promised plaintiff to pay the debtor's obligation, but said nothing of the other conditions. Held that plaintiff not having discharged the debtor, the promise, not being upon any consideration moving from plaintiff, was void by the statute.—Brown v. Hazen, 11 Mich. 219.

§ 20. ——Promise on consideration of promisee's action or forbearance.

¶ 77. One claiming an interest in certain goods held by another who was his debtor agreed not to attach them in consideration of the oral promise by another creditor who proposed to attach that he would pay his debt. Held, that this promise to pay was within the statute and void.—Waldo v. Simonson, 18 Mich. 345.

¶ 78. An agent's oral promise to pay the principal any deficiency which might arise upon a sale under a foreclosure decree, if the principal would make such sale, is void under the statute of frauds, the principal being the owner of the decree, and the agent being under no prior legal obligation to pay the mortgage debt.—Perkins v. Hershey, 77 Mich. 504.

¶ 79. The holders of a chattel mortgage upon a sawmill owned by M. agreed orally with M. and with certain persons for whom M. was then engaged in sawing lumber, that, in consideration of an extension of the time of payment of the mortgage, M. should allow customers of his to retain the sum of fifty cents per thousand feet of all lumber thereafter sawed by M. for them, and that they should pay that sum to the holders of the mortgage. Held, that the promise was valid and not within the statute of frauds; and the persons for whom the sawing was done were bound to withhold from M. such proportion of their sawbill as they had thus agreed to pay to the holders of the mortgage, and were liable to the latter for the amount thereof whether they did or not so withhold it.—Calkins v. Chandler, 36 Mich. 320.

¶ 80. B. hired out to V. to draw wood for D., but fearing that he would not get his pay went to D. and told him he would draw no more unless he could be assured of getting it. D. told him to go ahead and he would pay him and take it out of V. Whether this, instead of being a novation, was not void as a promise to pay another's debt, and whether Calkins v. Chandler, 36 Mich. 320, is not vitally distinguishable from it in that the arrangement there sustained was concurred in by the intermediate party whose debt was to be paid, quære.—Bates v. Donnelly, 57 Mich. 521.

¶ 81. A., who was indebted both to B. and to C., absconded, leaving property in B.'s hands, and B., on being informed that C. would attach the property, promised orally to pay C.'s claim. Held, that such promise was without any consideration that could inure to B., and was within the statute, whether B. appropriated the property to his own use or not.—Stewart v. Jerome, 71 Mich. 201.

¶ 82. Where one employed by another to do certain work has quit work because of nonpayment, a third person's promise in consideration of the benefits to the promisor, and not to secure credit for the employer, to pay him if he will complete the work is not within the statute of frauds.—Mitchell v. Beck, 88 Mich. 342.

¶ 83. When M. has agreed with J. to do the plumbing for a house to be built by J. for A., and where J. has abandoned his contract with A. the latter's oral agreement with M. to pay him for the work agreed by him to be done for J., if M. will finish said work and make certain changes at an additional price, is valid.—McLaughlin v. Austin, 104 Mich. 489.

¶ 84. Since there cannot be two original promises at the same time, it is essential that an owner's promise to pay a subcontractor for work must have been made in view of an abandonment of an earlier contract with the principal contractor or upon refusal to do the work under it, both promises having been oral.—Wilhelm v. Voss, 118 Mich. 106.

§ 21. ——Consideration moving to original debtor.

¶ 85. An oral promise to pay the debt of another is not exempted from the operation of the statute by reason of its consideration being the release of property to the original debtor. It remains a collateral promise still. —Corkins v. Collins, 16 Mich. 478.

§ 22. Promise to pay for services inuring to another.

See also ante § 20, ¶ 74.

Promise of personal representative to answer personally for services rendered the estate, see post § 29.

Oral promise to pay for services rendered at request of agent lacking authority, see Agency ¶ 301.

¶ 86. A parol promise by a railroad company to pay the obligations of a contractor to his laborers is void.—Bottomley v. Port Huron & N. W. R. Co., 44 Mich. 542.

¶ 87. Where A., for whom B. has contracted to do work, promises C., who has been employed by B. to do part of the work, to keep back enough of B.'s money to pay him, such promise is void, being an oral agreement to answer for another's debt or default. —Dupuis v. Interior Construction & Imp. Co., 88 Mich. 103.

¶ 88. Where A. let B. take a yoke of oxen to use in clearing land for A.'s wife, and with the understanding that B. should own the oxen when he had done $100 worth of clearing, such arrangement was not within the statute of frauds.—Sutherland v. Carter, 52 Mich. 151.

¶ 89. A physician who has rendered professional services to a man's father and has then been told by the man to charge to him the bill and also any bill for subsequent services, cannot, by prefixing the man's first initial to the charge previously made in the physician's account book to the father by his surname, make the man liable for services rendered prior to his promise, which was an unwritten agreement to pay another's debt. —Chappell v. Barkley, 90 Mich. 35.

¶ 90. An alleged agreement by a decedent to pay the claimant for work to be performed by him upon decedent's farm for claimant's father, who was the lessee, was void under the statute of frauds.—Bristol v. Sutton, 119 Mich. 693.

¶ 91. Where defendant received a telegram addressed to his wife announcing the death of her father, and orally authorized the telegraph operator to have the body shipped at his expense, his promise was not one to pay the debt of another, and he is primarily liable, even though the operator sent the telegram in the wife's name and the body was shipped to her.—Hillman v. Hulett, 149 Mich. 289.

§ 23. Promises to pay for goods furnished or delivered.

See also ante § 18, ¶ 52.

Promise of husband or wife to pay for goods furnished the other, see post § 26.

¶ 92. A promise to the vendor to pay for such goods as may be furnished to a third person is original and not collateral, and is not within the statute as a promise to pay another's debt.—Larson v. Jensen, 53 Mich. 427; Morris v. Osterhout, 55 Mich. 262.

¶ 93. An oral promise made by the purchaser of a stock of goods to a creditor of the vendor to pay the latter's indebtedness is void under the statute of frauds.—Dean v. Ellis, 108 Mich. 240.

¶ 94. A collateral promise to pay for goods furnished another is void under the statute of frauds unless in writing and signed by the person promising or by his duly authorized agent.—Ruppe v. Edwards, 52 Mich. 411.

¶ 95. The oral promise of the president of an electric corporation, that if a lumber company which had been furnishing the corporation with slabs for fuel would continue to deliver the slabs he would see that they were paid for, is void under the statute of frauds. —Ramsdell v. Citizens' Electric Light & Power Co., 103 Mich. 89.

¶ 96. A verbal promise by an employer to a merchant that he "would see that the account was paid" and that he "would guarantee the account" for goods furnished to one logging for him is an agreement to answer for the debt of a third person and not an original promise.—Butters Salt & Lumber Co. v. Vogel, 130 Mich. 33.

¶ 97. Where goods are furnished and credit given to one person under the understanding that he shall pay for the same in orders upon another person, the latter cannot be held for the purchase price because of his oral promise, made when the orders are presented, that he will pay them in a few days, since a contract to answer for another's debt is required to be in writing.—Fuller & Rice L. & M. Co. v. Houseman, 114 Mich. 275.

§ 24. ——To pay for materials furnished contractor or subcontractor.

Owner's oral promise to pay subcontractor for work, see ante ¶ 84.

¶ 98. An oral promise to pay for material furnished to another person on a contract made with him and not with the promisor cannot be enforced so long as the original contract remains uncanceled.—Baker v. Ingersoll, 89 Mich. 158.

¶ 99. Where defendants' superintendent stated to plaintiff that defendants would pay for any supplies furnished a lumbering jobber while working on defendants' logs, the

promise is void as a promise to pay the debt of another, and not in writing.—Sherman v. Alberts, 153 Mich. 361.

¶ 100. Where a house has been built for A. by B. with materials furnished to the latter by C., if any promise by A. to pay C. for such materials can be implied from A.'s asking C. to wait on him awhile for the bill, such promise is void as within the statute of frauds.—Preston v. Zekind, 84 Mich. 641.

¶ 101. If A., for whom B. has built a house with material furnished the latter by C., asks C. to wait awhile for his bill, such implied promise on A.'s part to pay is not sufficient in law under the statute of frauds to estop him from thereafter denying the validity of the claim, even though C. refrains, because of A.'s request, from proceedings under the lien law.—Preston v. Zekind, 84 Mich. 641.

¶ 102. Where the owner of property said to one who had furnished materials to contractors that if a lien was put upon his property he would sue, and, further, that such person would get his pay though it might take some time, such language did not take the case out of the statute of frauds. It was not a promise to pay.—Fuller & Rice Lumber & Mfg. Co. v. Houseman, 117 Mich. 553.

¶ 103. In an action to recover the price of board and supplies furnished to laborers and employees of a subcontractor of the defendants, a verdict for defendants, with special findings that such subcontractor was never agent of defendants, that the agreements were made with him personally and not as agent, and that the debts sued for were incurred and the articles furnished solely on his credit and engagement, and not on account of defendants, shows that even if defendants had promised to pay the accounts their promise was within the statute of frauds, as a promise to pay the debt of another.—Barden v. Briscoe, 36 Mich. 254.

¶ 104. Where one who has been furnishing to a subcontractor supplies for use in building a railroad is unwilling to sell further on his credit, and thereafter furnishes them to the company's camps upon the assurance of the company's agent that the company will pay, such assurance need not be in writing.—Michigan Slate Co. v. Iron Range & H. B. R. Co., 101 Mich. 14.

¶ 105. An oral promise to a merchant to guarantee payment for anything a third person should want in equipping a sawmill, at which he was to manufacture shingles for the promisor, is within the statute of frauds and cannot support an action by the merchant against the person making the promise where it appears that such goods were charged against such third person and the monthly statements were sent to him.—Studley v. Barth, 54 Mich. 6.

¶ 106. Where one furnishing material for a building in process of construction has agreed with mortgagees furnishing a building loan in writing, for a valuable consideration, to see that no liens are placed upon the property, his subsequent promise to pay the claim of a material man, in consideration of the latter's forbearing to enforce his lien, is binding as an original promise. The benefit of preventing a lien from going on is the consideration for the second promise.—Stephen v. Yeomans, 112 Mich. 624.

¶ 107. Where the owner of property in consideration of a material man forbearing to file a lien against his property and furnishing additional material to complete the building agrees to pay the debt owed by the defaulting contractor for materials furnished him the agreement is supported by a sufficient consideration so as to take the case out of the statute of frauds.—Monroe Lumber Co. v. Bezeau, 192 Mich. 307.

§ 25. Promise to pay on joint account.

¶ 108. The purchase of goods that are to be delivered to one on the joint promise and credit of two is in legal effect, as between them and the vendor, a purchase by both, and is not within the statute.—Gibbs v. Blanchard, 15 Mich. 292.

§ 26. Promise of husband or wife to pay the other's debt.

Liability of one spouse for other's debts, see Husband and Wife.

¶ 109. A wife is not liable upon her oral promise to pay for coal previously furnished for a steamboat owned by her husband but mortgaged to her, although she knew when she made the promise that the claim for such coal was a lien upon the vessel, and although the creditor thereafter made no effort to enforce a lien where there was no express agreement that the lien should be released, and where the creditor did not know of the wife's interest in the boat.—Goodman v. Felcher, 116 Mich. 348.

¶ 110. The business of a retail trader indebted to plaintiffs for goods bought was continued by his widow, who orally promised plaintiffs to pay her husband's debt if they would sell goods to her on credit. Credit was given. Held, that this was void as a promise to pay another's debt.—Ruppe v. Peterson, 67 Mich. 437.

¶ 111. The oral promise of a widow to pay a physician's bill against her husband is void under the statute of frauds.—Buck v. Haynes's Estate, 75 Mich. 397.

¶ 112. An oral agreement of a married woman that if the seller of lumber purchased by her husband would leave such material there and would ship the balance, she would see that it was paid for, was in effect a statement that if her husband did not pay for

such materials, she would, and was void under the statute of frauds, and as the act of a married woman who is sought to be made liable for the debt of her husband.—Reelman v. Grofsend, 140 Mich. 681.

§ 27. Assumption of another's debt.

¶ 113. It seems that an oral promise to execute a paper, undertaking to pay debts, in accepting a written offer of sale which stipulates that they shall be assumed, is not void under the statute of frauds.—Wagner v. Egleston, 49 Mich. 218.

¶ 114. Where a corporation which holds a note from two of its stockholders agrees to give it up in consideration that they pay a note of the corporation held by a bank, the agreement is an independent undertaking not within the statute of frauds.—Clay Lumber Co. v. Harts Branch Coal Co., 174 Mich. 613.

¶ 115. A firm of railway contractors sublet the work, reserving the right to pay off the laborers employed by the subcontractors, who assigned to the contractors all moneys due said laborers. The liability of the contractors to the laborers was limited to the amount so assigned, and to the amount due and payable to the subcontractors. The subcontractors abandoned their contract, and gave time checks to the laborers for the amount due them. The laborers sold their checks, and the contractors arranged with the purchaser, with notice that he was to release the subcontractors, to pay said checks, which were charged up in account against the subcontractors. Held, that the agreement was not within the statute of frauds.—Gleason v. Fitzgerald, 105 Mich. 516.

¶ 116. A promise by a tenant to pay the rent due for a previous tenant whose lease was taken over is a promise to pay the debt of another and void under the statute of frauds unless the circumstances show it was a valid new, and original promise.—Draggo v. West Bay City Sugar Co., 144 Mich. 195.

C. AGREEMENT UPON CONSIDERATION OF MARRIAGE.

§ 28. In general.

See also post ¶ 225.
Operation and effect of statute, see post III.
Marriage of the promisee as validating the agreement, see post ¶ 357.
Provisions of the statute, see Comp. L. 1915, § 11981, ¶ 3.

¶ 117. An ante-nuptial parol agreement to settle property on the wife is void.—Wood v. Savage, 2 D. 316.

¶ 118. One's parol promise to give his daughter certain lands upon her marriage is doubly within the statute of frauds because it concerns land and because it is in consideration of marriage; nor does the marriage take it out of the statute.—Welch v. Whelpley, 62 Mich. 15.

¶ 119. An oral agreement to make a will in favor of a person upon consideration of marriage to such person is void under the Statute of Frauds, C. L. 1897, sec. 9515, sub. 3, How. 2nd Ed., § 11399.—Dienst v. Dienst, 175 Mich. 724.

D. PROMISE BY EXECUTOR OR ADMINISTRATOR TO ANSWER PERSONALLY.

§ 29. In general.

Agreements to answer for another, see ante I, B.
Operation and effect of statute, see post III.
Provisions of the statute, see Comp. L. 1915, § 11981, ¶ 4.

¶ 120. An agreement by an administrator to pay for legal services for the estate is not within the statute of frauds, where credit is given to the administrator personally.—Meade v. Bowles, 123 Mich. 696.

E. AGREEMENT FOR COMMISSIONS ON SALE OF LAND.

§ 30. In general.

Estates and interests in lands generally, see post I, G.
Contracts of agency, brokerage or factorage as contracts for sale of goods, see post § 37.
Agreement to pay agent obtaining lands a proportion of profits on sale thereof, see post § 55.
Powers and agencies to transfer or create interests in land, see post § 72.
Agreements to procure sales or conveyances from or to others, see post § 75.
Requisites and sufficiency of writing or memorandum, see post § 90.
Operation and effect of statute, see post III.
Burden of showing the sale to be within the statute, see post § 151.
Recovery for services rendered under parol contract for commissions, see post § 126.
Employment of real estate broker, see Brokers § 3.
Provisions of the statute, see Comp. L. 1915, § 11981, ¶ 5.

¶ 121. Under Pub. Acts 1913, No. 238, amending Comp. Laws 1897, § 9515, How. 2nd Ed., § 11399, every agreement for the sale of real estate on commission entered into after the law takes effect is absolutely void unless such agreement or memorandum thereof is in writing and is signed by the party to be charged or by some person by him lawfully authorized.—McGavock v. Ducharme, 192 Mich. 98.

¶ 122. Contracts coming within Pub. Acts 1913, No. 238, providing that the statute of frauds shall include every agreement, promise or contract to pay any commission for or upon the sale of any interest in real estate,

are absolutely void.—Smith v. Starke, 196 Mich. 311.

¶ 123. Pub. Acts 1913, No. 238, providing that the statute of frauds shall include every agreement, promise or contract to pay any commission for or upon the sale of any interest in real estate, applies to contracts between others than those between owner and broker.—Smith v. Starke, 196 Mich. 311.

¶ 124. A contract for commissions for the sale of real estate made after the taking effect of Pub. Acts 1913, No. 238 is invalid unless in writing.—Bennett v. Denton, 194 Mich. 610.

¶ 125. A contract for the sale of land on commission is not invalid under Pub. Acts 1913, No. 238, amending Comp. Laws 1897, § 9515, How. 2nd Ed. § 11399, because such contract or some memorandum thereof is not in writing and signed by the party to be charged, or his authorized agent, where made before the act took effect.—McGavock v. Ducharme, 192 Mich. 98.

¶ 126. An oral contract for the sale of real estate on commission is not a contract creating an interest in land or a power over it so as to necessitate that it be in writing and subscribed by the party creating such interest or power or by his authorized agent under Comp. Laws 1897, §§ 9509, 9511, How. 2nd Ed. §§ 11393, 11395.—McGavock v. Ducharme, 192 Mich. 98.

¶ 127. Pub. Acts 1913, No. 238, making void every agreement to pay any commission, etc., unless in writing has no application in an action by the contract purchasers of land against the vendor for false representations as to the value of the land.—Cox v. Holkeboer, 200 Mich. 86.

¶ 128. Under Comp. Laws 1915, § 11981, the contract of one broker with another for commission for the sale of real estate must be in writing.—Fleming v. James S. Holden Co., 200 Mich. 519.

§ 31. Contract to furnish customer.

¶ 129. Compensation contracted by plaintiff, a farmer, and defendant, a real estate broker, for plaintiff to receive if he would furnish a customer for certain premises, held to be "commission" within Pub. Acts 1913, No. 238, providing that the statute of frauds shall include every agreement, promise or contract to pay any commission for or upon the sale of any interest in real estate.—Smith v. Starke, 196 Mich. 311. (Ostrander, J., dissenting.)

§ 32. Contract of purchaser to pay commission.

¶ 130. Under Pub. Acts 1913, No. 238, § 2, providing that every agreement, promise or contract to pay any commission for or upon the sale of any interest in real estate shall be void unless such agreement, contract or promise shall be in writing, a contract for the payment of a commission by the purchaser of land must be in writing.—Slocum v. Smith, 195 Mich. 281.

§ 33. Commissions for lease of real estate.

Leases of lands or interests therein, see post § 67.

¶ 131. A contract for commissions for the lease of real estate for a period of ten years, made before Pub. Acts 1913, No. 238, was passed, held enforceable though not in writing.—Collin v. Kittelberger, 193 Mich. 133.

F. SALE OF GOODS.

§ 34. In general.

Agreements for sale not to be performed in one year, see ante I, A.
Note, memorandum or bill of sale, see post § 107.
Part payment or earnest money, see post § 110.
Part performance or delivery and acceptance, see post § 114.
Operation and effect of statute, see post III.
Nonenforceability of the parol contract, see post § 146.
Effect on contract for sale of personalty of independent provision for realty void under the Statute, see post § 130.
Parol evidence to aid the contract for goods, see post § 153.
Sufficiency of parol assignments in general, see Assignments § 2.
Validity of parol assignment under statute permitting assignee to sue in his own name, see Assignments § 2.
Oral trusts in personalty, see Trusts III.
Provisions of the statute, see Comp. L. 1915, § 11835.

¶ 132. Where goods exceeding $50 in price are ordered, the vendee is not bound unless there is an acceptance in writing or some act done on the faith of the order.—Goodspeed v. The Wiard Plow Co., 45 Mich. 322.

¶ 133. There can be no recovery on an oral sale of goods exceeding $50 in value unless something has been paid or some part of the goods delivered.—Dooley v. Eilbert, 47 Mich. 615.

¶ 134. To make a sale of personal property of the value of fifty dollars or more valid, there must be a delivery, a part payment, or a writing signed by the party to be charged.—Johnson v. Morrison, 163 Mich. 322.

§ 35. What constitutes contract of sale of goods.

As to nature of contract of sale, see Sales.

¶ 135. A contract of barter is regarded as a contract of sale within the meaning of the

statute of frauds.—Gorman v. Brossard, 120 Mich. 611.

¶ 136. An agreement whereby certain chattels are to be turned over by the owner in consideration of the surrender of a note given by him for the purchase price is a contract for sale, within the meaning of the statute of frauds.—Hudson v. Emmons, 107 Mich. 549.

¶ 137. An oral agreement to accept a quantity of stone lying in an alley as payment of a debt is void under the statute of frauds, where there was no payment of money which would take the transaction out of the statute and no receipt or other extinction of the debt passed and no transfer of possession of the stone.—Gorman v. Brossard, 120 Mich. 611.

§ 36. ——Contracts for work and labor.

¶ 138. An agreement by one to construct an article especially for or according to the plans of another, whether at an agreed price or not, although the transaction is to result in the sale of the article, is a contract for work and labor and is not within the statute of frauds, but if the article to be made and delivered is of a kind which the producer usually has for sale, in the course of his business, it is a contract for sale and must be in writing.—Ericsson Mfg. Co. v. Caille Bros. Co., 195 Mich. 545.

¶ 139. A contract to paint a portrait is not a sale of chattels and is not required by How. St. § 6186 to be in writing though the price is more than $50.—Turner v. Mason, 65 Mich. 662.

¶ 140. A tailor's contract to make a coat is not a contract of sale within the statute. —Rasch v. Bissell, 52 Mich. 455.

¶ 141. An agreement to install and connect with machinery belonging to the defendant, machines to be furnished by plaintiff and to be affixed to the freehold and become a part of the fixtures already situate upon the premises, was not a sale of goods within the meaning of the statute of frauds, and therefore the original contract between the parties need not have been in writing.—Underfeed Stoker Co. v. Detroit Salt Co., 135 Mich. 431.

¶ 142. The deceased ordered of claimant, a German manufacturer, a set of goods of special shape and style, and inscribed with the monogram of deceased. The goods were such as the claimant could not sell in its general trade. Held, the order was not within the statute of frauds since the contract was one for work and labor and not for the sale of goods.—In re Gies' Estate, 160 Mich. 502; Bauscher v. Gies, Id.

§ 37. ——Contracts of agency; brokerage or factorage.

Agreements for commissions on sale of lands, see ante § 30.

Agency contracts in general, see Agency.

Brokerage or factorage contracts in general, see Brokers.

¶ 143. An agreement between a retail grocer and a commercial broker that the former shall include for the latter in his annual order for canned goods a certain amount for the broker is not a contract of bargain and sale required by the statute of frauds to be in writing where the value of the goods exceeds $50, but of agency.—Hatch v. McBrien, 83 Mich. 159.

¶ 144. An agreement to pay compensation to an agent for the sale of personal property, graduated by the price obtained from a third person on such sale, is not an agreement for the sale of chattels and is not required to be in writing.—Hamilton v. Frothingham, 59 Mich. 253.

¶ 145. A contract by which a broker agreed to find a purchaser for goods worth more than fifty dollars need not be in writing.—Obenauer v. Solomon, 151 Mich. 570.

¶ 146. An agreement to procure a purchaser of shares of stock conditioned on the promisee's subscribing therefor, is not within the statute of frauds.—Green v. Brookins, 23 Mich. 48.

§ 38. ——Parol subscription for stock.

Parol contract for sale of stock, see post ¶ 149.

Subscriptions for stock generally, see Corporations, VII.

¶ 147. The statute of frauds does not bar a recovery on a parol subscription for stock in a corporation. It is not a sale of the stock.—Peninsular Leasing Co. v. Cody, 161 Mich. 604.

¶ 148. The terms "goods, wares and merchandise," in the statute, embrace animate as well as inanimate property.—Weston v. McDowell, 20 Mich. 353.

§ 39. Property within the statute.

¶ 149. A parol contract for the sale of stock already issued in an incorporated company is invalid, such stock being "goods," within the meaning of the statute of frauds (3 Comp. Laws, 1897, § 9516).—Sprague v. Hosie, 155 Mich. 30.

§ 40. Parol modification or discharge of written contract.

Modification of contracts in general, see Contracts, VIII.

¶ 150. A written contract for the sale of personalty of the value of over $50 may be modified by a subsequent oral agreement which works a release or discharge of the whole contract or obligation.—Grand Traverse Fruit & Produce Exchange v. Thomas Canning Co., 200 Mich. 95.

G. ESTATES AND INTERESTS IN LAND.

§ 41. In general.

Agreements for commissions on sale of lands, see ante § 30.
Executory agreements for conveyances or interests, see post § 59.
Parol leases, see post § 67.
Parol agreements for lease, see post § 71.
Powers and agencies to transfer or create interests, see post § 72.
Parol alterations of conveyances, see post § 77.
Creation grant or surrender of estates or interests by operation of law, see post § 79.
Requisites and sufficiency of writing or of part performance, see post II, B.
Operation and effect of statute, see post III.
Parol evidence to aid the writing or identify the parties, see post § 153.
Illegality of arbitration of fee titles to land, see Arbitration § 2.
Parol building restrictions, see also Buildings § 20.
Validity of oral dedication, see Dedication §§ 1, 6, 17.
Nature and requisites of deeds or conveyances generally, see Deeds I.
Inadmissibility of oral evidence of title or ownership of lands, see Evidence § 114.
Office of execution certificate of purchase to satisfy statute of frauds, see Executions § 76.
Parol trusts in respect to lands or interests therein, see Trusts, III.
Provisions of the statute, see Comp. L. 1915, §§ 11975, 11976, 11977.

¶ 151. Conveyances of land and interests therein must be by deed.—Enos v. Sutherland, 11 Mich. 538; Morrill v. Mackman, 24 Mich. 279; Hayes v. Livingston, 34 Mich. 384; Nims v. Sherman, 43 Mich. 45; Shaw v. Chambers, 48 Mich. 355.

¶ 152. Transfers of real property cannot be shown by parol testimony.—McDonald v. Smith, 189 Mich. 211.

§ 42. Equitable rights or interests.

Oral extinguishment of equitable interests, see post § 58.
Contract to procure conveyance of equity of redemption, see post § 75.
Equitable rights and titles in general, see Equity II.

¶ 153. The interest which the grantor in a conveyance of land absolute in form but intended as a security has in the premises can only be transferred at law by a written instrument.—Miner v. O'Harrow, 60 Mich. 91.

§ 43. Easements.

Effect of part performance of agreement for easement, see post § 105.
Nature and creation of easements in general, see Easements I.
Creation of easements by estoppel or by prescription, see Easements §§ 11-13.

¶ 154. In general an easement on the land of another cannot be created without deed.—Millerd v. Reeves, 1 Mich. 107; and see Day v. Walden, 46 Mich. 575.

¶ 155. An agreement to convey a right of way is an agreement to convey an interest in land, and must, it seems, be in writing to bind the land-owner.—Detroit, H. & I. R. Co. v. Forbes, 30 Mich. 165, 175.

¶ 156. A privilege granted for an annual compensation to flow lands for an indefinite period is void unless in writing.—Morrill v. Mackman, 24 Mich. 279.

¶ 157. Under the statute of frauds, an easement imposing a servitude upon lands of a grantor for the benefit of the estate of the grantee, cannot be assigned, granted or surrendered unless by a writing or by operation of law.—Ives v. Edison, 124 Mich. 402.

¶ 158. The right of drainage through the lands of another is an easement requiring for its enjoyment, an interest in such land, and cannot be conferred except by deed or conveyance in writing.—Schultz v. Huffman, 127 Mich. 276.

¶ 159. An oral agreement is insufficient to support an easement of way over land.—Dummer v. United States Gypsum Co., 153 Mich. 622.

§ 44. Licenses to enter on land.

Void land contract operative as license, see post § 129.
Validity of oral license to cut standing timber given by agent without written authority, see post ¶ 260.
Nature and creation of licenses to enter land, generally, see Licenses to Enter on Land.

¶ 160. A parol license to cut and remove timber at a fixed price is valid until revoked. It is not a sale of an interest in lands, and is entirely outside of the statute of frauds.—Greeley v. Stilson, 27 Mich. 153; Spalding v. Archibald, 52 Mich. 365.

¶ 161. A parol license to enter land and cut timber is valid so far as executed before revocation, and cannot be revoked so as to undo what has been done or earned under it.—Greeley v. Stilson, 27 Mich. 153; Spalding v. Archibald, 52 Mich. 365; Wetherbee v. Green, 22 Mich. 311; Wetmore v. Neuberger, 44 Mich. 362; Sovereign v. Ortmann, 47 Mich. 181.

¶ 162. A license, being merely a permission to do some act or series of acts on the licensor's land without any permanent interest in it, may be created by parol, and will protect the licensor until revoked.—Morrill v. Mackman, 24 Mich. 279.

¶ 163. Parol extensions of time to take off growing timber under a contract for its sale

and removal, whether valid under the statute of frauds or not when made, are good as licenses so far as acted upon.—Haskell v. Ayres, 35 Mich. 89.

¶ 164. Where standing timber was by written contract absolutely sold to be taken off in two years by the vendee, who had fully paid therefor, subsequent parol extensions not exceeding one year each were made by the vendor, at least they amounted to a revocable license.—Williams v. Flood, 63 Mich. 487, per Champlin and Morse, JJ., Campbell, C. J., and Sherwood, J., contending that they were more and were valid waivers of a forfeiture.

§ 45. Reservations and exceptions.

Reservation of trees, see post ¶ 214.

Reservations and exceptions in general, see Deeds, III, D.

¶ 165. A parol agreement reserving crops growing on land contracted in writing to be sold is void.—Vanderkarr v. Thompson, 19 Mich. 82.

¶ 166. A parol agreement for the reservation or exception of a barn or sheds from the operation of a deed is void under the statute of frauds, and the question whether an undertaking sued on is of that character is not to be determined by the name which the parties or their witnesses give it, but by the nature and substance of the transaction.—Detroit, H. & I. R. Co. v. Forbes, 30 Mich. 165.

¶ 167. An undertaking to remove a barn and sheds situated upon a forty-acre tract in consideration of the giving of a deed of land lying fifty feet on each side of a proposed railroad route where it should cross such tract cannot be construed as an exception or reservation of the barn and sheds from the operation of the deed, in the absence of any showing of the actual location of the route of the railroad, or that it was so located as to include the ground where the barn and sheds stood, nor is such undertaking required to be in writing.—Detroit, H. & I. R. Co. v. Forbes, 30 Mich. 65.

¶ 168. A parol agreement between the parties to a deed, reserving to the grantor certain trees and a right of pasturage, is within the statute of frauds.—Dodder v. Snyder, 110 Mich. 69.

§ 46. Warranties or covenants for title.

Nature and requisites of covenants for title generally, see Covenants for Title.

¶ 169. A warranty or representation that real estate is not incumbered is not the creation, granting or surrendering or declaring of any estate, interest, etc., which the statute requires to be in writing.—Huntington v. Wellington, 12 Mich. 10.

¶ 169a. A guaranty that the maker of a certain mortgage sold by defendant to plaintiffs was responsible and able to pay is simply an undertaking that certain facts exist, and, if inserted in a deed of conveyance, would be simply a personal covenant which would not run with the land, and it need not be written as if it passed an interest in the land.—Huntington v. Wellington, 12 Mich. 10.

§ 47. Assignments and transfers of mortgages.

Executory agreements for mortgages, see post § 66.

Necessity that agent's authority to assign mortgage be written, see post § 74.

Requisites and sufficiency of writing, see post § 92.

Part performance of agreement to convey land subject to mortgage, see post § 104.

Assignment and transfer of mortgages generally, see Mortgages.

¶ 170. Mortgages, being chattel interests, may be transferred or extinguished without writing.—Cooper v. Ulmann, W. 251; Dougherty v. Randall, 3 Mich. 581; Martin v. McReynolds, 6 Mich. 70; Pease v. Warren, 29 Mich. 9; Nims v. Sherman, 43 Mich. 45.

§ 48. Agreements affecting redemption rights.

Rights of redemption from execution sale generally, see Executions, VII.

¶ 171. The right to redeem from an execution sale, being a right created by law, the time for its exercise may be prolonged by verbal agreement.—Pellston Planing Mill & Lumber Co. v. Van Wormer, 198 Mich. 648.

§ 49. Reconveyance or revestment of title.

Oral extinguishment of equitable right to reconveyance, see post ¶ 186.

Executory agreements for reconveyance, see post § 60.

¶ 172. A grantee's title cannot be divested or revested in his grantor by destruction of the conveyance.—Gugins v. Van Gorder, 10 Mich. 523; Warren v. Tobey, 32 Mich. 45; Mette v. Feldman, 45 Mich. 25; Hyne v. Osborn, 62 Mich. 235.

¶ 173. Under the statute requiring a writing to transfer an interest in land, the surrender of an unrecorded deed and its subsequent destruction at the instance of the grantee, was not in effect a reconveyance of the land; particularly in the absence of evidence of a surrender of the deed by the grantor with the intention to revest the title, or of its destruction at his direction.—Tabor v. Tabor, 136 Mich. 255.

¶ 174. After a vendor in a land contract has put performance out of his power by conveying to a third person, an oral agreement to have the land conveyed to the vendor and then reconveyed to the original vendee on his paying up all the purchase money is within the statute of frauds, and

cannot operate as a waiver of such vendee's right to treat the contract as rescinded and to recover the money paid.—Weaver v. Aitcheson, 65 Mich. 285.

§ 50. Waiver, release or surrender of estates or interests.

Executory agreements for release or surrender of estates or interests, see post § 60.
Surrender of estates or interests by operation of law, see post § 79.
Letter as disclaimer of title to real estate, see Estoppel ¶ 179.

¶ 175. An interest that rests in parol may be extinguished by parol.—First Nat. Bank v. McAllister, 46 Mich. 397.

¶ 176. One cannot by mere waiver part with the legal title to land. As to waiver of the right that an execution purchaser has to demand and receive a sheriff's deed after the period for redemption has expired, quære. —Whiting v. Butler, 29 Mich. 122.

¶ 177. An agreement to surrender or release an equitable estate in fee-simple must be in writing signed by the party transferring or releasing it, and if oral it cannot be shown to alter a written contract.—McEwan v. Ortman, 34 Mich. 325.

¶ 178. A parol agreement by one remainderman in common not to claim a share of his testator's realty will not affect a vested interest in land.—Broas v. Broas, 153 Mich. 310.

§ 51. ——Purchaser's or vendor's interest under contract.

¶ 179. An interest of a contract purchaser in land is such an interest in land as cannot be surrendered by parol under the statute (How. St. § 6179).—Grunow v. Salter, 118 Mich. 148.

¶ 180. Under Comp. Laws 1897, § 9509, providing that no estate in lands shall be created, granted, or surrendered unless by operation of law or by a written instrument, the interest of a purchaser under the land contract is such an interest in land as cannot be surrendered by parol.—Stewart v. McLaughlin's Estate, 126 Mich. 1.

¶ 181. A parol arrangement whereby a man, who had deeded land to his wife, reserving to himself by written contract the right of possession and of repurchase within five years, bargains to give up his right under such contract, is void under the statute of frauds; and a ruling to that effect is not made erroneous by the judge's adding incidentally that "if the arrangement amounted to anything it would make the wife tenant of the husband, which was impossible," such further remark being immaterial.—Grover v. Buck, 34 Mich. 519.

¶ 182. Complainant and his wife deeded a remainder interest in land to defendant, who agreed in writing to pay them twenty-five dollars a month for their lifetime. Later defendant took possession of the land. Held, he could not show a verbal agreement with complainant modifying the original agreement to the effect that defendant was to work the land and to support complainant, since interests in land cannot be divested by a verbal agreement.—Herpel v. Herpel, 162 Mich. 606.

§ 52. ——Waiver of forfeiture.

¶ 183. While Comp. L. 1897, § 9509, prohibit the selling of standing timber upon land except by a writing signed by the owner, the right to forfeit timber thus sold for failure or nonremoval within a certain time may be legally waived by parol.—Wallace v. Kelly, 148 Mich. 336.

¶ 184. Where a contract gives to the vendor a right to forfeit a vendee's right to cut timber, such right of forfeiture may be waived by parol.—Newberry v. Chicago Lumbering Co., 154 Mich. 84.

§ 53. ——Oral extinguishment of equitable interests.

Equitable rights and interests, see ante § 42.

¶ 185. It seems that, against the legal owner of land, equities may be extinguished otherwise than by conveyance under the statute of frauds.—Munch v. Shabel, 37 Mich. 166.

¶ 186. Inasmuch as a right resting in parol may be surrendered or extinguished by parol, one who has an equitable right to a reconveyance of land may orally relinquish it and direct the reconveyance to be made to his wife as a gift.—Crittenden v. Canfield, 87 Mich. 152.

§ 54. Agreements representing real estate corporations or firms or shares therein.

Persons to whom statute is available, see post § 141.
Equities based on part performance of parol agreement as to partnership property, see post § 139.
Questions of law and fact as to time of entering into the agreement, see post § 156.

¶ 187. The statute of frauds is not involved where complainant seeks specific performance of an oral agreement for the reorganization of a bankrupt corporation and for a division of corporate stock between complainant, a stockholder in the bankrupt corporation and the purchaser of the assets of the bankrupt corporation, including real estate, so far as it relates to a division of stock, where complainant was legally entitled to the stock when issued and defendant has already conveyed the real estate to the corporation.—Millen v. Potter, 190 Mich. 262.

¶ 188. An agreement among promoters is within the statute where it contemplates purchase and preparation of ground and erection of buildings thereon for use as a factory and reimbursement in stock of the corporation to be formed to which it was to be devoted.—McLennan v. Boutell, 117 Mich. 544.

¶ 189. A parol contract of partnership for the purpose of dealing in timber lands is within the statute of frauds and therefore void, though it contemplates numerous tracts. —Nester v. Sullivan, 147 Mich. 493.

¶ 190. An oral agreement to form a copartnership for the purchase of timber land from which the manufacture and sale of lumber is to be carried on is within the statute of frauds.—Raub v. Smith, 61 Mich. 543.

¶ 191. An agreement whereby plaintiff is to purchase, for himself and defendant, land whereon a plaster-bed is located, the title to be in the names of both parties, and whereby both are to form a partnership to work the plaster, is within the statute.—Brosnan v. McKee, 63 Mich. 454.

§ 55. Agreements for interests in future proceeds of land.

Executory agreements for interests in lands generally, see post § 59.

¶ 192. The statute does not apply to a bargain between principal and agent whereby the latter is to be paid for his services in obtaining lands a certain proportion of the profits on the sale thereof.—Carr v. Leavitt, 54 Mich. 540.

¶ 193. An agreement whereby one party was to look up lands to be purchased, the profits to be shared equally after a sale, there being no express agreement as to whose names should appear as grantees in the purchase deeds, is not within the statute of frauds.—Davis v. Gerber, 69 Mich. 246.

¶ 194. Where the holder of an option on pine land agrees orally with another person to give him the right to purchase, each to pay half the expense incurred in examining the timber, and such other person if he purchases to pay one-third of the profits, the agreement is not void under the statute of frauds.—Petrie v. Torrent, 88 Mich. 43.

¶ 195. An agreement was within the statute and therefore unenforceable under the rule of Petrie v. Torrent, 88 Mich. 43; s. c., 100 Mich. 117, because oral, where complainant, holding an option on timber lands agreed with defendant that the option should be exercised and it was done, placing title in the name of a third person who advanced necessary funds, and the agreement was that all the profits were to be divided and that the land or its proceeds were to be regarded as profits and complainant was to have a half interest in them.—Tuttle v. Bristol, 142 Mich. 148.

¶ 196. An oral agreement between the owner of land and the purchaser under contract, after forfeiture of the lease for nonfulfillment of conditions and election by the owner to treat the contract purchaser as tenant, that the contract purchaser should have a certain sum out of the proceeds of the sale of the farm to a third person before he removed from the premises is invalid within the statute of frauds.—Brown v. Brown, 194 Mich. 578.

¶ 197. An agreement between one making an application for a patent to land and two other persons, who furnished the purchase money, and to whom the patent was issued, whereby the applicant was to have an undivided interest in the land for his services in exploring the land for mining purposes, is invalid where not in writing, under How. St. § 6179, providing that no trust or power over or concerning lands shall be created, unless in writing and subscribed by the party to be charged or his authorized agent.—Crawford v. Moore, 28 Fed. 824, aff'd 130 U. S. 122, 32 L. ed. 878, 9 Sup. Ct. Rep. 447.

¶ 198. Real estate was devised in trust to be sold under power of attorney in a will, and the balance of the proceeds from the sale of the land, was void under the statute paid to complainant. An absolute deed was made conveying the land, and complainant alleges an oral agreement between the grantee and herself with reference to her interest in the land. Held, that alleged agreement, being made several years before the alleged trust fund was created by the subsequent sale of the land, was void under the statute of frauds.—Longe v. Kinney, 171 Mich. 312.

¶ 199. Where the heirs at law of a deceased person enter into a contract with the widow of decedent for the purchase of her dower interest in land, an oral agreement among such heirs as to the proportionate amount of the contract price to be paid by each of them is not within the statute of frauds.—Stevens v. Jackson, 180 Mich. 131.

¶ 200. Defendant held two mortgages on land. Plaintiff held a third mortgage, and bought in the equity of redemption. Defendant foreclosed. Before the time for redemption expired, plaintiff and defendant made an oral agreement by which each was to try to sell the land, and the proceeds were to be divided according to their respective equities. Upon the maturing of his foreclosure title defendant went into possession, and seven years afterwards sold the land. Held, that the oral agreement to make the sale and divide the proceeds was void under the statute of frauds.—Mitchell v. Bilderback, 159 Mich. 483.

§ 56. Agreements affecting fixtures and improvements.

Agreements as to character of fixture and right to remove generally, see Fixtures, III.

Inefficacy of verbal agreement to change fixtures into movables, see also Fixtures ¶ 60.

¶ 201. A house built by one who holds lands under a contract of purchase, being part of the realty, an oral agreement that it may be levied upon by virtue of an execution against chattels is void.—Hogsett v. Ellis, 17 Mich. 351.

¶ 202. The provision as to contracts for the sale of an interest in lands has no application to an instrument in so far as it affects a building which never in fact became a part of the realty.—Osborn v. Potter, 101 Mich. 300.

§ 57. Agreements affecting fencing and boundaries.

Settlement of boundaries by estoppel, see post ¶ 145.
Parol agreements as to boundaries generally, see Boundaries §§ 2-8.
Agreements as to fencing generally, see Fences.

¶ 203. An agreement to build a fence does not relate to an interest in lands.—Dodder v. Snyder, 110 Mich. 69.

¶ 204. Where it is established that the oral promise of the grantee in a deed to build a fence constituted in part the consideration for the conveyance, although not so expressed in the deed, such agreement being valid warrants a recovery of damages against him for non-performance thereof.—Dodder v. Snyder, 110 Mich. 69.

¶ 205. Adjoining owners orally agreed that one of them should keep up a division fence, but should keep it entirely within his own bounds. After twenty years the fence was moved to the boundary, and ejectment was brought for the strip of land cut off by its removal. Held, that the action would not lie. As the oral agreement was void, and the owner of the strip might have withdrawn from it, the strip was never held adversely to the owner, whose title was recognized in the agreement and always afterwards.—White v. Hapeman, 43 Mich. 267.

¶ 206. A title complete by adverse possession cannot be divested by an executory parol agreement to rectify boundaries.—Lamoreaux v. Creveling, 103 Mich. 501, on authority of Burns v. Martin, 45 Mich. 22.

¶ 207. Occupancy to an agreed line supposed to be the true boundary for more than the statutory period cannot be undone and the titles adjusted to the true boundary when afterwards discovered by a parol agreement.—Bunce v. Bidwell, 43 Mich. 542.

¶ 208. A division line established by mutual agreement and acquiescence and constant occupancy for more than twenty years cannot be changed without writing.—Burns v. Martin, 45 Mich. 22.

§ 58. Agreements affecting growing crops or standing timber.

See also post ¶ 247.
Agreements for exchange of standing timber, see post § 61.
Contracts affecting crops and emblements generally, see Agriculture § 2.

¶ 209. Whether a parol sale of a growing crop on a valuable consideration is valid, quære.—Vanderkarr v. Thompson, 19 Mich. 82.

¶ 210. Annual crops may be sold and conveyed by parol.—Dayton v. Dakin's Estate, 103 Mich. 65.

¶ 211. A parol sale of standing timber is void.—Russell v. Myers, 32 Mich. 522; Wetmore v. Neuberger, 44 Mich. 362; Spalding v. Archibald, 52 Mich. 365; Antrim Iron Co. v. Anderson, 140 Mich. 702.

¶ 212. Standing timber can only be sold by a conveyance in writing.—Wallace v. Kelly, 148 Mich. 336.

¶ 213. Title to standing timber cannot be passed except by deed; but where timber is cut pursuant to a license it becomes personalty, and title thereto passes to the licensee unless the license is revoked before the cutting.—White v. King, 87 Mich. 107.

¶ 214. A reservation of trees is one of an interest in land.—Dodder v. Snyder, 110 Mich. 69.

§ 59. Executory agreements for conveyances or interests.

Contracts for commissions on sale of land, see ante § 30.
Agreement to convey easement, see ante § 43.
Parol surrender on transfer of purchasers or vendors' interest under contract, see ante § 51.
Agreements respecting real estate corporations or firms, see ante § 54.
Agreements for interests in future proceeds of land, see ante § 55.
Agreements affecting fixtures and improvements, see ante § 56.
Agreements affecting fencing and boundaries, see ante § 57.
Agreements affecting growing crops or standing timber, see ante § 58.
Agreements for lease, see post § 71.
Parol alterations of executory contracts, see post § 78.
Note or memorandum of executory agreements for conveyances or interests, see post § 93.
Part performance or execution of the agreement, see post § 103.
Oral executory contract in respect to lands as consideration for subsequent promise, see post § 128.

Avoidance of reciprocal promise or connected parts of transaction, see post § 130.
Reformation of contracts for sale of land, see Reformation of Instruments.

¶ 215. An oral contract for the sale of lands is void under the statute of frauds.—Dwight v. Cutler, 3 Mich. 566; Bomier v. Caldwell, 8 Mich. 463; Holland v. Hoyt, 14 Mich. 238; Hogsett v. Ellis, 17 Mich. 351; Palmer v. Williams, 24 Mich. 328; Scott v. Bush, 26 Mich. 418; Scott v. Bush, 29 Mich. 523; Colgrove v. Solomon, 34 Mich. 494; Liddle v. Needham, 39 Mich. 147; Curtis v. Abbe, 39 Mich. 441; Nims v. Sherman, 43 Mich. 45; Ayres v. Gallup, 44 Mich. 13; Sutton v. Rowley, 44 Mich. 112; Jackson v. Evans, 44 Mich. 510; De Moss v. Robinson, 46 Mich. 62; Peckham v. Balch, 49 Mich. 179; Wardell v. Williams, 62 Mich. 50; Bewick v. Hanika, 142 Mich. 206.

¶ 216. A contract involving the transfer of real estate and assumption of debts must be written.—Wagner v. Egleston, 49 Mich. 218.

¶ 217. A parol agreement for the purchase and disposition of land is void under the statute of frauds so long as it remains executory.—Collar v. Collar, 86 Mich. 507.

¶ 218. An agreement relative to the sale or exchange of real estate must be in writing signed by the party to be charged or some person lawfully authorized.—Kaufmann v. Burton, 144 Mich. 487.

¶ 219. A verbal executory agreement to purchase real estate subject to the back taxes was as between the parties void under the statute of frauds.—Ball v. Harpham, 140 Mich. 661.

¶ 220. An oral agreement to pay for services by a conveyance of lands is invalid.—Hillebrands v. Nibbelink, 40 Mich. 646; Sutton v. Rowley, 44 Mich. 112.

¶ 221. An oral agreement between a son and his father that if the son will pay the father's debts, and obtain the discharge of mortgages upon his property, the father shall convey to him his real estate, is void under the statute of frauds.—Kelly v. Kelly, 54 Mich. 80.

¶ 222. A verbal promise by an employer to deed to an employee certain land in payment of services previously rendered, is void under the statute of frauds.—Rodgers v. Lamb's Estate, 137 Mich. 241.

¶ 223. A verbal promise to convey after the parties to a contract to sell land had agreed on a release by which the title was vested in the vendor and all rights released, and where the vendor had specifically refused to assent to the insertion in the releasing agreement any provision for repurchase because he wanted an end of the former contract, explaining that the other party must rely entirely on his oral promise, confers no enforceable right on the releasor who understood and was informed by the draftsman of the contract that it terminated all legal right.—Loth v. Friederick, 95 Mich. 598.

¶ 224. A parol promise by one who had secured title from the purchaser at a mortgage foreclosure sale to convey the land either to the former owner or to a railroad company to which the latter had agreed to sell it as a right of way, and pay the price he was to receive therefor to the owner is void under the statute of frauds.—Rapley v. McKinney's Estate, 143 Mich. 508.

¶ 225. One's parol promise to give his daughter certain lands upon her marriage is void under the statute of frauds.—Welch v. Whelpley, 62 Mich. 15.

¶ 226. A transaction by which three parties verbally agree that title to real estate shall be taken in the name of one for the joint account of all, with a parol understanding as to the terms on which the title should be held, is a contract for an interest in land, and is unenforceable under the statute of frauds unless in writing.—White v. McKenzie, 193 Mich. 189.

§ 60. ——For release, surrender or reconveyance.

See also ante ¶ 118.
Reconveyance or revestment of title, see ante § 49.
Release or surrender of estates or interests, see ante § 50.
Agreements respecting real estate corporations as firms, see ante § 54.
Parol agreement to release or surrender a parcel mentioned in a contract for sale of lands, see post § 78.
Contracts for exchange of property generally, see Exchange of Property.

¶ 227. An agreement to surrender or release a parcel of land, mentioned in a contemporaneous contract, is not a defeasance but an agreement for a resale, and is within the statute.—McEwan v. Ortman, 34 Mich. 325.

¶ 228. A parol promise by a grantee of land to reconvey the same is void under the statute of frauds.—Poppe v. Poppe, 114 Mich. 649.

§ 61. ——For exchange.

¶ 229. A parol agreement for the exchange of standing timber for a farm, which provides for the necessary transfers by deed, is void under the statute of frauds until the deeds are delivered.—Chick v. Sisson, 95 Mich. 412.

§ 62. ——For partition or settlement of estates.

¶ 230. An oral contract among heirs for the amicable division of an estate, including

both personalty and realty, in order to avoid the contesting of the will, is not void under the statute of frauds.—Kunzie v. Nibbelink, 199 Mich. 308.

§ 63. ——Vendee's agreement to pay purchase money.

¶ 231. The statute does not require a vendee's agreement to pay purchase money to be in writing.—Holland v. Hoyt, 14 Mich. 238; Scott v. Bush, 26 Mich. 418; Burke v. Wilber, 42 Mich. 327; Huff v. Hall, 56 Mich. 456.

§ 64. ——For dower interests.

Extinguishment or release of dower generally, see Dower, III.

¶ 232. A wife's parol agreement to convey or release her right of dower is not valid.—Wright v. De Groff, 14 Mich. 164.

¶ 233. A promise by an administratrix to a certain person that if the latter would attend a sale of real estate to be made by her and bid a certain amount her right of dower in the land would pass by the sale is void.—Wright v. De Groff, 14 Mich. 164.

§ 65. ——For devise or provision by will.

Agreement to will property in consideration of marriage, see ante ¶ 119.

Contracts to will generally, see Wills, I.

¶ 234. An oral agreement to devise real estate is void.—De Moss v. Robinson, 46 Mich. 62.

¶ 235. An agreement to provide by will for the support of a divorced wife in consideration of her refraining from taking legal proceedings to enforce her rights and procure alimony, is not within the statute of frauds.—Kundinger v. Kundinger, 150 Mich. 630.

§ 66. Executory agreements for mortgaging.

Assignments and transfers of mortgages, see ante § 47.

Requisites and sufficiency of writing or of performance of mortgage agreements, see post § 93.

¶ 236. An agreement to execute a mortgage upon real estate is an agreement concerning interests in lands which, to be valid, must be in writing, or some note or memorandum thereof signed by the party making the promise.—Wardell v. Williams, 62 Mich. 50.

§ 67. Leases.

Agreements not to be performed within a year generally, see ante § 1.

Contract for commissions for lease of real estate, see ante § 33.

Agreements for leases, see post § 71.

Powers and agencies to execute leases for more than one year, see post § 72.

Parol alterations of leases, see post § 78.

Requisites and sufficiency of writing or memorandum, see post § 101.

Sufficiency of part performance of agreement for lease, see post § 106.

Tenancy under void lease, see post § 140.

¶ 237. An oral lease for more than a year is invalid.—Huyser v. Chase, 13 Mich. 98.

¶ 238. How. St. § 6179, as to the essentials of a lease of land for a term exceeding a year, covers every case where an interest in land is to be divested by act of the party.—Chesebrough v. Pingree, 72 Mich. 438.

¶ 239. A leasehold interest for a term of years is within the purview of Comp. Laws 1897, § 9509, How. 2nd Ed. § 11393, providing that no estate or interest in lands other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing.—In re Reh's Estate, 196 Mich. 210.

¶ 240. An oral subletting at a monthly rental of a part of leased premises for the unexpired term of a lease having three years yet to run is within the prohibition of How. St. § 6179, as a lease exceeding one year.—Fratcher v. Smith, 104 Mich. 537.

¶ 241. An oral agreement by the owner of land with one in possession thereof that, if the latter takes care of the former's father, she can stay on the land until she receives therefrom sufficient to pay her for such care, is invalid, under How. St. § 6179, providing that no estate or interest in lands, other than leases for not more than a year, shall be created unless by act or operation of law, or by a written deed or conveyance.—Smalley v. Mitchell, 110 Mich. 650.

§ 68. ——For undefined term or term of one year or less.

¶ 242. The statute permits leases for a year to be created by parol.—Morrill v. Mackman, 24 Mich. 279.

¶ 243. An oral lease for a stipulated annual rent, no time being named, is a lease for a year.—Benfey v. Congdon, 40 Mich. 283.

¶ 244. A verbal lease of property until the lessor can find another tenant, which may and in fact does terminate within a year is not void under the statute of frauds.—Drew v. Billings-Drew Co., 132 Mich. 65.

§ 69. ——For one year to commence in future.

Contracts to be performed one year from future date, see ante § 4.

Agreement for lease for a year from future date, see post ¶ 249.

¶ 245. An agreement made in April for a year's tenancy from the 1st of May is not a lease for a term exceeding one year or a contract for the leasing for a longer period than one year, and it need not be in writing.—Tillman v. Fuller, 13 Mich. 113; Whiting v. Ohlert, 52 Mich. 462.

¶ 246. Where a lease due to expire in one month is by a parol contract extended for another year, the agreement is not void as contravening the statute of frauds.—Rooks v. Booth, 160 Mich. 62.

§ 70. ——For one year with privilege running longer.

¶ 247. The right to enter and reap a crop, when it cannot be exercised within one year, is an interest in land; and so, a parol lease of land for one year, coupled with an oral agreement that the tenant may sow to wheat, will not entitle him to re-enter after the year and harvest the wheat.—Carney v. Mosher, 97 Mich. 554.

§ 71. Agreement for lease.

Executory agreements for conveyances or interests, see ante § 59.
Requisites and sufficiency of writing or memorandum, see post § 101.
Sufficiency of part performance of agreement for lease, see post § 106.

¶ 248. A parol agreement to lease lands for one year, with the privilege of three, at an annual rental, is void under the statute of frauds, and, if wholly executory, no action can be founded thereon. It is not performable within a year.—Hand v. Osgood, 107 Mich. 55.

¶ 249. An agreement for a lease is performed by making the lease; hence, an oral agreement to make a lease within a year for the term of a year to commence on a future day is not within the statute.—Tillman v. Fuller, 13 Mich. 113; Whiting v. Ohlert, 52 Mich. 462.

¶ 250. A verbal agreement to rent premises to a tenant for a "long term of years at a rental to be afterwards agreed upon" is within the statute of frauds, and is void.—Kezeli v. River Rouge Lodge, No. 410, Independent Order of Odd Fellows, 195 Mich. 181.

§ 72. Powers and agencies to transfer or create interests.

Agreements for commissions on sale of lands, see ante § 30.
Requisites and sufficiency of writing or of performance, see post § 102.
Ratification of land contract made by agent without written authority, see post § 136.
Creation of agencies generally, see Agency, I.
Agency to buy or sell within the statute, see also Agency ¶ 5.
Parol trusts, see Trusts, III.

¶ 251. The authority of an agent acting for the vendor in the sale of lands must be in writing; otherwise the agreement to sell is void.—Holland v. Hoyt, 14 Mich. 238; Hammond v. Hannin, 21 Mich. 374; Palmer v. Williams, 24 Mich. 328; Powell v. Conant, 33 Mich. 396; Dickinson v. Wright, 56 Mich. 42.

¶ 252. A contract for the sale of land, signed by an agent whose authority to make the same rests wholly in parol, is within the statute of frauds.—Baldwin v. Schiappacasse, 109 Mich. 170.

¶ 253. Under Comp. L. 1897, § 9509, a written contract for the sale of lands made by an agent without written authority is void unless it has been ratified or adopted by the principal.—Detroit, P. & N. R. Co. v. Hartz, 147 Mich. 354.

¶ 254. An agent whose authority rests in parol cannot bind his principal by a contract for the purchase of land.—Colgrove v. Solomon, 34 Mich. 494.

¶ 255. It seems that the authority of the agent of the vendee in a contract for the sale of lands must be in writing.—Hammond v. Hannin, 21 Mich. 374.

¶ 256. The authority of an agent to execute a lease of land for more than one year must be in writing.—Toan v. Pline, 60 Mich. 385.

¶ 257. A lease for more than one year, executed by an agent whose authority rests in parol only, is void under the Illinois statute of frauds, providing that no action shall be brought to charge any person upon any contract for the sale of lands, or any interest in or concerning them, for a longer term than one year, unless such contract shall be in writing, signed by the party to be charged therewith, or by some other person thereunto authorized in writing signed by such party.—McIntosh v. Hodges, 110 Mich. 319.

¶ 258. A renewal for more than one year of a lease of the right to cut and remove ice is invalid if made by a surviving partner without written authority from the deceased partner's heirs, unless it is necessary to close out the partnership business.—Oliver v. Olmstead, 112 Mich. 483.

¶ 259. A lease of land for more than one year, executed by an agent without written authority and delivered to the lessee, is void under the statute of frauds, and is not validated by the after execution of a duplicate by the principal, of the existence of which the lessee has no knowledge.—Chesebrough v. Pingree, 72 Mich. 438.

¶ 260. It was not necessary that the agent who gave defendant oral license to cut standing timber should have written authority.—Antrim Iron Co. v. Anderson, 140 Mich. 702.

§ 73. ——Sale by auctioneer.

¶ 261. A sale of land made by an auctioneer without written authority from the owner is absolutely void even though made within the terms of the printed advertisement thereof.—Muffatt v. Gott, 74 Mich. 672.

§ 74. ——To assign mortgages.

Assignments and transfers of mortgages, see ante § 47.

Executory agreements for mortgaging, see ante § 66.

¶ 262. Authority of an agent to assign a mortgage need not be in writing.—Moreland v. Houghton, 94 Mich. 548.

§ 75. Agreements to procure sales or conveyances from or to others.

Agreements for commissions on sale of land, see ante § 30.

¶ 263. Agreements to pay money for services in procuring the sale of real estate are not within the statute of frauds.—Waterman Real Estate Exch. v. Stephens, 71 Mich. 104.

¶ 264. A contract between an owner of land and a real estate dealer in which the owner agrees to sell his farm for $6,400 and to allow said dealer all over that sum which he can induce a purchaser to pay, and in which said owner agrees to furnish an abstract of title and warranty deed, is not a contract for the sale of land required to be in writing under 3 Comp. Laws, §§ 9509, 9510.—Brittson v. Smith, 165 Mich. 222.

¶ 265. A contract to procure the conveyance of an equity of redemption held by a third person is, within the statute, a contract for the sale of an interest in lands, and is void if not in writing.—Rawdon v. Dodge, 40 Mich. 697.

¶ 266. An agreement by one person to purchase an interest in lands for another is void. —Raub v. Smith, 61 Mich. 543.

§ 76. Agreements for making deed in another's name.

¶ 267. Where, under oral authority from the vendee in a land contract the deed in fulfillment thereof is made to the vendee's wife, both signing a written memorandum of the receipt of such deed, the transaction is not in the nature of a parol agreement relating to land, but is a ratification in writing of the vendor's transfer of the legal title. —Merson v. Merson, 101 Mich. 55.

§ 77. Parol alterations of conveyances.

Subsequent oral agreement to modify agreement for support contained in deed, see also Evidence ¶ 1223.

¶ 268. Under the statute of frauds, which requires all contracts for the sale of lands to be in writing and avoids them if not written and signed by the vendor, parol alterations cannot be made extending the time therein expressly fixed for performance.—Abell v. Munson, 18 Mich. 306; Cook v. Bell, 18 Mich. 387.

¶ 269. That which is evidenced by the deeds of conveyance cannot be changed on parol testimony of promises, agreements or understandings.—Hayes v. Livingston, 34 Mich. 384.

¶ 270. An attempted verbal modification of the written conditions of a deed relative to time for delivery, was within the statute of frauds and therefore ineffectual to make it deliverable sooner.—Culy v. Upham, 135 Mich. 131.

¶ 271. The correction which changes a void into a good deed can only be made by conforming to the statute of frauds.—Paine v. State Land Office Com'r, 66 Mich. 245.

§ 78. ——Of executory contracts and leases.

Parol leases for more than one year, see ante § 67.

¶ 272. An oral stipulation inconsistent with the terms of a contract for the sale of lands cannot be imported into it; e. g., one to release or surrender a parcel mentioned therein.—McEwan v. Ortman, 34 Mich. 325.

¶ 273. Title to land cannot under the statute of frauds be divested from the purchaser by mere oral authority to insert another's name as copurchaser, or by the mere payment of money by such alleged copurchaser contract for the purchase of land.—Truski v. Streseveski, 60 Mich. 34.

¶ 274. The time limited for acceptance in a written offer to sell land cannot be extended by parol.—Wardell v. Williams, 62 Mich. 50.

¶ 275. The parties in a contract for the sale of land that requires the deed to be executed on a specified day may, without violating the statute, orally extend the time. —Loveridge v. Shurtz, 111 Mich. 618.

¶ 276. Where complainant and defendant entered into a written lease of premises for a term of years, and complainant made extensive improvements thereon as provided in the lease, oral promises by defendant made subsequent thereto that in the event of the improvements costing more than was contemplated he would pay an increased rental are not binding under the statute of frauds. —Miles v. Shreve, 179 Mich. 671.

§ 79. Creation, grant or surrender by operation of law.

¶ 277. Under Comp. Laws 1897, § 9509, providing that no estate in lands shall be created, granted, or surrendered unless by operation of law or by a written instrument,

the parol surrender and acceptance of a land contract is not a surrender by operation of law where the land was unoccupied and the vendor has not subsequently attempted to exercise dominion over it.—Stewart v. McLaughlin's Estate, 126 Mich. 1.

¶ 278. Where a lessor assented to an assignment by his lessee, and agreed by parol to accept the assignee as his tenant and to look to him for the rent, this was held to be a sufficient surrender of the old lease by operation of law (Laws 1883, p. 342, § 9, How. St., § 6179).—Logan v. Anderson, 2 D. 101.

H. REPRESENTATIONS AS TO CREDIT OF ANOTHER.

§ 80. In general.

Requisites and sufficiency of writing, see post § 89.
Operation and effect of statute, see post, III.
Fraudulent representations as to credit or solvency, what constitute, see Fraud § 17.
Provisions of the statute, see Comp. L. § 11983.

¶ 279. An oral representation that a person is a member of a specified firm, by means of which the party to whom the assurance was made was induced to sell the firm goods, is not within How. St., § 6188, requiring favorable representations concerning another's character, etc., to be in writing in order to be actionable.—Clark v. Hurd, 79 Mich. 130.

¶ 280. It is not a representation concerning the character, conduct, credit, etc., of another person, required by How. St. § 6188, to be in writing to charge the maker, where a person induced a dealer to supply brick to contractors engaged in building houses for him, he falsely representing—orally—to the dealer that he had sufficient money coming to them under his control, and that the dealer should be paid first.—Daniel v. Robinson, 66 Mich. 296.

¶ 281. The fact that a person, who falsely represented to a dealer that there was enough money due to the dealer's customer, a builder, to pay for bricks, that it was under control of the person making the representations, promised that he would apply enough to pay for the bricks does not raise the transaction to a representation concerning the other's credit or character, he having been insolvent as both knew, for which reason the dealer had refused to furnish more bricks without such representation.—Daniel v. Robinson, 66 Mich. 299.

¶ 282. Under Comp. L. 1897, § 9518, providing that no action shall be brought against any person by reason of any favorable representation or assurance made regarding the credit, etc., of any other person, unless made in writing and signed by the party to be charged; a director in a bank who offered his father's paper to the bank for discount, while acting solely as the father's agent, was not liable for representations made orally, where the proceeds were placed to the father's credit and the son obtained no benefit from the transaction.—St. John's Nat. Bank v. Steel, 135 Mich. 165.

¶ 283. In an action by the assignee of a state bank which was the successor of a national bank to recover damages for fraud and deceit sustained by his assignor, against a director of the bank, where the allegations in the declaration state that at the time of presenting certain notes belonging to defendant's father for discount, the defendant fraudulently represented the notes, makers, and indorsers to be good, and relying on such representations, the notes were discounted, there can be no recovery unless there is written evidence of such misrepresentations signed by the defendant given or offered.—Hicks v. Steel, 142 Mich. 292.

§ 81. Representations entering into maker's contract.

¶ 284. Comp. L. 1857, § 3186, How. St. § 6188, is confined to cases where the representations form no part of a contract.—Huntington v. Wellington, 12 Mich. 10.

¶ 285. Comp. L. 1871, § 4701, How. St. § 6188, does not apply where the holder of a note seeks to recover against an indorser whose signature was obtained by means of his own false and fraudulent representations as to the maker's solvency.—Lenheim v. Fay, 27 Mich. 70.

§ 82. Fraudulent representations with intent to deceive.

Actionable fraud and deceit generally, see Fraud.

¶ 286. Section 9318, 3 Comp. Laws 1897, providing that no person shall be charged for favorable representations as to the credit, trade, etc., of another unless the representations be in writing has no application to a case of fraudulent representations made with intent to deceive.—Massey v. Luce, 158 Mich. 128.

¶ 287. Where a corporation whose worthless stock plaintiff was induced to purchase, was only an instrument in a scheme of fraud by which defendants obtained plaintiff's property for their own use, Comp. L. 1897, § 9518, requiring that to be actionable representations made concerning another person must be in writing, has no application to an action for damages for the fraud.—McDonald v. Smith, 139 Mich. 211.

§ 83. Representations as to credit of corporation or value of stock.

See also ante § 82.

¶ 288. Representations concerning the credit of a corporation are within Comp. L.,

§ 4701 (How. St. § 6188), which prohibits actions on oral representations concerning another's character, ability, trade or dealings. —Bush v. Sprague, 51 Mich. 41.

¶ 289. The statute of frauds, forbidding any action to be based on unwritten assertions of the business credit of a third person (Comp. L. 1871, § 4701), does not apply to a case in which defendants are charged with conspiring to form a corporation for the purpose of defrauding plaintiff and with carrying out their fraudulent purposes by a course of dealing tending to make him believe the alleged corporation to be of good credit.—Bush v. Sprague, 51 Mich. 41.

¶ 290. Representations made in good faith by the directors of a company as to its financial standing and business management are not actionable on the ground of fraud unless made in writing as provided in Comp. L. 1897, § 9518; where such directors were not selling their own stock and made no profit out of the transaction and were, in fact, representing the good faith and credit of another and not of themselves.—Getchell v. Dusenbury, 145 Mich. 197.

¶ 291. The statute requiring representations concerning the character, etc., of another to be in writing to sustain action thereupon does not apply to fraudulent representations concerning a fictitious corporation.—Hess v. Culver, 77 Mich. 598.

§ 84. ——By corporate member in his own interest.

¶ 292. Comp. L. 1897, § 9518, providing that only such misrepresentations of the credit or ability of another as are made in writing are actionable, does not apply in the case of one who by oral false representations of the financial condition of a company effected the sale of stock of such company and who was directly benefited by receiving a commission on such sale.—Getchell v. Dusenbury, 145 Mich. 197.

¶ 293. Where a person falsely represents the value of stock held by him thus inducing another to purchase the same, it cannot be said that the representations made were as to the standing of the corporation thus precluding recovery under the statute of frauds by reason of its being a representation as to the credit of a third party.—Hubbard v. Oliver, 173 Mich. 337.

¶ 294. Alleged representations by a stockholder that the corporation is paying large dividends, made for his own benefit to induce the party to whom they are made to purchase stock, are not within How. St., § 6188, which provides that "no action shall be brought to charge any person upon or by reason of any favorable representation or assurance made concerning the character, conduct, credit, ability, trade, or dealings of any other person, unless such representation or assurance be made in writing, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized."—Hubbard v. Long, 105 Mich. 442.

¶ 295. How. St., § 6188, requiring representations concerning character or credit of another to be in writing in order to charge the maker of them, does not apply to a stockholder's representations as to his corporation's financial condition and as to his own affairs, made by him in selling his corporate stock and one of its bonds.—French v. Fitch, 67 Mich. 492.

II. REQUISITES AND SUFFICIENCY OF WRITING, OR OF PERFORMANCE IN LIEU OF IT.

A. IN GENERAL.

§ 85. Memorandum or contract in general.

Memorandum of contract not to be performed in one year, see post § 87.

Memorandum of agreement for commission on sale of land, see post § 90.

Note or memorandum of executory agreement for conveyances or interests in land, see post § 93.

Note or memorandum of sale of goods, see post § 107.

¶ 296. Whether, under the statute, the contract required to be in writing is not to be treated as one entire contract, so that all the stipulations of both parties must be in writing, quære.—Whipple v. Parker, 29 Mich. 369.

¶ 297. A telegram to "come on at once at a salary of two thousand, conditional only upon satisfactory discharge of business," lacks some of the essential terms of a contract in that it fixes no time for the continuance of the employment and does not even name the employment itself.—Palmer v. Marquette & P. Rolling Mill Co., 32 Mich. 274.

¶ 298. A complete contract binding under the statute of frauds may be gathered from letters, writings and telegrams between the parties relating to the subject-matter of the contract, and so connected with each other that they may fairly be said to constitute one paper relating to the contract.—Ryan v. United States, 136 U. S. 68, 34 L. ed. 447, 10 Sup. Ct. Rep. 913.

¶ 299. Arguendo, that a printed memorandum and signature is sufficient.—Pelton v. Ottawa County Sup'rs, 52 Mich. 517.

§ 86. Agreements to answer for another.

See also ante ¶ 57.

Necessity that agreements to answer for another be in writing, see ante I, B.

Necessity for expressing in promise to answer for another the consideration for the promise, see Contracts ¶ 396.

¶ 300. A promise in writing to pay the debt of another must show the whole terms of the contract; no resort can be had to parol evidence to add to them.—Hall v. Soule, 11 Mich. 494.

¶ 301. A writing relied upon to take a promise to pay the debt of another out of the statute must contain all the terms of the contract; such promise cannot rest partly in writing and partly in parol.—Baumann v. Manistee Salt & Lumber Co., 94 Mich. 363.

¶ 302. The writing need not state the consideration on which a promise is based to pay the debt of another.—DeCamp v. Scofield, 75 Mich. 449.

§ 87. Agreements not to be performed in one year.

Necessity that agreements not to be performed in one year be in writing, see ante I, A.

Burden of showing sufficient writing or memorandum, see post § 151.

¶ 303. The memorandum of a contract that is not to be performed within a year must embrace all its substantial terms except the consideration; and when essentially defective it cannot be aided by parol evidence.—Palmer v. Marquette & P. Rolling Mill Co., 32 Mich. 274.

¶ 304. Comp. L. 1871, § 4702, How. St., § 6189, which dispenses with the necessity of expressing in any contract required to be in writing the consideration thereof, and permits proof of such consideration by other evidence, does not, it seems, apply to a case where the consideration consisted of counter-promises or executory stipulations to be performed more than a year after the making of the contract.—Whipple v. Parker, 29 Mich. 369.

¶ 305. A memorandum of a contract of employment for a year to begin at a future date, sufficient to satisfy the statute of frauds, is not shown by letters which, although stating some of the terms of the agreement, show that a future contract was to be entered into.—Carroll v. Palmer Mfg. Co., 181 Mich. 280.

§ 88. ——Signature by one party only.

¶ 306. An agreement in writing under which the defendants agreed to buy of plaintiff two shares of stock a week, but which was not signed by the plaintiff, inasmuch as it was not to be performed within one year is void under the statute of frauds.—McIlroy v. Richards, 148 Mich. 694.

¶ 307. A contract to keep an advertising cabinet in a hotel for two years not signed by the plaintiff, being unperformable within one year, is unenforceable under Comp. L. 1897, § 9515, where the defendant, who did sign it, rejected the cabinet when sent to it.—Adams v. Harrington Hotel Co., 154 Mich. 198.

¶ 308. A contract of service for more than a year, signed only by the employer, is void for want of mutuality; and the other party cannot make it effective by written acceptance after the employer has refused to perform.—Wilkinson v. Heavenrich, 58 Mich. 574.

§ 89. Representations as to credit of another.

¶ 309. Under Comp. L. 1897, § 9518, providing that no action shall be brought on assurance or representation of credit unless in writing and signed by the party to be charged or his agent, in an action for fraud in an unsigned statement exhibited by a third person in securing a loan, a subsequent letter written by the defendant in which he says he remembers such an exhibit at the time of making the loan is not sufficient to amount to a signed statement where the statement had not been exhibited by the defendant and it could not be identified from the letter.—Third Nat. Bank of New York v. Steel, 129 Mich. 434.

§ 90. Memorandum of agreement for commissions on sale of land.

Necessity that agreements for commissions be in writing, see ante I, E.

¶ 310. A letter written by the owner of real estate to a real estate broker with whom the owner had entered into an oral agreement for commissions for the sale of land, stating that it was agreed between the owner and the agent that a note attached was to be paid from commissions earned by the agent in selling certain lands of the owner, and signed by the owner and the agent, is insufficient to take the case out of the Statute of Frauds, Comp. Laws 1897, § 9515, How. 2nd Ed., § 11399, providing that every agreement or contract to pay commissions for the sale of any interest in real estate must be in writing.—Paul v. Graham, 193 Mich. 447.

B. ESTATES AND INTERESTS IN LAND, LEASES AND TRUSTS.

Necessity of writing generally, see ante I, G.

Creation, grant or surrender of estates or interests by operation of law, see ante § 79.

Necessity and sufficiency of written declaration of a trust in lands, see Trusts.

§ 91. Deeds or conveyances.

Defective deed as memorandum, see post § 100.

Transfer or conveyance as part performance of contract for sale of lands, see post § 104.

Requisites and sufficiency of deeds and conveyances generally, see Deeds.

¶ 311. A deed or conveyance in writing of an interest in land must be complete in it-

self and leave nothing resting in parol.—In re Reh's Estate, 196 Mich. 210.

¶ 312. Plaintiff presented a written petition to the mayor and common council of defendant city, asking permission to construct a private sewer in some of the public streets, describing specifically the termini of the proposed sewer, the streets in which it was to be placed, and its exact location therein. The council referred the petition to a committee, with power to act. Thereafter a bond conditioned for the proper performance of the work of constructing the sewer was furnished by plaintiff, and was accepted and approved by the proper officers. Extensions were authorized in like manner. Held, that there was sufficient written evidence of a contract, granting to plaintiff the use of the streets, to satisfy the statute of frauds.—Stevens v. City of Muskegon, 111 Mich. 72.

§ 92. Mortgages and mortgage agreements.

Necessity of writing to assign or transfer mortgages, see ante § 47.

Assignability as personalty of deed given as mortgage, see also Assignments ¶ 6.

Sufficiency of signature by corporate officers to mortgage to satisfy statutory requirement of lawful authorization, see also Corporations § 103, ¶ 381.

¶ 313. An agreement in writing to pay higher interest held sufficient under the statute of frauds to charge the land, it being connected with the mortgage.—Smith v. Graham, 34 Mich. 301.

§ 93. Note or memorandum of executory agreement.

Necessity that executory agreements for conveyances or interest be in writing, see ante § 59.

Note or memorandum in general, see ante § 85.

Part performance or execution of agreement, see post § 103.

¶ 314. A complete and binding contract of sale of land may be created by letters or other writings relating to one connected transaction, if, without the aid of parol testimony, the parties, the subject-matter and the terms of the contract may be collected.—Francis v. Barry, 69 Mich. 311.

¶ 315. Correspondence looking to purchase of a store property, and including an offer to sell culminated in an offer of $2,000 in cash and notes for $500, to which the seller wrote that all was satisfactory; that he would take the money when defendant could raise it, and to let all stand until his return in two weeks' time. Plaintiff borrowed the money and wrote defendant that it was ready and that she wanted a deed. Defendant replied that he would give a deed, take $2,000 and notes for the balance, and would attend to it when he returned. Held, that there was a sufficient contract in writing to comply with How. St., § 6181.—Francis v. Barry, 69 Mich. 311.

¶ 316. In a suit for specific performance of a land contract, letters between the parties with reference to the purchase and the amount due, contemplating the carrying out by the plaintiff of a written contract between the defendant and the plaintiff's assignor, were sufficient to satisfy the requirements of the statute of frauds.—Hickman v. Chaney, 155 Mich. 217.

¶ 317. A complete contract binding under the statute of frauds may be gathered from letters, writings and telegrams between the parties relating to the subject-matter of the contract and so connected with each other that they may be fairly said to constitute one paper relating to the contract.—Ryan v. United States, 136 U. S. 68, 34 L. ed. 447, 10 Sup. Ct. Rep. 913.

§ 94. ——Terms and conditions of contract.

Consideration and terms of payment, see post § 96.

¶ 318. In order to satisfy the statute of frauds, the memorandum of contract for sale of lands must contain the substantial terms of the contract, expressed with such certainty that they may be understood without resort to parol evidence.—Messmore v. Cunningham, 78 Mich. 623.

¶ 319. A memorandum of agreement for the sale of lands is not invalidated by omitting to provide therein for transfer of possession.—Munro v. Edwards, 86 Mich. 91.

¶ 320. Where a written contract for the sale of land signed by both parties states the parties, the considerations, and when and how payments are to be paid, the description of the premises and the date of taking possession, it is sufficiently definite to satisfy the statute of frauds.—Harris v. Brown, 172 Mich. 164.

¶ 321. An agreement for a contract for the sale of real estate in which the parties, the property, the price, terms of payment and time of performance are all definitely fixed, complies with the statute of frauds.—Ogooshevitz v. Arnold, 197 Mich. 203.

¶ 322. A contract for the sale of real estate definitely fixing the property, the parties, the price and the terms of payment, complies with the statute of frauds, Comp. Laws 1897, § 9511, How. 2nd Ed., § 11395.—Walsh v. Oakman, 199 Mich. 688.

¶ 323. A writing that does not specify the purchase price or the time of payment is insufficient to constitute a contract for the sale of lands under the statute of frauds, and is not aided by a subsequent letter of the party sought to be charged instructing his agent how to fill out the contract if one should be made.—Webster v. Brown, 67 Mich. 328.

¶ 324. A contract for the sale of land reciting the receipt from designated persons of a certain sum as deposit on designated premises, the purchase price of which was a designated sum, and further reciting "One thousand will be paid before June 15, 1915. Balance $300 and interest," held insufficient under the statute of frauds because not containing the terms and time of the performance.—Rosenbaum v. Tyszka, 192 Mich. 457.

¶ 325. An option for the sale of real estate, naming the purchase price and adding "Int. 5 per cent easy terms," is not indefinite as to whether it is for the purchase or leasing of the property, but it fails to state sufficiently the time or terms of the payment purchase price to satisfy the Statute of Frauds, Comp. Laws 1897, § 9511, and will not support a bill by the vendee for specific performance.—Hilberg v. Greer, 172 Mich. 505.

¶ 326. Where the directors of a corporation, who were also trustees of a deceased stockholder's estate, acting as trustees, and not as directors, signed a tentative acceptance of a written offer to purchase the corporate property; and where, immediately after the authority to consummate such sale had been obtained by such trustees by a bill in chancery, to which neither the purchaser nor the corporation were made parties, one of the trustees telephoned a further acceptance, it was held that no valid contract in writing binding upon the corporation, and answering the requirements of the statute of frauds, ever existed.—Taylor v. R. D. Scott & Co., 149 Mich. 525.

§ 95. ——Description of the land or interest therein.

¶ 327. A land contract which, though written, does not describe a part of the lands nor point out any method for identifying them, is fatally defective under the statute of frauds. So held where a joint owner of land purported, in selling it, to be acting for himself and his co-owners, but the quantity of land fell short of his representations, and a compromise agreement was made which provided that the deficiency might be made up out of lands owned solely by the vendor, but there was nothing relied upon by either party to show what particular parcel could be taken. —Alpena Lumber Co. v. Fletcher, 48 Mich. 555.

¶ 328. The description of real property, in a contract for its sale, must so fit and comprehend it that it can be applied to the property intended and exclude all else with the aid at least of extrinsic testimony which shall neither contradict nor add to it; and a conflict in the extrinsic evidence cannot establish its insufficiency under the statute.—Eggleston v. Wagner, 46 Mich. 610.

¶ 329. A sale of lands is not made out by an entry on the books of the vendors and by their receipts for purchase money where the land was not fully described and did not belong to them, and the actual owners only assented to the sale orally.—Ayres v. Gallup, 44 Mich. 13.

¶ 330. In correspondence relative to the purchase and sale of certain real estate the property was at first described by both parties as the "Schoolcraft store" and subsequently as "the property." Held a sufficient description.—Francis v. Barry, 69 Mich. 311.

¶ 331. A written proposal to sell land to the federal government for a military post, describing the land by township, range, and section, and giving the purchase price, and a written acceptance of such proposal, contained a sufficient description to meet the Statute of Frauds, How. St., § 6181, even though the name of the village in which the land was located was not given, where such defect, if any, was supplied by a communication by a member of the board of army officers having charge of making the purchase to the seller in which he transmitted to the latter a letter of instruction from the war department in which the land was referred to as a certain number of acres at such village and also by reference to a deed executed and delivered by the seller which disclosed the exact locality of the land.—Ryan v. United States, 136 U. S. 68, 34 L. ed. 447, 10 Sup. Ct. Rep. 913.

§ 96. ——Consideration and terms of payment.

See also ante § 94.
Consideration in memorandum of sale of goods, see post § 108.
General rules as to consideration, see Contracts, V.

¶ 332. There is no known and recognized custom fixing the time or times of payment of the purchase money where the memorandum of the sale of land leaves it undetermined.—Gault v. Stormont, 51 Mich. 636.

¶ 333. An instrument in which the signer agrees to leave to a certain person a half interest in designated property at any time the deed may be demanded is an insufficient memorandum under the Statute of Frauds, Comp. Laws 1897, § 9511, How. 2nd Ed., § 11395, as no consideration is named and there is not any time stated within which the consideration must be paid.—Holland v. Holland, 195 Mich. 513.

¶ 334. A mere memorandum of a land sale in a receipt for money paid down is not enough to establish the contract under the statute, unless it is complete in itself and leaves nothing to rest in parol. It is not enough to state the purchase price and omit the time of payment, as there is no known usage to fix periods of payment.—Gault v. Stormont, 51 Mich. 636.

¶ 335. A memorandum of a contract for the sale of land stating that a warranty deed will be given upon the payment of $275 is not defective because failing to show when

payment is to be made, the inference being that the payment is to be made within a reasonable time.—Mull v. Smith, 132 Mich. 618.

¶ 336. A vendor's receipt evidencing an oral agreement for the sale of land is not sufficient to take the contract out of the statute of frauds so as to make it specifically enforceable where such receipt recites the sum of money paid down and the balance of the agreed purchase price, but fails to specify the time or times for the payment of said balance.—Ebert v. Cullen, 165 Mich. 75.

§ 97. ——Subscribing and signing.

See also ante ¶ 218.

Signing note or memorandum of sale of goods, see post § 109.

Execution of instruments generally, see Execution of Instruments.

¶ 337. A written agreement for the sale of lands is void unless signed by the vendor.—Abell v. Munson, 18 Mich. 306; Cook v. Bell, 18 Mich. 387; Maynard v. Brown, 41 Mich. 298.

¶ 338. A contract for the sale of land must, in order to satisfy the statute of frauds, be signed by the party who is to make the sale.—Maynard v. Brown, 41 Mich. 298.

¶ 339. A memorandum of a contract for the sale of land, signed by the vendor only and accepted by the vendee, is sufficient to satisfy the statute of frauds which requires that a contract for the sale of land, to be valid, must be witnessed by a note or memorandum thereof signed by the vendor.—Mull v. Smith, 132 Mich. 618.

¶ 340. There is no grant of land by the purchaser under a land contract necessitating the signing of the contract by the purchaser within the statue of frauds, where such contract provides that the vendor shall have until a certain time to take off a crop and that the buildings are "excepted," and will be removed when necessary.—Walsh v. Oakman, 199 Mich. 688.

¶ 341. The signature to the memorandum contemplated by the statute of frauds, written by the party to be charged or another for him at his request and in his presence, is sufficient.—Eggleston v. Wagner, 46 Mich. 610.

¶ 342. Where a memorandum for the sale of real estate owned by two persons jointly provides for delivery upon the execution of a land contract and is signed by one of the vendors individually and for the other vendor without authority, such agreement, not being severable, is entirely void under the statute of frauds, Comp. Laws, 1897, § 9511, How. 2nd Ed., § 11395.—Adler v. Katus, 190 Mich. 86.

¶ 343. A deed was executed by two only of three grantors named therein and delivered to an agent of both parties, who was to obtain the signature of the third grantor and then deliver it to the grantee, and the latter deposited the consideration with the agent to be delivered to the grantors when the deal was completed. The third grantor refused to sign and action for specific performance was brought against the two grantors who had signed. Held that the transaction constituted an oral executory contract and was within the statute of frauds and hence not enforceable.—Wisconsin & M. R. Co. v. McKenna, 139 Mich. 43.

§ 98. ——Sealing.

Necessity and requisites of a seal, see Execution of Instruments, I.

¶ 344. The statute of frauds does not require executory contracts to be under seal, but requires deeds only where trusts or powers or estates in land are created or assigned.—Enos v. Sutherland, 11 Mich. 538; Hammond v. Hannin, 21 Mich. 374.

§ 99. ——Acceptance of contract.

Necessity that actionable representations as to credit of another be in writing, see ante I, H.

General rules as to acceptance of contracts, see Contracts, III.

¶ 345. A party offered in writing to sell land at a certain price, part to be secured by mortgage on the land, the valuation of the lots into which the land had been subdivided to be agreed to, and, on payment being made on account of said mortgage, lots of value equal to amount paid to be released, the valuation of each lot as agreed upon to be placed on plat. Held, that a mere oral acceptance of such offer within the time limited, without tender of cash payment or of any deed or mortgage executed or to be executed, did not constitute a sufficient contract under How. St., § 6181.—Wardell v. Williams, 62 Mich. 50.

¶ 346. Where one party signs a memorandum offering to exchange land which he owns for land owned by another party, such memorandum cannot be made a valid contract by the oral acceptance and promise of the other party to make such exchange; such oral promise not being enforceable.—Wardell v. Williams, 62 Mich. 50.

¶ 347. The execution and tender of a deed of lands, pursuant to the written offer of the person proposed as grantee to pay a specified price therefor, is not an acceptance in writing completing the written offer, and so complying with the requirement of the statute of frauds that such contracts, to be binding, shall be in writing, signed by the party by whom the sale is to be made.—Kroll v. Diamond Match Co., 113 Mich. 196.

¶ 348. A memorandum of agreement for the sale of land signed by the vendor is binding on both parties even if accepted verbally by the vendee where it acknowledges the receipt of a part of the purchase price and provides for the transfer of title and the payment of the price.—Smith v. Mathis, 174 Mich. 262.

§ 100. ——Defective deed as memorandum.

Deed or conveyance within the statute in general, see ante § 91.

Form and requisites of deeds generally, see Deeds.

¶ 349. The delivery of a deed which does not conform to an oral agreement for the purchase of the lands conveyed is not a sufficient written memorandum to avoid the statute of frauds.—Kelsey v. McDonald, 76 Mich. 188.

¶ 350. A deed executed by the vendor under an oral agreement for sale of land, and left with an attorney not authorized to accept it and to close the transaction in behalf of the vendee, was not such a written memorandum as would take the case out of the statute of frauds.—Ducett v. Wolf, 81 Mich. 311.

§ 101. Leases.

Necessity of writing to create lease, see ante § 67.

Necessity that agreement for lease be in writing, see ante § 71.

Part performance of agreement for lease, see post § 106.

Tenancy under void lease, see post § 140.

¶ 351. A written lease of lands for a term of years which stated that the rental should be a certain percentage of the entire cost of the premises, including the purchase price, money furnished to lessees to pay for the breaking of the land and preparation of the first crop, and commission paid lessee, for management of such work, held not uncertain or indefinite so as to be void under the Statute of Frauds of Texas or New York.—Eames v. Barber, 192 Mich. 1.

§ 102. Powers in respect to estates or interests therein.

Necessity for writing generally, see ante § 72.

Parol trusts in respect to lands, see Trusts, III.

¶ 352. A contract for sale of land signed by one as agent for the owners, his principals, and naming the purchaser and otherwise sufficient, is not invalidated because the agent's written authority to sell did not name the prospective purchaser and because that name was not disclosed to the principal.—Stuart v. Mattern, 141 Mich. 686.

§ 103. Part performance or execution of agreement.

Part performance of contract of sale of goods, see post § 114.

Rights arising out of executed or partly performed contract, see post §§ 135, 137.

Burden of showing part performance of the agreement, see post § 151.

Sufficiency of occupancy and part performance of oral contract to support homestead by purchaser, see Homestead, II.

Partial performance as ground for specific enforcement of oral agreements, see Specific Performance, III.

Part performance or execution of parol trusts in lands, see Trusts, III.

¶ 353. The statute of frauds will not bear any exception that cannot rest on the substantial equities of a partly-performed contract.—Baker v. Johnston, 21 Mich. 319.

¶ 354. The effect of part performance on a void contract is not to make it enforceable at law, but to raise such equities against whichever party permits the other to rely on it as may justify a court of equity in enforcing it specifically against him. — Dickinson v. Wright, 56 Mich. 42.

¶ 355. A parol land contract void under the statute of frauds does not become valid through part performance.—Hallett v. Gordon, 122 Mich. 567.

¶ 356. Part payment of an existing debt in money, under an arrangement to accept payment partly in money and partly in land held and to be conveyed by a third person, and in the debtor's present discharge of a mortgage he held against the land in question, cannot operate as such a part performance of an oral contract to accept the land as payment as to take the case out of the statute; such part payment was but payment of so much of an existing debt, and the discharge of the mortgage was not a fact of part performance at all, but merely a preparatory act to put the payer in condition to tender performance by offering a deed to the land disincumbered of his mortgage.—Colgrove v. Solomon, 34 Mich. 494.

¶ 357. Marriage of the promisee does not take out of the statute a promise to settle lands on the promisee when she should marry.—Welch v. Whelpley, 62 Mich. 15.

§ 104. ——Transfer or conveyance pursuant to contract.

Requisites and sufficiency of deed or conveyance, see ante § 91.

Effect of tender of deed responsive to contract invalid under the statute, see also Contracts ¶ 144.

¶ 358. An oral agreement for the purchase of lands is not taken out of the statute by payment and deposit of a deed which does not conform to the agreement; and the ven-

dee's oral expression of his intention to accept the deed, and his taking possession of the land without doing anything thereon that cannot be compensated for in damages, will not help the matter.—Kelsey v. McDonald, 76 Mich. 188.

¶ 359. A parol agreement by one tenant in common of land for its sale by his cotenant in the joint interest, which has been fully executed, and the interest of such tenant converted into money and received by the cotenant, is not within the statute of frauds.—White v. Cleaver, 75 Mich. 17.

¶ 360. An oral contract for the exchange of lands, whereby one of the parties agrees to reduce an incumbrance on the land conveyed by him, is taken out of the statute of frauds by the execution and delivery of deeds, so as to render enforceable a subsequent promise in writing to deliver possession, and to reduce the incumbrance pursuant to the oral agreement.—Bennett v. Knowles, 111 Mich. 226.

¶ 361. The legal title held by a mortgagor is not conveyed by oral agreement and delivery of possession of the land.—Nims v. Sherman, 43 Mich. 45.

¶ 362. The owner of land made an oral agreement with defendant to convey to him the land subject to a mortgage, defendant agreeing to pay the same and the mortgage notes, and to hold the vendor harmless. Subsequently the vendor quitclaimed the land to defendant's sons at the request of defendant, who renewed his agreement to pay the notes and mortgage. Held, that the conveyance to the sons was equivalent to a sale to defendant, and the conveyance, delivery and acceptance of possession took the case out of the statute.—Waldron v. Laird, 65 Mich. 237.

¶ 363. The grantor of land who had conveyed it by deed absolute in form but intended as a security, having had an offer from a third person for the land, informed B., the grantee, thereof, who told him he would like to take the land himself for the price, and it was orally agreed B. should have it, and possession was given up to him accordingly. B. subsequently sold the land for a larger price to the third person. Held, that the parol contract had been carried out by performance; that B.'s promise was based on a sufficient consideration, and that he was liable for the price.—Miner v. O'Harrow, 60 Mich. 91.

§ 105. ——Of agreement for easement.

Easements as interests in land necessitating writing, see ante § 43.

Nature and creation of easements generally, see Easements, I.

¶¶ 364, 365. A parol agreement by the servient owner to allow to the dominant owner, in consideration of a release by the latter of his rights in the track as originally laid, a corresponding interest in a new track to be constructed a short distance away, is so far performed as to be taken out of the statute of frauds, where the dominant owner consents to the removal, and continues to use the track as reconstructed.—Kent Furniture Mfg. Co. v. Long, 111 Mich. 383.

§ 106. ——Of agreements for leases.

Necessity of writing to create leases, see ante § 67.

Necessity that agreements for leases be in writing, see ante § 71.

Requisites and sufficiency of writing, see ante § 101.

¶ 366. In a particular case the partial execution of an oral agreement varying the terms of a lease of water-power was held to take the whole agreement out of the statute.—Norris v. Showerman, 2 D. 16.

¶ 367. As between landlord and tenant, when the tenant is in possession at the date of the agreement to purchase, holding under the lease, continuance in possession is not an act of part performance to take the case out of the operation of the statute of frauds.—Messmore v. Cunningham, 78 Mich. 623.

C. SALE OF GOODS.

1. Note, Memorandum or Bill of Sale.

§ 107. In general.

Necessity of writing in general, see ante § 34.

Memorandum or contract in general, see ante § 85.

Part payment or earnest money, see post § 110.

Part performance or delivery and acceptance, see post § 114.

¶ 368. Whether or not the statute requires that the memorandum of a contract of sale shall show the price to be made, it must, at all events, show all the other terms of the contract, and also show that it is a contract of sale.—James v. Muir, 33 Mich. 223.

¶ 369. Essential parts of a contract for the sale of goods of the value of over $50, resting in parol, renders the contract void under the statute of frauds.—McCaskey Register Co. v. Truettner, 149 Mich. 241.

¶ 370. A contract for the sale of goods of the value of fifty dollars and upwards is within the statute of frauds, when resting partly in writing and partly in parol.—Kraus v. Hansen, 182 Mich. 52.

¶ 371. An incomplete agreement for the sale of goods of the value of fifty dollars and upwards cannot be validated by a subsequent telephonic conversation supplying the missing essential elements.—Kraus v. Hansen, 182 Mich. 52.

¶ 372. Where a vendee signs an order for goods solicited by and delivered to the ven-

dor's agent, and the agent acknowledges in writing that the goods have been ordered from his principal, a foreign manufacturer, there is a sufficient memorandum of sale to satisfy the statute of frauds.—Leo Austrian & Co. v. Springer, 94 Mich. 343.

¶ 373. The contractual vendee of stock under an oral agreement took from the attorney of the vendor the following receipt: "Received of Louis J. Goux, six hundred dollars for the purchase of forty shares Ditzler Cola Company stock.

"Lodge, Trevor & Brown."

There was evidence that the vendee deposited the money conditionally upon its being repaid if the vendor did not secure title within a specified time. Held, the receipt was not sufficient to take the contract out of the statute of frauds.—Leonard v. Roth, 164 Mich. 646.

¶ 374. A letter from the vendor "confirming" to the purchaser a sale of a cow at a certain price per pound, and inclosing an order on her keeper for delivery and weighing, is a sufficient memorandum.—Sherwood v. Walker, 66 Mich. 568.

¶ 375. Defendant, having been shown goods in plaintiff's store at an agreed price of $200 with a view to purchase, afterwards wrote to plaintiff, "You may place the gas fixtures I selected today. The dining-room fixtures may as well be changed over with the salesman who showed me the goods. Please put them up in fine shape, promptly as possible." The goods were prepared for installation but delay was requested by defendant and they were not accepted or received, and defendant afterwards countermanded his order. Held, that the letter contained no information except by reference to the oral agreement on the price and did not make a written memorandum.—Sheley v. Whitman, 67 Mich. 397.

¶ 376. A telegram in the following words: "I will take double-deck car—hogs; W. C. Bryant will close contract," having reference to a previous parol negotiation and arrangement, is not, under the statute, a sufficient memorandum of a contract. Standing by itself it contains none of the elements of a bargain except quantity.—McElroy v. Buck, 35 Mich. 434.

¶ 377. The following is, under the statute of frauds, a sufficient memorandum of sale, viz., "John Heffron bought of J. H. Rudell, agent for J. K. Armsby, 300 cases B. M. corn, $1.25 cash, less one-half per cent. [Signed] J. H. Rudell," provided the alleged agent was authorized to act for the vendor.—Heffron v. Armsby, 61 Mich. 505.

¶ 378. An order to a broker to buy wheat, reduced to writing by the agent of the broker in the presence of the customer and signed in the customer's name by the agent and acted upon by the broker, is not within the statute of frauds.—DeMary v. Burtenshaw's Estate, 131 Mich. 326.

§ 108. Consideration.

See also ante § 107.

Consideration in memorandum of agreement for sale of land, see ante § 96.

Necessity for consideration to support contracts generally, see Contracts, V.

¶ 379. Where the statute requires a written contract, it requires all material parts of the contract to be expressed in a signed writing. This requires the consideration on both sides, which involves, in the case of an alleged sale, an agreement to sell and an agreement to buy and pay the price.—Delaware & H. Canal Co. v. Roberts, 72 Mich. 49.

§ 109. Signatures.

Subscribing and signing memorandum of agreement for sale of land, see ante § 97.

General rules in respect to signing instruments, see Execution of Instruments.

¶ 380. A contract for the sale of goods, wares and merchandise of the value of fifty dollars and upwards, is not valid unless signed by both the seller and purchaser.—Willebrandt v. Sisters of Mercy, 185 Mich. 366.

2. Part Payment or Earnest Money.

§ 110. In general.

See also post §§ 135, 137.

Part performance of the contract, see post § 114.

General rules as to payment and tender, see Payment.

Payment and tender under sale contracts generally, see Sales, VII.

Earnest money in seller's hands as subject of garnishment for debt of vendor, see Garnishment ¶ 88.

¶ 381. The payment required by the statute of frauds is the usual payment, as the term is commonly understood, whereby the vendee unconditionally transfers money or property to the vendor which the vendor unconditionally accepts in discharge, pro tanto, of the purchase price.—Leonard v. Roth, 164 Mich. 646.

¶ 382. A verbal executory contract of sale of an automobile delivery wagon for $1,020 held valid where the terms were mutually understood and earnest money paid thereon.—Meyer v. Shapton, 178 Mich. 417.

¶ 383. Defendants entered into an oral agreement with plaintiff to purchase from him an automobile delivery wagon. A written memorandum of the terms of the sale was signed by defendants and delivered to the plaintiff. At the time of the agreement $10 was paid down and subsequently $75

was paid on the contract. In an action for refusal to accept the machine when delivered, held, that a valid oral contract existed.—Meyer v. Shapton, 178 Mich. 417.

¶ 384. One Sturback, a Finn unable to speak English, negotiated with defendant's agent for the sale of some logs to defendant. There was some dispute as to the money to be paid down to Sturback. Defendant's agent gave Sturback a letter to defendant stating that it would be safe to pay Sturback $230 on account. The defendant upon being handed the letter by Sturback wrote out an order to one of his clerks to pay that sum to Sturback and handed the order to Sturback, who, upon being informed by his interpreter as to the amount, returned the order to defendant and declared the sale off. Held, the delivery of the order by defendant to Sturback was not such a part payment as to take the sale out of the statute of frauds.—Johnson v. Morrison, 163 Mich. 322.

¶ 385. Plaintiff agreed with defendant to buy twenty-four tons of hay of defendant, plaintiff to bear the expense of baling. Plaintiff sent balers with whom defendant cooperated in doing the baling, and plaintiff paid the balers. Defendant refused to go on with the contract. Held, that plaintiff's act in paying for the baling was such a part payment as to take the case out of the statute of frauds, and entitled plaintiff to damages for breach of contract.—Driggs v. Bush, 152 Mich. 53.

¶ 386. An intervener contracted orally to purchase stock of complainant. Complainant was engaged in litigation over the title to the stock and the intervener put up the purchase money with complainant's attorney to be returned to him if complainant should not be successful in securing clear title by a specified time. Held, there was here no such payment as would take the contract out of the statute of frauds.—Leonard v. Roth, 164 Mich. 646.

¶ 387. Where earnest money is paid to an agent acting for several interests it will be regarded as belonging ratably to all, and will therefore bring all within the protection of the statute, which validates sales without delivery where earnest money is given.—Burhans v. Corey, 17 Mich. 282.

§ 111. Time of payment.

¶ 388. A subsequent part payment intended and accepted as such is sufficient to satisfy Comp. L. 1897, § 9516, with reference to the sale of personal property.—Dallavo v. Richardson, 134 Mich. 226.

¶ 389. An oral sale of railroad ties is taken out of the operation Comp. L. 1897, § 9516, by a subsequent agreement that a piece of machinery bought by the seller from the buyer of the ties is to be applied on the payment of the ties.—Dallavo v. Richardson, 134 Mich. 226.

§ 112. Medium of payment.

Medium of payment generally, see Payment, I.

¶ 390. Part payment may be made in money or in anything of value.—Johnson v. Morrison, 163 Mich. 322.

§ 113. Agreement to discharge pre-existing debt.

¶ 391. Merely agreeing that merchandise should be taken as a payment of a debt without some act of cancellation of the debt is not such a "payment" as will satisfy the statute.—Gorman v. Brossard, 120 Mich. 611.

3. Part Performance or Delivery and Acceptance.

§ 114. In general.

Part payment or earnest money, see ante § 110.

Part performance of agreements respecting interests in real property, see ante § 103.

Recovery for goods transferred under the contract, see post § 147.

Burden of showing delivery and acceptance under the contract, see post § 151.

Questions of law and fact as to delivery and acceptance, see post § 155.

Delivery and acceptance under contracts of sale generally, see Sales, V.

¶¶ 392, 393. A case cannot be taken out of the statute of frauds by the intention of the parties; acts, not words, are required.—Spedding v. Griggs, 196 Mich. 571.

¶ 394. A conversation in which the plaintiff asked the defendant if he thought he could purchase a car load of potatoes at 90 cents a bushel in his vicinity, to which defendant replied that he would see and if he could purchase a car load, he would do so, is not an enforceable contract, where, no memorandum was signed by either party, and no money was paid; even though the defendant went into the country and bought some potatoes following such conversation.—Ayers v. Hinkle, 145 Mich. 283.

¶ 395. In trover by an administrator against a son of the deceased, evidence of a parol agreement faithfully executed by the defendant who had made it with the deceased and his wife, and by which the defendant was to remain on the farm, manage affairs and support his parents during their lives in consideration of what there was of the property, was held admissible, notwithstanding the objection that it showed an oral arrangement required by the statute of frauds to be in writing.—Hill v. Chambers, 30 Mich. 422.

§ 115. Delivery and acceptance.

See also ante § 114.

Necessity of delivery of goods within state to make binding contract in that state, see also Contracts ¶ 378.

¶ 396. Delivery and acceptance of part of the goods purchased take the case out of the statute as to the whole.—Alderton v. Buchoz, 3 Mich. 322; Garfield v. Paris, 96 U. S. 557, 24 L. ed. 821.

¶ 397. The delivery of a portion of goods sold satisfies the statute of frauds.—Kendrick v. Hochradel, 167 Mich. 179.

¶ 397a. No writing is necessary where personal property sold is at the same time delivered to the vendee.—Dean v. Adams, 44 Mich. 117.

¶ 398. Delivery of merchandise, to validate a contract for over $50 under the statute of frauds, must be a delivery under the contract and in pursuance of it.—Armour & Co. v. Freeman Baking Co., 197 Mich. 421.

¶ 399. In assumpsit, where plaintiffs claimed defendant had agreed to purchase a stock of apple butter for $4,800, and where the same was stored in a warehouse, and later taken back and sold by plaintiffs, and defendant denied the agreement or acceptance, the statute of frauds can be satisfied only by an unequivocal act of defendant indicating a receipt or acceptance.—Yeiter v. Campau, 174 Mich. 94.

¶ 400. Where a quantity of onions are sold by sample, and stored in one lot, to be shipped on the order of the vendees, the delivery and acceptance of one car load saves the sale from the operation of the statute of frauds, and passes the title to the entire lot to the vendees.—Gilbert v. Lichtenberg, 98 Mich. 417.

¶ 401. An oral contract for the sale of a printing press for five hundred dollars is taken out of the operation of the statute of frauds where immediately after the date of making said contract the press is removed to defendant's plant and installed by him.—Paddock v. Hatch, 169 Mich. 95.

¶ 402. Acceptance of merchandise under a contract that is invalid by the statute of frauds cannot be implied from a tender of such merchandise made on one side without referring to any contract, and from a refusal on the other to take it then for want of time to attend to it, with a promise, however, to send for it when it should be needed.—Scotten v. Sutter, 37 Mich. 526.

¶ 403. If an oral order is followed by delivery and acceptance the sale is completed and the case is taken out of the statute. So held where the vendee telegraphed cancelling the order, but upon receiving an answer that the goods had been shipped accepted them.—Sullivan v. Sullivan, 70 Mich. 583.

§ 116. Delivery to or from common carrier.

Title and control of goods in custody of common carrier, see Carriers, II, C; Sales, IV.

¶ 404. Delivery to a common carrier is not such delivery and acceptance as to take the sale of personal property out of the statute of frauds.—Gatiss v. Cyr, 134 Mich. 233; Kuppenheimer v. Wertheimer, 107 Mich. 77; Spedding v. Griggs, 196 Mich. 571.

¶ 405. Where a contract which was void and unenforceable under the statute of frauds was made for the sale of certain goods by plaintiff to defendant which the parties agreed should be shipped to plaintiff as consignee with bill of lading and draft attached and defendant notified, delivery to the carrier for such shipment held not delivery to defendant and not to take the case out of the statute.—Spedding v. Griggs, 196 Mich. 571.

¶ 406. Where an oral sale would otherwise be void under the statute of frauds, and there is a delivery of the goods in pursuance of the same contract to a carrier who has no separate and independent authority from the vendee to receive them, reception by the carrier does not amount to an acceptance by the vendee so as to bar the statute.—Grimes v. Van Vechten, 20 Mich. 410; Webber v. Howe, 36 Mich. 150; Smith v. Brennan, 62 Mich. 349.

¶ 407. A purchaser by verbal contract of goods does not by verbal contract with a carrier for transportation of the goods thereby make the carrier his agent to accept the goods, when the statute of frauds is involved.—Spedding v. Griggs, 196 Mich. 571.

¶ 408. Whether receipt of goods by carrier selected by vendees is such an acceptance by them as satisfies the statute in absence of writing or earnest money, quære.—Barker v. Cleveland, 19 Mich. 230.

¶ 409. It seems that acceptance by a carrier employed by the vendee is effectual to satisfy the statute of frauds, where the vendee reserves no right of personal inspection or decision.—Grimes v. Van Vechten, 20 Mich. 410.

¶ 410. Reception and assumption of custody by a carrier who is to take the goods to vendee subject to acceptance by him does not complete an oral sale so as to take it out of the statute.—Rindskopf v. DeRuyter, 39 Mich. 1.

¶ 411. Where one bought a carload of coal through a verbal order, the fact that the seller ordered the railroad company to turn the car over to the buyer is not such a delivery and acceptance as will take the oral contract of sale out of the statute of frauds, where there was nothing to show an authority by the buyer that the railroad company could accept the coal for him.—Calvert v. Schultz, 143 Mich. 441.

¶ 412. The claimed custom existing among coal dealers by which a direction to the rail-

road company to turn coal over to the purchaser constitutes a delivery and acceptance does not change the rule that such a delivery of an oral order does not take it out of the statute of frauds, and the proof of the acceptance of coal by purchasers under similar circumstances proves no more than that the great majority of purchasers would not insist on the defense of the statute of frauds.—Calvert v. Schultz, 143 Mich. 441.

§ 117. Constructive delivery and acceptance.

Symbolical delivery of goods sold in general, see Sales, V.

¶ 413. Acceptance sufficient to satisfy the statute may be constructive; so held where spirituous liquors were sold by parol, vendor agreeing to furnish certain copyrighted labels which added to the value of the liquors and entered into the price and were accepted by the vendee.—Garfield v. Paris, 96 U. S. 557, 24 L. ed. 821.

¶ 414. An oral agreement to accept a quantity of stone there present in satisfaction of a debt, the buyer agreeing to send for them when desired, is void under the statute of frauds, such facts not being sufficient to show a constructive delivery so as to take the transaction out of the statute.—Gorman v. Brossard, 120 Mich. 611.

¶ 415. A party contracted to sell a quantity of wood, part of which was piled in his yard and the rest of which was afterwards hauled and piled by him. Then the vendee took possession of the wood and hired a man to repile it. Held, a sufficient delivery to take the case out of the statute.—Richards v. Burroughs, 62 Mich. 117.

¶ 416. The delivery required by the statute where no payment is made or earnest money given is not dispensed with by an agreement at the time that the vendee should take the property where it then was and the vendor not be troubled to make any delivery. —Alderton v. Buchoz, 3 Mich. 322.

¶ 417. Inquiry about the property by the buyer after it has been sold to him and left for him to take possession of without actual delivery will not amount to an act of ownership, which will take the sale out of the statute of frauds.—Alderton v. Buchoz, 3 Mich. 322.

¶ 418. In an oral sale of ponderous articles incapable of actual delivery, if the purchaser accepts them where they are, and exercises acts of control and ownership over them, it will satisfy the statute; but where it does not appear that the articles (as here, mill-irons) are ponderous, or were so regarded by the parties, that fact cannot be assumed without proof.—Alderton v. Buchoz, 3 Mich. 322.

§ 118. ——Goods in buyer's possession at time of sale.

¶ 419. Defendant had in his possession lumber culls belonging to plaintiff, and made an oral offer to plaintiff's agent to buy the same. Plaintiff accepted this offer immediately, by letter of February 17th. Shortly thereafter defendant informed plaintiff's agent that he would not take the culls, and followed this by a letter of February 22d, notifying plaintiff. Held, that this retention of possession of the culls by defendant did not constitute an acceptance so as to take the case out of the statute of frauds, under 3 Comp. Laws 1897, § 9516.—Godkin v. Weber, 154 Mich. 207. (Grant, Blair, and Moore, JJ., dissenting.)

§ 119. ——Seizure of the property under process against buyer.

¶ 420. A parol contract for the sale of goods exceeding $50 in value is not taken out of the statute of frauds, at the option of the vendor, by a seizure of the property by the vendee under a chattel mortgage.—Hudson v. Emmons, 107 Mich. 549.

§ 120. Acceptance of goods on other and distinct contract.

¶ 421. A sale by a salesman for a wholesale dealer to a retailer of goods for immediate delivery and goods for future delivery listed upon separate sheets and canceled in entirety the next day is not made valid under the statute of frauds by the subsequent receipt and acceptance of the part of the goods delivered immediately.—Brown v. Snider, 126 Mich. 198.

¶ 422. Where, in order to effectuate for his principal the sale of a binder, an agent included in the transaction a corn-sheller owned by him personally, which was delivered to the vendee, and for which the agent was paid by his principal, the delivery of the corn-sheller was not such a delivery of part of the goods as would take the sale of the binder out of the statute of frauds; since it passed by a transaction personal to the agent and not part of the contract for the binder.—McCormack Harvesting Machine Co. v. Cusack, 116 Mich. 647.

§ 121. Acceptance by one of several vendees.

¶ 423. An oral purchase by two vendees of goods worth more than $50 is not taken out of the statute as to both by a subsequent acceptance of the goods by one without the other's knowledge or assent.—Chamberlain v. Dow, 10 Mich. 319.

§ 122. Delivery to and acceptance by executor or administrator.

Powers of executors and administrators in general, see Estates of Decedents, IV.

¶ 424. The administrator of a deceased vendee cannot accept goods orally ordered by

his intestate and thus take the case out of the statute.—Smith v. Brennan, 62 Mich. 349.

¶ 425. Where goods ordered orally by sample reached the purchaser's warehouse after his death and were inventoried and appraised by his administrator as part of the estate, there was not such a delivery and acceptance as would satisfy the statute of frauds and preclude the seller from replevying the goods.—Smith v. Brennan, 62 Mich. 349.

III. OPERATION AND EFFECT OF STATUTE.

A. IN GENERAL; COLLATERAL AND ALTERNATIVE RIGHTS.

Creation, grant or surrender of estates or interests by operation of law, see ante § 79.
Effect on title or ownership, see post § 131.
Ratification or performance of oral contract, see post § 135.
Effect of execution of the contract, see post § 137.
Estoppel to urge statute, see post § 143.
Rights where statute makes the contract unenforceable by action thereon, see post § 146.
Validity of oral contract as depending on place where made, see Conflict of Laws, II.
Requisites and sufficiency of contracts in general, see Contracts.
Conflict of laws as to validity and effect of contracts, see Conflict of Laws, II.
Domestic or foreign statute as governed by place of contract, see Conflict of Laws § 15.
Actionableness of oral representation of credit made in state where no writing is required, see Conflict of Laws ¶ 88.
Adverse possession under parol grant, see Adverse Possession § 25.

§ 123. Nullity or voidableness.

Invalidity of parol agreements for commissions for sale of land, see also ante § 30.
Effect of invalidity of contracts in general, see Contracts, IV, D.
Void oral promise as defense in suit for reformation, see Reformation of Instruments.
Gift by invalid parol transfer, see Gifts § 24.
Provisions of the statute invalidating the contract when not in writing, see Comp. L. 1915, §§ 1975, 1977, 1981.
Provisions of statute rendering oral contracts for sale of personalty nonenforceable, see Comp. L. 1915, § 11835.

¶ 426. A contract void under the statute of frauds is a mere nullity, and cannot be used or be binding for any purpose whatever.—Scott v. Bush, 26 Mich. 418; Lentz v. Flint & Pere Marquette R. Co., 53 Mich. 444; Raub v. Smith, 61 Mich. 543; Wardell v. Williams, 62 Mich. 50.

¶ 427. A contract void under the statute of frauds can support no rights, legal or equitable.—Kelly v. Kelly, 54 Mich. 30.

¶ 428. An oral bargain that is not a valid contract under the statute needs no rescission, being utterly void.—Colgrove v. Solomon, 34 Mich. 494.

¶ 429. An oral agreement, based upon a good consideration, to furnish steady employment to a discharged employee, is valid for a year at least.—Hobbs v. Brush Electric Light Co., 75 Mich. 550.

§ 124. Right to damages.

Use of void parol contract to measure damages, see post § 127.
Remedies upon breach of contracts generally, see Contracts, VII.
General rules as to damages, see Damages.
Right to damages for breach of contract for sale of lands generally, see Vendor and Purchaser, IX.

¶ 430. For the breach of a contract void under the statute there can in law be no damages, stipulated or otherwise.—Scott v. Bush, 29 Mich. 523.

¶ 431. Money advanced on an oral agreement for the sale of lands with a stipulation for its retention as damages on default in the purchaser, cannot be retained on the claim that there was a sufficient consideration for the payment growing out of collateral matter which in effect was but part of the void contract itself.—Scott v. Bush, 29 Mich. 523.

§ 125. Right to recover on implied contract.

Recovery for value of land conveyed, see post § 138.
Recovery for goods transferred under nonenforceable parol contract, see post § 147.
Recovery on implied contracts generally, see Implied Contracts.
Recovery of illegal or mistaken payments generally, see Payment, VI.
Common assumpsit for performance under parol contract, see also Assumpsit § 35.
Oral invalid ratification as sufficient to make principal liable on implied contract, see Agency ¶ 393.

¶ 432. One who goes into possession under an oral contract, makes payments and cuts timber cannot maintain an action to recover back such payments.—Cilley v. Burkholder, 41 Mich. 749.

¶ 433. In an action on the common counts to recover back the value of a consideration paid, received and appropriated under a contract void under the statute of frauds, held, that the contract might be referred to to show the equitable circumstances under which the consideration was received in order to reduce the value, but that it could not be used by the plaintiff to aid him in recovering

beyond the real value of such consideration. —Whipple v. Parker, 29 Mich. 369.

§ 126. Recovery for services.

Use of the void contract to measure value of services, see post § 127.

Recovery upon contracts for services generally, see Master and Servant, II; and see also Implied Contracts, II.

¶ 434. There can be no recovery for services not actually performed under a parol contract of employment for a term of years. —Smith v. Chase & Baker Piano Mfg. Co., 185 Mich. 313.

¶ 435. One may recover at the agreed compensation for services actually performed under a contract of employment void under the statute of frauds.—Smith v. Chase & Baker Piano Mfg. Co., 185 Mich. 313.

¶ 436. No recovery can be had upon a quantum meruit for services performed under an agreement which is void under Pub. Acts 1913, No. 238, including in the statute of frauds every agreement, promise or contract to pay any commission for or upon the sale of any interest in real estate. —Smith v. Starke, 196 Mich. 311.

¶ 437. There can be no recovery on quantum meruit for services rendered by a broker to a purchaser of land in procuring the purchase of land where the contract is not in writing as required by the statute of frauds, Pub. Acts 1913, No. 238, § 2.—Slocum v. Smith, 195 Mich. 281.

¶ 438. Unless an agreement for the sale of land on commission is in writing as required by Comp. Laws 1897, § 9515, How. 2nd Ed. § 11399, as amended by Pub. Acts 1913, No. 238, no recovery can be had for commissions, either under the contract or under quantum meruit.—Paul v. Graham, 193 Mich. 447.

¶ 439. In a suit for work and labor performed under a contract void under the statute of frauds, evidence of the terms of the contract, as claimed by plaintiff, is admissible to show the value of plaintiff's services as agreed upon by the parties.—Moore v. Capewell Horse Nail Co., 76 Mich. 606.

¶ 440. An oral contract by a mother to convey land to her adopted child in consideration of services to be rendered by the latter, though void under the statute of frauds, may be resorted to, in an action to recover for such services, for the purpose of negativing the presumption that they were gratuitously rendered, at least if there have been such acts of part performance as would entitle plaintiff to equitable relief.—In re Williams' Estate, 106 Mich. 490.

§ 127. Use to measure damages or value.

Right to damages under void parol contract, see ante § 124.

Measure of damages for breach of contract generally, see Damages, II.

Liquidated damage clause as void because oral contract is void, see also Damages ¶ 684.

Evidence of value in general, see Values.

¶ 441. An agreement void under the statute because not written cannot be considered in measuring damages or for any other purpose.—Hillebrands v. Nibbelink, 40 Mich. 646; Sutton v. Rowley, 44 Mich. 112.

¶ 442. It is the general rule that an agreement void under the statute of frauds is void in all its parts, cannot be considered for the purpose of assessing damages, and is not good as fixing the consideration.—Smelling v. Valley, 103 Mich. 580.

¶ 443. An oral agreement to purchase land, and to convey it to a broker, in payment of his commissions on a land sale, is void under the statute of frauds and cannot serve as a basis for a recovery of the value of the lots. —McDonald v. Maltz, 78 Mich. 685.

¶ 444. In an action to recover the value of machinery which was exchanged for real estate, while no recovery can be had on the verbal agreement to sell the real estate, it is proper to show what the verbal contract was, as bearing upon the relations of the parties and the delivery and acceptance of the machinery.—Bowen v. Chandler, 172 Mich. 678.

¶ 445. Evidence of an oral option to sell real estate is competent where no question arises as to the enforcement of an executed conveyance under it, and where such evidence is offered in a suit by the holder of the option to recover his share of the profits realized on a resale of the land by a third party.—Ranney v. Donovan, 78 Mich. 318.

¶ 446. An oral agreement to convey land in consideration of personal services may be considered in estimating the value of the services in an action to recover therefor, although there have been no acts of part performance by the promisor.—Rhea v. Meyers' Estate, 111 Mich. 140.

§ 128. Void contract as consideration for subsequent promise or conveyance.

Promise invalid under the statute as consideration for other's promise, see Contracts § 131.

Void oral agreement carried into written one with terms fraudulently omitted, see Contracts ¶ 1122.

Validity of account stated based on invalid oral promise, see Account Stated ¶ 24.

¶ 447. A contract that is within the statute and void because not in writing cannot be recognized as creating a moral obligation which in its turn should be held a sufficient consideration to take any part of the contract

out of the statute.—Scott v. Bush, 29 Mich. 523.

¶ 448. An oral promise to pay the debt of another, being void under the statute of frauds, is not a valid consideration for a subsequent promise in writing.—Hall v. Soule, 11 Mich. 494.

¶ 449. A promise made in consideration of an oral executory contract to deed land is void for want of consideration.—Liddle v. Needham, 39 Mich. 147.

¶ 450. Whether a mere oral promise of such a character that by the statute it would have to be in writing to be of any force constitutes of itself a sufficient consideration for another promise to render the latter binding at the time it is made, quære. Where such oral promise has been fully performed within a reasonable time, and before the promise in consideration of which it was made has been retracted, and such performance has been accepted, the defendant's promise becomes binding and can be enforced.—Detroit, H. & I. R. Co. v. Forbes, 30 Mich. 165.

§ 129. Void land contract operative as license.

Necessity that licenses to enter land be in writing, see ante § 44.

¶ 451. A contract to sell standing timber although invalid as a contract because not in writing was good as a license to cut such timber, and such timber cut before such license was revoked became the property of defendant, in replevin.—Antrim Iron Co. v. Anderson, 140 Mich. 702.

§ 130. Avoidance of reciprocal promise or connected parts of transaction.

¶ 452. It seems that, when the only consideration for defendant's promise is plaintiff's promise or undertaking, which is invalid because merely oral, such consideration is insufficient.—Detroit, H. & I. R. Co. v. Forbes, 30 Mich. 165, 176.

¶ 453. Defendant made a written offer to sell real estate. Plaintiffs made a written acceptance at the bottom thereof, but did not deliver the instrument with the acceptance to defendant or even show it to him. They did orally inform defendant of their acceptance and were instantly informed that the deal was off. Held, under § 9511, Statute of Frauds, requiring contracts for the sale of land to be in writing, no contract of sale resulted, and since plaintiffs, not having delivered a written acceptance, were not bound, defendant for lack of mutuality was not bound either.—Hollingshead v. Morris, 172 Mich. 126.

¶ 454. A written contract was supplemented by an oral agreement whereby one of the parties was to advance money and use it in buying an interest in land for the other. Held, that under the statute of frauds the arrangement had no force, and that as the obligation to buy could not bind the other party he could not be charged with the cost of executing such obligation.—Wetmore v. Neuberger, 44 Mich. 362.

¶ 455. Where an oral agreement is made for the transfer of a farm, and it is also agreed that the wheat growing on the farm shall be transferred, the former agreement, being void because not in writing, avoids the latter as inseparably connected with it.—Jackson v. Evans, 44 Mich. 510.

¶ 456. An oral agreement for the purchase of lands, with a stipulation that money paid down may be retained as stipulated damages, is a single contract, and under the statute is void—the agreement for forfeiture as well as the other stipulations.—Scott v. Bush, 26 Mich. 418; Scott v. Bush, 29 Mich. 523.

¶ 457. Where a written contract for the sale of personalty includes real estate also, the contract for personalty is not necessarily vitiated by noncompliance with the statute of frauds in that portion which relates to realty.—Stansell v. Leavitt, 51 Mich. 536.

§ 131. Effect on title or ownership.

See also post § 144.

Effect of oral agreement establishing boundary, see ante § 57.

Effect where transfer or conveyance is made pursuant to contract for sale of lands, see ante § 104.

Effect on title to goods transferred under parol contract of sale, see also post § 147.

Leviability of title of one heir holding deed under verbal agreement with others to care for parents, see Executions ¶ 50.

¶ 458. Under an oral arrangement between the owner of a railroad and another person for the sale to the latter of a part of the rails to be taken from the road-bed, nothing being paid and no rails taken up or delivered, title does not pass.—Ginsburg v. Cutler & Savidge Lumber Co., 85 Mich. 439.

§ 132. ——Trover, trespass or replevin for property.

Recovery for goods transferred under invalid contract, see post § 147.

¶ 459. Liquors worth $80 were sold on oral order and were shipped to the vendee by rail, and while in the possession of the railroad company, before acceptance by or delivery to the vendee, were seized on execution against him. Held, that the sale was within How. St. § 6186, and that the vendor could bring trover against the execution purchaser.—Winner v. Williams, 62 Mich. 363.

¶ 460. A party receiving a number of sheep to be returned double in number in four years cannot assert title and avoid his obligation to return the sheep on the ground

that the contract is void under the statute of frauds; the contract is void in toto, no title passes and the party is liable in trover for the value of the sheep which he has converted.—Dietrich v. Hoefelmeir, 128 Mich. 145.

§ 133. Recovery for fraud and not on contract.

See also ante ¶ 127; post § 148.

¶ 461. In an action for fraud in the sale of lands, perpetrated by pointing out and pretending to sell to one ignorant of the manner of describing lands in deeds, and unable to read, a parcel of valuable land, and then fraudulently deeding in lieu thereof a different and worthless parcel, evidence of the fraudulent transaction cannot be excluded on the ground that the agreement to sell the land, not being in writing, was void under the statute of frauds.—Ochsenkehl v. Jeffers, 32 Mich. 482.

¶ 462. A party who, by promising to assign a tax-purchase certificate to the owner of the land, has induced the latter not to exercise his right to redeem, cannot, after the time for redemption has expired, shield himself behind the statute.—Laing v. McKee, 13 Mich. 124.

¶ 463. The statute does not preclude a suit by a principal against his agent for money equitably due the former in consequence of a fraudulent transaction whereby the agent bought lands of his principal and sold them at a higher price.—Moore v. Mandlebaum, 8 Mich. 433.

¶ 464. Parol evidence of an agreement to make good any deficiency in the value of land agreed to be given in part payment for other land is admissible, where the deed to the latter land, having been delivered to a third person to be held until a written agreement to make good such deficiency should be executed, was fraudulently obtained by the grantee therein before the execution and delivery of such agreement, and the transaction was thereupon repudiated by the grantor.—Gillett v. Knowles, 108 Mich. 602.

§ 134. Accounting or other equitable relief.

Equities based on entire or partial performance, see post § 139.

Equitable remedies and relief in general, see Equity.

General law as to accounting, see Accounting Suits.

Insufficiency of void parol promise to pay another's debt to constitute primary resort of creditor in relief of other creditor of principal debtor, see also Marshalling Assets.

¶ 465. Courts of equity will not enlarge the exceptions of the statute of frauds.—Webster v. Gray, 37 Mich. 87.

¶ 466. Where complainant is not seeking to enforce the specific performance of a verbal contract, relating to an interest in land, but requests an accounting for wrongfully disposing of an interest in a mining option and for profits, he may prove himself entitled to such relief.—Quinn v. Tully, 174 Mich. 30.

§ 135. Ratification or performance of oral contract.

See also ante ¶ 253.

Sufficiency of part performance or execution of agreement in respect to real property, see ante § 103.

Part performance of contract for sale of goods, see ante § 114.

Effect of execution of contract, see post § 137.

Equities based on entire or partial performance, see post § 139.

¶ 467. A contract void under the statute is wholly, not partially, void, and cannot furnish authority to a third person to ratify it.—Grimes v. Van Vechten, 20 Mich. 410.

¶ 468. An oral contract by two persons jointly to purchase articles within the statute cannot be made effectual against both by the subsequent ratification by one of them, the contract being wholly void.—Chamberlain v. Dow, 10 Mich. 319.

§ 136. ——Of land contract by agent under parol authority.

Necessity that agencies to transfer or create interests be in writing, see ante § 72.

Execution of duplicate lease by principal as validating a lease for more than year by agent, see ante ¶ 259.

¶ 469. The absence of proof of written authority to an agent to execute a land contract is unimportant where there is full proof of ratification by both parties by demand and receipt of payment and by possession and improvement.—Hanchett v. McQueen, 32 Mich. 22; Bailey v. Cornell, 66 Mich. 107.

¶ 470. An unauthorized sale of land cannot be ratified except in writing or by such conduct as creates an estoppel; and it must be by a party informed of the facts.—Palmer v. Williams, 24 Mich. 328.

¶ 471. Ratification of agency by covendor in land contract executed for him on parol authority, though insufficient under statute of frauds to validate contract, is sufficient as to receipt of money on joint account, and renders party jointly liable to refund to vendee payments made by latter.—Wright v. Dickinson, 67 Mich. 590.

¶ 472. Where the officers of an association have given a written agreement whereby the recipient is declared entitled to a specified portion of certain described land held by the association under a lease, and this agreement is ratified and confirmed on the books

of the association, the objection that a subsequent oral agreement to perfect the title and give him the interest was void under the statute of frauds was considered unimportant where this agreement also was ratified, confirmed and entered on the books, especially as the title was afterwards perfected, which fact in itself would have left the original agreement, if valid, sufficient to assure the same interest.—Compo v. Jackson Iron Co., 49 Mich. 39.

¶ 473. An oral ratification by the vendee in a written contract for the sale of lands made by his agent without authority is sufficient.—Hammond v. Hannin, 21 Mich. 374.

§ 137. Effect of execution of contract.

Executed parol license to enter on land, see also ante § 44.

Sufficiency of part performance or execution of agreement in respect to real property, see ante § 103.

¶ 474. Failure to sign a written lease does not destroy the effect of a previous arrangement that had been practically executed in part by an exchange of possession which took it out of the statute of frauds.—Switzer v. Gardner, 41 Mich. 164.

¶ 475. An oral agreement is valid so far as it has been carried out, even though when made it referred for its terms to another contract not then signed and not in fact signed afterwards, and therefore invalid. Nor can such an agreement be so revoked as to undo what has been earned under it.—Sovereign v. Ortmann, 47 Mich. 181.

¶ 476. A parol agreement that would be void under the statute of frauds may nevertheless be put in evidence in an action on it to the extent to which the parties have carried it out, since they have so far agreed to be governed by its terms.—Fuller v. Rice, 52 Mich. 435.

¶ 477. A parol agreement for the purchase of land is not open to objection in ejectment, where both litigants claim title through the same person who acquired his legal title in the consummation of such oral agreement.—Clark v. Daniels, 77 Mich. 26.

¶ 478. J. G. and her infant daughter owned certain land, to sell the infant's interest in which proceedings had been taken in chancery, and J. G. agreed with W. G. that if the latter would buy at the chancery sale, whereat a complete title was to be offered, he could have the land for a specified sum regardless of the amount of his bid, J. G.'s share to be computed accordingly. Then J. G. conveyed to W. G., who bid in the premises for more than the price agreed upon. In an action by J. G. for the purchase price, held, that she could not claim that the agreement, being oral, was void under the statute of frauds, so as to enable her to recover on the basis of the sum bid.—Gardner v. Gardner, 106 Mich. 18.

¶ 479. The statute of frauds has no application to a parol agreement by a widow, who is administratrix, to convey her dower rights to the purchaser at administratrix' sale to pay debts, the case being one of a parol contract fully executed.—Gerber v. Upton, 123 Mich. 605.

¶ 480. A logging contract with the owners of certain pine lands provided that they were to sell the other parties, on certain terms, all the white pine the latter should cut from the lands before a certain date. The signing of the contract was delayed, but meanwhile the parties made an oral agreement that the purchasers should proceed with their lumbering. The original contract was not signed after all, and the owners of the land replevied the logs which the other parties had got out and forwarded to buyers, whereupon the purchasers sued for damages. Held, that the plaintiffs were entitled to all the interests which they had earned under their parol agreement so far as they had executed it, whether it made them agents or equitable owners, and that they could recover their agreed compensation or the money had and received by defendants to their use, or such damages as might appear, according to the nature of the agreement; the case was one for the jury.—Sovereign v. Ortmann, 47 Mich. 181.

§ 138. ——Recovery for value of land conveyed.

Recovery on implied contract, see ante § 125.

¶ 481. The statute of frauds does not preclude recovery for the price of lands actually conveyed, whether the agreement for the price is written or oral.—Holland v. Hoyt, 14 Mich. 238.

¶ 482. L. and N. agreed orally that if N. would deed land to L.'s son L. would give him his note for a certain sum. N. deeded the land but L. refused to pay. Held, that N. could not recover from him, as an oral land contract is void and furnishes no consideration for a promise, and if any undertaking to pay for the land was implied the grantee was liable upon it.—Liddle v. Needham, 39 Mich. 147.

§ 139. ——Equities based on entire or partial performance.

See also ante § 103.

Accounting or other equitable relief under void parol contract, see ante § 134.

Enforcement of partly executed parol trust, see Trusts, III.

[Note. The specific enforcement of parol land contracts because of partial performance is based on the equities of the parties, and is only in a qualified sense an exception to the statute of frauds. See Specific Performance, III.]

Sufficiency of performance to raise an equity entitling complainant to specific performance or other equitable relief, see Specific Performance, III; Rescission, II, III; Quieting Title, I; Reformation, I.

¶ 483. Payment by A. under his oral contract with B. to pay the latter's debts and obtain discharge of mortgages upon his land, B. to convey his real estate to A., cannot create an equitable lien upon the land, though perhaps recoverable in assumpsit.—Kelly v. Kelly, 54 Mich. 30.

¶ 484. One who conveys land to the purchase of which both he and his grantee have contributed, relying merely upon the latter to do equity as between them, is remediless under the statute of frauds.—McCarn v. Wilcox, 106 Mich. 64.

¶ 485. A parol gift of land followed by possession and improvements makes the donee the equitable owner of the land.—Maas v. Anchor Fire Ins. Co. of Cincinnati, Ohio, 148 Mich. 432.

¶ 486. The statute of frauds has no application to a contract entered into by the president of a paper company, without authority from the board of directors, with a railroad for the construction and use of a sidetrack, where the railroad company performed by constructing and using the sidetrack, since such performance took it, at least in equity, out of the operation of the statute.—Michigan Cent. R. Co. v. Chicago, K. & S. Ry. Co., 132 Mich. 324.

¶ 487. A contract or permit to cut timber, though not executed by one whose authority appeared to be in writing and therefore inadequate under the statute of frauds to convey title to the standing trees, was valid in equity as a parol contract partly, if not fully, performed, in view of the full payment of consideration and the work done in reliance upon it; and the prosecution of trespass by a subsequent purchaser of the land charged with knowledge of the licensee's operation, was enjoined.—Oconto Co. v. Lundquist, 119 Mich. 264.

¶ 488. The following offer by parol accepted by performance is held to be a binding contract to convey, and effective against subsequent grantees of the original owner: "Right here I will give you an acre of land just as long as you will occupy it for a school. If you will build a school-house here, you will have it just as long as you will keep school in it. It shall be yours. I will give you a deed of this land if you will put a school-house on it."—Greenwood v. School District No. 4 of Napoleon Township, 126 Mich. 81.

¶ 489. On accounting and partition of partnership assets, the statute of frauds is no obstacle to treating lands as part of such assets where the partnership agreement has been entered upon and partially performed, though one partner holds the legal title and has made no conveyance of any interest in it to the other partner.—Chase v. Angell, 148 Mich. 1.

¶ 490. For the purpose of protecting in equity the rights of a bona fide purchaser in possession under an oral contract, who has fully performed and has made improvements, the oral contract is valid and enforceable.—Atkinson v. Akin, 197 Mich. 289.

¶ 490a. Part performance of a contract for the sale of land will entitle the parties to specific performance thereof, or to recover, upon its breach, whatever consideration they have paid thereunder.—Scott v. Bush, 26 Mich. 418; Davis v. Strobridge, 44 Mich. 157.

§ 140. Tenancy under void lease.

Necessity that leases be in writing, see ante § 67.

Requisites and sufficiency of writing, see ante § 101.

Continuance of tenant in possession under parol agreement for lease as constituting part performance, see ante § 106.

Right to institute summary proceedings at end of year against tenant in possession under parol lease valid for one year only, see Forcible Entry § 9.

¶ 491. Though an oral lease for more than a year is void, such a lease, reserving an annual rent under which the lessee has been put in possession, will be a good lease from year to year until terminated by notice.—Morrill v. Mackman, 24 Mich. 279.

¶ 492. Leases for more than one year are invalid if executed by an agent not authorized in writing; but when the lessee has been put in possession and has enjoyed the premises for a full year, the executed agreement is good for that period at least, and the lessee is liable for the accrued rent.—Toan v. Pline, 60 Mich. 385.

¶ 493. A lessee, who, having entered upon the performance of an oral contract that he should have a two years' longer term for clearing certain land, and who, having made part of the clearing could have enforced the agreement by a resort to equity, was not allowed to say that he was not bound to pay the consideration agreed upon as a condition to his continued occupancy.—Smelling v. Valley, 103 Mich. 580.

¶ 494. In an action for use and occupation, a void lease, under which the defendant entered into possession, is admissible to show the nature of his holding.—McIntosh v. Hodges, 110 Mich. 319.

§ 141. Persons to whom statute is available.

¶ 495. Defendant received from complainant an absolute deed of realty as security for

money loaned. Third parties obtained a judgment against complainant and levied execution on the premises. Defendant, acting on behalf of complainant, bought in the title obtained at the execution sale, by said third parties. Held, defendant stood in a fiduciary relation to complainant, and in a suit by the latter to redeem could not invoke the statute of frauds.—Williams v. Bolt, 170 Mich. 517.

¶ 496. The statute of frauds does not apply to an oral copartnership agreement concerning land, where the plaintiff who has the title and whom the statute is designed to protect, states that the defendant has paid for and should have an undivided half interest.—Edwards v. Zuck, 171 Mich. 29.

¶ 497. Intervener contracted orally to buy stock of complainant. Complainant subsequently pledged the stock to defendant. In a suit by complainant to compel a retransfer of the stock, which suit was prosecuted by the intervener, held, defendant could raise the statute of frauds as invalidating said contract despite the fact that complainant ratified it.—Leonard v. Roth, 164 Mich. 646.

§ 142. Waiver or curing of invalidity.

¶ 498. If the parties to a sale that would be void under the statute of frauds choose to treat it as valid, it will be so as to them, and may become effectual for all purposes. —Spalding v. Archibald, 52 Mich. 365.

§ 143. Estoppel to urge statute.

Invalid oral contract as basis for estoppel, see Estoppel § 42.

Inefficacy of estoppel to impart validity to void contracts, see Estoppel § 51.

Narrowed operation of estoppel in pais because of effect of statute, see Estoppel ¶ 222.

Building and renting house on land held under parol agreement as estoppel to claim it as movable against paramount owner, see Fixtures ¶ 63.

¶ 499. A promise void under the statute of frauds cannot be enforced as an estoppel where the party has not been misled as to the facts. Accordingly, where an administratrix promised one that if the latter would attend a sale of real estate to be made by her and bid a certain amount her right of dower in the land should pass by the sale, it was held that she was not thereby estopped from claiming it.—Wright v. De Groff, 14 Mich. 164.

¶ 500. The doctrine of estoppel by acts in pais cannot be so applied as to transfer or extinguish interests which the law provides shall pass by writing only.—Showers v. Robinson, 43 Mich. 502.

§ 144. ——Effect on land titles and interests.

See also ante § 131.

¶ 501. The doctrine of estoppel by actions, oral statements or silence cannot have the effect to pass title to land.—Hayes v. Livingston, 34 Mich. 384; Nims v. Sherman, 43 Mich. 45; White v. Hapeman, 43 Mich. 267; First Nat. Bank of Kalamazoo v. McAllister, 46 Mich. 397; Shaw v. Chambers, 48 Mich. 355; De Mill v. Moffat, 49 Mich. 125.

¶ 502. Land titles cannot rest upon estoppels in pais.—Penfold v. Warner, 96 Mich. 179.

¶ 503. Because of the statute of frauds title to land cannot pass by an estoppel in pais.—Nowlin Lumber Co. v. Wilson, 119 Mich. 406.

¶ 504. Interest in land cannot rest on an estoppel alone, this being forbidden by the statute of frauds.—Wilson v. Muskegon, G. R. & I. R. Co., 132 Mich. 469.

¶ 505. Oral estoppel cannot pass the right to the permanent possession of land.—White v. Hapeman, 43 Mich. 267.

¶ 506. Spoken words will not by estoppel establish a title to land in the absence of the formal conveyances required by the statute of frauds, unless in cases of doubtful and disputed claims and cases where the facts are not of record and not readily accessible. —Shaw v. Chambers, 48 Mich. 355.

¶ 507. The statute of frauds prevents the passing of title to realty by parol, and this cannot be done any more under the guise of an estoppel, in the absence of fraud, and when the estoppel consists only of an implied assent, than by showing a direct parol contract.—Huyck v. Bailey, 100 Mich. 223.

¶ 508. One who has not sufficient authority to bind his principal under the statute of frauds by a contract for the sale of lands cannot accomplish the same result by way of estoppel.—Holland v. Hoyt, 14 Mich. 238.

¶ 509. Where defendant's grantor at the time of the formation of a subdivision did not join in a building restriction imposed on adjacent property, but later on acquired a portion of such property in part consideration of his agreement that the entire tract should be subject to the restriction, same being recited in the deed to him, which however was not signed by him, it was held that defendant having notice of the agreement under which its grantor acquired the title to the property and that such agreement had been made by its grantor and partially performed, it was estopped to invoke the statute of frauds to enable it to do what it knew before it purchased it its grantor promised he would not do.—Hartz v. Kales Realty Co., 178 Mich. 560.

§ 145. ——Settlements of boundaries by estoppel.

Agreements affecting fencing and boundaries, see also ante § 57.

¶ 510. Unless the attempt to settle a doubtful boundary is honestly made in view of a question about it, the statute of frauds will prevent mere acquiescence in the boundary from operating as an estoppel.—Cronin v. Gore, 38 Mich. 381.

¶ 511. Estoppel to question a boundary settled by agreement relied on by the parties does not amount to a transfer of land titles by estoppel in violation of the statute of frauds; since the statute does not apply to boundaries.—Pittsburgh & L. A. Iron Co. v. Lake Superior Iron Co., 118 Mich. 109. Writ of error dismissed in 178 U. S. 270, 44 L. ed. 1065, 20 Sup. Ct. Rep. 931.

B. RIGHTS UNDER CONTRACTS UNENFORCEABLE BY ACTION THEREON; SALE CONTRACTS.

Provisions of the statute as to nonenforceability of the contract, see Comp. L. 1915, § 11835, ¶ 1.

§ 146. In general.

Necessity that sales of goods be in writing generally, see ante § 34.

Requisites and sufficiency of writing or part performance of contract for sale of goods, see ante II, C.

Effect where statute renders parol contract void, see ante § 123.

Void contract as consideration for subsequent promise, see ante § 128.

Trover, trespass or replevin of property transferred under void parol contract, see ante § 132.

Effect of execution of void parol contract, see ante § 137.

Estoppel to urge statute of frauds, see ante § 143.

Remedies under contract for sale of goods generally, see Sales.

§ 147. Recovery for goods transferred under invalid contract.

Right to recover on implied contract, see also ante § 125.

Recovery of property transferred under void contract, see ante § 132.

¶ 512. Where, under an arrangement for the exchange of personal property for real estate, a bill of sale is to be executed by the vendor, and the vendee receives and accepts the goods, but refuses to convey the real estate, the agreement not being in writing, the title to the personal property passes without such bill of sale, and the vendor can recover its value.—Harris Photographic Supply Co. v. Fisher, 81 Mich. 136.

§ 148. Actions for fraud and not on the sale.

See also ante § 133.

Remedies for fraud and deceit generally, see Fraud.

¶ 513. The statute of frauds was not involved in an action to recover for the fraudulent conversion of corporate stock, where plaintiff did not seek to recover for a breach of the verbal agreement in question to take over the stock in certain contingencies, but claimed that the promises were made in pursuance of a conspiracy and fraudulently, for the purpose of obtaining from him his stock.—McNaughton v. Smith, 136 Mich. 368.

IV. PLEADING, EVIDENCE AND PRACTICE.

[Note. The present division is restricted to pleading, urging and proving the fact that the contract or transfer is within the statute. Remedial rights and procedure pertaining to actions based on or arising from the contract or deed are fully treated in the appropriate specific topics, e. g., Contracts, X; Sales, VIII, IX; Vendors and Purchasers, XII; Assumpsit; Conversion; Replevin; Ejectment; etc. See also cross-references which follow.]

Recovery of damages under void parol contract, see ante § 124.

Recovery on implied contract where parol agreement void under the statute, see ante § 125.

Recovery for services rendered under void parol contract, see ante § 126.

Trover, trespass or replevin for property transferred under void parol contract, see ante § 132.

Recovery for fraud and not on the parol contract, see ante §§ 133, 148.

Recovery for goods transferred under invalid contract, see ante § 147.

Equities based on entire or partial performance of parol contract, see ante § 139.

Common assumpsit for performance under parol contract, see Assumpsit § 35.

Promises for benefit of third persons, who may sue, see Contracts § 13.

§ 149. Pleading the statute.

General law as to pleading statutes, see Pleading, I.

General rules as to anticipating defenses, see Pleading, III.

¶ 514. A declaration on a contract need not contain allegations taking it out of the statute of frauds; since these are matters of proof.—Harris Photographic Co. v. Fisher, 81 Mich. 136.

¶ 515. A declaration alleging that defendant proposed in writing to pay plaintiff a specified sum for a deed to certain lands, that plaintiff accepted the offer, and afterwards tendered the deed, but that defendant refused payment, is not defective in failing to aver that plaintiff's acceptance was in writing.—Kroll v. Diamond Match Co., 106 Mich. 127.

¶ 516. It is not necessary in pleading to aver that a contract required by the statute of frauds to be in writing was reduced

to writing. It is enough to aver that a contract was made, which imports a valid contract, and admits the requisite proof to show its validity.—Stearns v. Lake Shore & M. S. R. Co., 112 Mich. 651.

¶ 517. A declaration on a guaranty within the purview of the statute of frauds need not aver that the guaranty was in writing, or that the undertaking guaranteed was made with the formalities required by the statute. —Dayton v. Williams, 2 D. 31.

¶ 518. A declaration in a suit for the breach of a contract for the sale of personal property exceeding $50 in value, in exchange for real estate to be conveyed to the vendor, need not aver that the agreement in relation to the real estate was in writing, or that there was a part delivery and acceptance of the personal property, or any payment made on account of its purchase, in order to take the case out of the statute of frauds; such facts, if existing, being matters of proof on the trial.—Harris Photographic Supply Co. v. Fisher, 81 Mich. 136.

¶ 519. An averment in a declaration that a contract was made between the parties to the suit imports a valid contract, and renders proof admissible to show that the contract was in writing, when essential to its validity under the statute of frauds.—Stearns v. Lake Shore & M. S. R. Co., 112 Mich. 651.

§ 150. ——Pleading defensively.

General law as to defensive pleading, see Pleading, III.

Scope of the general issue in general, see Pleading, IX.

¶ 520. The scope of the plea of the general issue is as a general rule a denial of every material averment of fact in the declaration, and under this plea it may be proved that the contract sued on was unenforceable under the statute of frauds although no notice was given of this defense, and the declaration did not show whether or not the contract sued on was obnoxious to the statute.—Sprague v. Hosie, 155 Mich. 30.

¶ 521. The defense of the statute of frauds is available under a plea of the general issue. —Third Nat. Bank of New York v. Steel, 129 Mich. 434.

¶ 522. The question of the application of the statute of frauds cannot be raised by demurrer to the declaration.—First Nat. Bank of Ovid v. Steel, 136 Mich. 588.

¶ 523. A bill to enforce an agreement involving an interest in land is demurrable if it appears that the agreement is void under the statute of frauds; and even though it does not appear, the defect is involved in the case. But the defense may be lost by not insisting on it.—Eveland v. Stephenson, 45 Mich. 394.

§ 151. Presumptions and burden of proof.

See also post § 154.

Presumption as to time of payment of land, see also ante ¶ 335.

General law as to presumptions and burden of proof, see Evidence, II.

Presumption as to validity of oral contract under law of other state, see Evidence § 59.

¶ 524. Both the delivery and acceptance of personal property must be established in order to save an oral sale of goods worth more than $50 from the operation of the statute of frauds, and the burden of proof rests upon the vendor.—Harris Photographic Supply Co. v. Fisher, 81 Mich. 136.

¶ 525. In an action to recover the market price of certain lard where a verbal order for over $50 void under the statute of frauds, Comp. Laws 1897, § 9516, How. 2nd Ed., § 11400, is made, the burden is on defendant to show that delivery was made on the particular contract.—Armour & Co. v. Freeman Baking Co., 197 Mich. 421.

¶ 526. One who counts on a contract not to be performed within a year from the time of its making must show that the contract, or a memorandum of it, was reduced to writing and signed by the defendant or on his behalf.—Palmer v. Marquette & P. Rolling Mill Co., 82 Mich. 274.

¶ 527. The rule adopted by courts of equity in suits to enforce the specific performance of oral contracts for the sale of land, that a party who sets up part performance to take the contract out of the statute of frauds must show acts unequivocally referring to and resulting from that agreement, and done with a direct view to its performance, is equally applicable to actions at law founded upon contract.—Sullivan v. Ross's Estate, 98 Mich. 570.

§ 152. Admissibility of evidence.

Void parol contract as evidence of value of services, see ante § 126.

Void parol contract as evidence of damages or value, see ante § 127.

Right to put in evidence parol contract partly or wholly executed, see ante §§ 135, 137.

Right to refer to the contract to show equitable circumstances under which consideration paid, see ante ¶ 433.

Inadmissibility of oral evidence of title or ownership of lands, see Evidence § 114.

Admissibility of writings not satisfying the statute, see Evidence §§ 494, 497.

Rule requiring writing conformable to statute of frauds as best evidence, see Evidence, IV, A.

¶ 528. Where it is sought to charge a corporation on an obligation which, if it ex-

ists, is collateral and necessary to be in writing, for money lent to its president and alleged to have been received by it, testimony by plaintiff as to conferences with such president or with other officers of defendant is incompetent for the purpose of connecting entries upon defendant's books with the president's individual notes executed to plaintiff, and to show that such notes are in fact the company's.—Baumann v. Manistee Salt & Lumber Co., 94 Mich. 363.

¶ 529. In an action by C. against A. upon a void oral guaranty the record of an action by C. against B. is admissible to show that the two actions are based upon the identical claim, and that it was still in existence and uncanceled and that C. never discharged B. from liability.—Dupuis v. Interior Construction & Imp. Co., 88 Mich. 103.

¶ 530. One who sues for the price of goods which he claims to have furnished a third party upon defendant's agreement to pay for the same, may testify that he never presented a bill for the goods to such third party or made any claim upon him, and that he did not look to him in any way; this as tending to exclude any claim that defendant may make under the statute of frauds.—Rossman v. Bock, 97 Mich. 430.

§ 153. ——Parol evidence to aid writing or identify parties.

Parol evidence to aid written agreement to answer for another, see also ante § 86.
Parol evidence to aid written agreement not to be performed in one year, see ante § 87.
Parol evidence to aid contract for sale of lands, see also ante § 94.
Parol evidence to aid description of land in contract for its sale, see also ante ¶ 95.
Parol evidence in aid of note, memorandum or bill of sale of goods, see also ante § 107.
General rules as to parol evidence to explain or vary writings, see Evidence, V.

¶ 531. Because of the statute requiring a promise to answer for the debt of another to be in writing, it cannot be shown orally that such a contract in writing and signed only by the president of a bank as an individual was in fact the contract of the bank by which it undertook to guarantee sureties on a note discounted by the bank.—First Nat. Bank of Sturgis v. Bennett, 33 Mich. 520.

¶ 532. The statute of frauds is against extending on parol testimony an ambiguous description in a mortgage, unless upon positive proofs.—Hurst v. Beaver, 50 Mich. 612.

¶ 533. The sufficiency, under the statute, of a description of land in a contract for its sale is a question which arises on the face of the paper; and, it seems, should be settled by inspection thereof before the introduction of extrinsic evidence to connect the contract with any particular premises.—Eggleston v. Wagner, 46 Mich. 610.

¶ 534. It cannot be shown by parol that goods mentioned in a contract of sale, which is signed by the purchaser only, were to be manufactured by the vendor, where there is nothing in the contract to show that the goods were not in existence.—Willebrandt v. Sisters of Mercy, 185 Mich. 366.

§ 154. Weight and sufficiency of evidence.

Sufficiency of memorandum of agreement for commissions on sale of land, see ante § 90.
Sufficiency of note or memorandum of contract for land, see ante § 93.
Sufficiency of note, or memorandum of sale of goods, see ante § 107.
General law as to weight and sufficiency of evidence, see Evidence, X.

¶ 535. Goods being found by two jointly in the St. Clair river, it was agreed that defendant should sell the same and divide the proceeds. Suit being brought upon this agreement, defendant claimed that under the statute relative to lost goods no sale could lawfully have been made within a year, and the agreement, which was not in writing, was therefore void. Held that, to render the statute applicable, he should have shown that the finding was within the state.—Cummings v. Stone, 13 Mich. 70.

¶ 536. After two owners of a mill had hired plaintiff to run it and to cut their stock of logs for a stated price per thousand, defendant, before much had been done under the contract, bought the interest of the owner in the mill but not in the logs, and told plaintiff that he took his vendor's place in the contract; relying upon which plaintiff went on with the work. Held, that there was evidence of an original promise by the vendee, not within the statute of frauds, to pay in connection with his co-owner for work subsequently done under the contract.—Franks v. Stevens, 82 Mich. 192.

¶ 537. Evidence that S., on presentation of a hotel bill due from P. to G., orally promised to pay it, and that G. never afterwards looked to P. for payment, and that at the time P. was lumbering under a contract with S., who was furnishing him advances and supplies, supports a finding that it was understood P. should be released, and S. substituted as debtor.—Green v. Solomon, 80 Mich. 234.

¶ 538. In the matter of a claim against an estate under an alleged agreement by the decedent to pay for work done upon decedent's farm for claimant's father, who was the lessee, testimony that claimant's labor enhanced the value of the farm, was insufficient to take the case out of the statute of frauds in the absence of testimony that this was a consideration for the contract, or that

the father was not correspondingly benefited by his increase in the crops.—Bristol v. Sutton, 119 Mich. 693.

¶ 539. A claim that the defendant in consideration of the promise of a material man to withhold a lien, agreed to pay for materials furnished a contractor for use in a building before he abandoned work thereon, held not established by the evidence.—Central City Lumber Co. v. Weber, 184 Mich. 563.

¶ 540. Evidence that defendant told plaintiff that he would have some work for him, and that L. would see him about it; that on request of L. plaintiff met L., and gave him a price on the work, but afterwards, suspecting L.'s responsibility, told defendant that he had found that L.'s credit was no good, whereupon defendant said that it was all right, that he (defendant) was putting money into the matter and helping L. along, that all the money would go through his (defendant's) hands, and that he would pay plaintiff—is sufficient to justify a jury in finding a direct promise by defendant to pay for the work, although contradicted by defendant's evidence.—Wenzel v. Johnston, 112 Mich. 243.

¶ 541. A judgment for the seller of building materials against a husband and wife in assumpsit for the sale price thereof, will not be reversed on the ground that the wife's agreement was void under the statute of frauds or as an agreement to pay for her husband's debt; where plaintiff claimed that although the lumber was originally sold to the husband, after the first car load was shipped, and when he was in condition to recover it back, a new arrangement was made by which the material was to go into a building to be erected upon land owned by the wife, though to be occupied by both defendants, and the balance of the material was shipped, both defendants agreeing to pay for all such material, and where the record states that plaintiff introduced testimony in support of such claim, but does not set forth the evidence, although both defendants denied such new agreement.—Reelman v. Grosfend, 140 Mich. 681.

¶ 542. Testimony of the proposed purchaser under a written contract for the sale of personal property which omitted to name the purchase price, that the seller estimated the property to be worth from $60 to $150, but that witness had never seen it, is insufficient to bring the contract within the statute of frauds as being for the sale of chattels of the value of $50 or more.—Slesinger v. Bresler, 110 Mich. 198.

¶ 543. In an action to recover the market price of certain lard, where a verbal order for over $50 void under the Statute of Frauds, Comp. Laws 1897, § 9516, How. 2nd Ed., § 11400, was made, evidence held insufficient to show that delivery was intended by plaintiff to be on such order and at the contract price.—Armour & Co. v. Freeman Baking Co., 197 Mich. 421.

¶ 544. One will not be permitted to avail himself, as part performance, of acts that by numerous voluntary writings he has referred to another and a different transaction.—Sullivan v. Ross's Estate, 98 Mich. 570.

¶ 545. Acceptance of a memorandum of agreement for the sale of real estate constitutes the same a binding contract and in a suit by the vendee for specific performance thereof the fact that a copy or duplicate of the memorandum of agreement was not retained by the vendor is of no importance.—Smith v. Mathis, 174 Mich. 262.

§ 155. Questions of law and fact.

General law as to questions of law and fact, see Trial, VI.

¶ 546. The question of whether there was a delivery and acceptance of a horse satisfying the statute of frauds is, on conflicting evidence, one for the jury.—Kendrick v. Hochradel, 167 Mich. 179.

¶ 547. The existence of an agreement or original promise on the part of an owner to pay for lumber alleged to have been sold, is a question of fact, when the evidence is conflicting as to whether the seller of the lumber trusted the owner, for such lumber, or gave credit to a carpenter who bid for the work.—Temple v. Goldsmith, 118 Mich. 172.

¶ 548. Where there is evidence that the seller sold a bill of goods to the alleged promisor rather than to his lessee, and that contemporaneously and as one transaction the promisor agreed to pay for other goods which the lessee was then using, it is for the jury to say whether the promise was direct as a whole or was within the statute as a promise to pay another's debt.—Hake v. Solomon, 62 Mich. 377.

¶ 549. Where there was a jury question as to whether the goods were sold to the promisor or to a dealer, it was proper to refuse a binding charge that the oral promise to pay for them was one to answer for the debt of another, and proper to leave it to the jury to find which was the buyer with instructions that the promise was invalid if it was to pay another's debt, but valid if it was a promise to pay the price of a direct sale of goods delivered to another.—Hake v. Solomon, 62 Mich. 377.

¶ 550. Whether an oral promise to pay for the plastering on a building was an original promise by the owner, or was collateral to the principal contractor's promise, was for the jury on evidence that the owner's prospective son-in-law, employed as a workman by the principal contractor, accompanied the principal contractor at the time the latter

made a contract for it; that afterward, on hearing that the principal contractor was not financially responsible, the plastering contractor inquired of such son-in-law and was informed that he expected to live in the house and that the owner would pay for the plastering, or see that it was paid for; and that the plastering contractor said he would not do the work unless the owner paid for it, there being some evidence also that the son-in-law was an agent of the owner for the purpose of making the promise.—Wilhelm v. Voss, 118 Mich. 106.

¶ 551. Whether the contract was an original promise or one to answer for another's debt was a jury question on evidence that a building contractor to whom it had been furnished failed to pay, whereupon the plaintiff material man refused to furnish more, and the owner then promised that, since he wanted the job finished, he would pay for the lumber furnished and to be furnished.—Haak v. Kellogg, 146 Mich. 541.

¶ 551a. Defendant's tenant went to plaintiff's mill to get, on credit, some seed for the farm. Plaintiff's clerk called up the defendant by telephone and talked about the payment for the seed. The clerk testified that the sale was to the defendant, and he agreed to pay. The defendant's testimony as to the telephone conversation, and also the original order and other correspondence between the plaintiff and defendant, showed the defendant to be the guarantor of payment, but not the purchaser. Held, it was a question for the jury whether defendant agreed to pay or was simply the maker of a guaranty, required by Comp. L. 1897, § 9515, to be in writing.—Saginaw Milling Co. v. Mower, 154 Mich. 620.

¶ 552. A finding of the jury that the defendant in assumpsit for the price of supplies furnished a third party, understood, through its officers and agents, that such goods were being furnished entirely on the credit of defendant, and that defendant would pay for them, was supported by the evidence, where it appeared that such third party threatened to abandon a contract with defendant on account of failure to secure such supplies, and that thereupon defendant's superintendent gave such third party a letter of recommendation to plaintiff, with instructions to get the supplies there; that plaintiff after filling the first order for supplies upon such recommendation charged them upon the books to defendant and a few days thereafter informed such superintendent that he was furnishing such supplies solely on defendant's credit; that monthly bills were rendered to defendant, which made no objection to any of them until the completion of the contract; that defendant's superintendent took possession of the supplies left over, saying that defendant would have to pay for them; and the statute of frauds does not apply.—Hagadorn v. Stronach Lumber Co., 81 Mich. 56.

¶ 553. A sale by a wholesale dealer of goods for immediate delivery and future delivery, listed upon separate sheets, and containing different terms of payment is sufficient to justify submitting to the jury the question of whether the contract is entire, so as to take it out of the statute of frauds upon acceptance by the purchaser of the part of the goods shipped immediately.—Brown v. Snider, 126 Mich. 198.

¶ 554. Evidence held to present a question for the jury whether an oral agreement was made between plaintiff and defendant, prior to the organization of a corporation, for a sharing in the profits and losses of the venture, so to render it, if made, not invalid within the statute of frauds, as an agreement not in writing to pay the debt of another.—Lowitz v. Kimmerle, 221 Fed. 857. Writ of certiorari denied, 238 U. S. 639, 59 L. ed. 1501, 35 Sup. Ct. Rep. 901.

¶ 555. Where several oral contracts of employment had been entered into, and it was contended that the contract was within the statute of frauds, but the only agreement relied on was one to be performed within one year it was properly submitted to the jury.—Galvin v. Detroit Steering Wheel & Windshield Co., 176 Mich. 569.

¶ 556. In an action for goods sold and delivered, in which the issue was whether the agreement of the defendant was void as a mere verbal undertaking to answer for the debt of another, testimony from which the jury could have inferred that defendant's obligation was that of an original purchaser, warranted the refusal to direct a verdict for defendant.—Butters Salt & Lumber Co. v. Vogel, 135 Mich. 381.

§ 156. Instructions.

General law of instructions, see Instructions.

¶ 557. In an action to recover for goods purchased by defendant's alleged agent, where the defense was that the goods were purchased by such agent for her personal account, an instruction that if the goods were not purchased with the authority of defendant, he would not be bound by a promise to pay unless in writing and on good consideration held proper.—Feist v. Root, 189 Mich. 595.

¶ 558. Contractors for the construction of a railroad gave their workmen certificates of the amount due them, which were presented to and accepted by the railroad company. Upon these certificates the plaintiffs furnished goods which they charged to the contractors. In a suit brought against the contractors to recover the price it was made a question before the jury whether the goods were furnished on the credit of the contractors, or of third persons who, according to some of the evidence, were to make advances. The jury were charged that if the goods were

furnished under an arrangement with the contractors, or if they subsequently assented to the goods being charged to them—in either case they would be liable. Whether the latter branch of this charge was correct, quære; the court being equally divided on the question.—Farwell v. Dewey, 12 Mich. 436.

FRAUDULENT CONVEYANCES.

TREATS of transfers or conveyances of property with intent or effect to defraud or hinder third persons, creditors of the transferor or to whom he owes some duty or obligation, especially those obnoxious to Comp. L. 1915, chapters 231-233 and to the Bulk Sales Law (Comp. L. 1915, chapter 122). It excludes preferential or fraudulent assignments for creditors (see Assignments for Creditors), transfers voidable under the Bankruptcy Law (see Bankruptcy), chattel mortgages or conditional sales voidable because not filed or accompanied by change of possession (see Chattel Mortgages; Sales, XII), and illegal preferences by failing or insolvent corporations (see Corporations, XXIII). The operation and effect of the Recording Acts and the bona fide taker doctrine are treated in Notice and Record of Title. Bills in aid of execution are treated in Creditors' Suits.

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§ 7. Hindering and delaying transfers.
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§ 9. Transfers on eve of suit or levy.
§ 10. Bulk sales of merchandise stocks.
§ 11. ——"Fixtures" and property used in connection with business.
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§ 13. Transfer back to grantor or seller.
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Validity of assignments excepting prior transfers and incumbrances, see Assignments for Creditors § 10.
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General principles of fraud, see Fraud.
Buying on strength of false mercantile statement as fraud, see Fraud § 23.
Invalidity of conveyances made to hinder, delay or defraud creditors, see Comp. L. 1915, §§ 11998-12003.
Conveyances embraced by statutory prohibition of transfers in fraud of creditors, see Comp. L. 1915, § 12003.

¶ 1. The question of fraud in a conveyance by a debtor to his creditor must be determined by the state of affairs at the time of the conveyance.—Rathbone v. Maltz, 155 Mich. 306.

¶ 2. A conveyance valid when made cannot be invalidated by subsequent acts of the grantor, or by creation of subsequent debts. —Page v. Kendrick, 10 Mich. 300.

¶ 3. Where a bill in aid of execution is filed to reach land which has been previously conveyed without fraudulent intent, the grantee's right must be determined by the original nature of the transactions, and cannot be made to depend on later dealings with other lands which are not involved in the litigation.—First Nat. Bank v. McAllister, 46 Mich. 397.

¶ 3a. Mere ignorance on the part of the attaching creditor that the debtor's interest had been assigned at the time of the levy will not enable such attaching creditor to treat the assignment as invalid and to regard the debtor as still having an interest, where the assignment was prior in time and was not found to be fraudulent in fact and where value was paid and the assignee was in possession.—Dumas v. Geer, 144 Mich. 377.

¶ 4. The statute which allows creditors to treat certain dealings as absolutely void confines their redress to frauds aimed against creditors, and does not reach frauds against the debtor himself.—Lewis v. Rice, 61 Mich. 97.

§ 2. Intent to defraud or hinder.

Implied or constructive fraud, see post § 3.
Failure to record as badge, see post § 4.
Making discharged mortgage appear as lien, see post § 5.
Acquiescence of debtor in loss of property, see post § 6.
Necessity of fraudulent intent to set aside transfer as to subsequent creditors, see post § 95.
Intent to defraud as determinative of creditors against whom invalid, see post § 89, ¶ 436.
Necessity for actual intent to defraud on transfer from one spouse to other, see post ¶ 210.
Necessity for an actual fraudulent design to defeat voluntary conveyance, see also post ¶ 123.
Effect of intent to defraud and hinder upon rights of bona fide purchaser, see also post ¶ 528.
Presumption of good faith from payment of consideration, see post ¶ 109.
Instructions as to intent to defraud or hinder, see post ¶ 88.
Intent to defraud or hinder as question for jury, see post ¶¶ 80-86.
Admissibility and sufficiency of evidence of intent to defraud or hinder, see post ¶¶ 64, 66, 67, 69-72, 74.
Necessity for actual fraudulent design to defeat voluntary conveyance as against existing creditors, see also post ¶ 442.
Fraudulent intent as question of fact, see Comp. L. 1915, § 12001.

¶ 5. If a conveyance is made with intent to hinder or delay or defraud the grantor's creditors in collecting their demands, it is fraudulent as to them.—Corbitt v. Cutcheon, 79 Mich. 41.

¶ 6. As against a judgment creditor proceeding with diligence, any disposition of property made with a direct design of defeating his remedy is fraudulent and void. —Nelson v. Ferris, 30 Mich. 497.

¶ 7. An agreement between a mortgagor and mortgagee for the sale of the land, and extension of the time of payment, although not per se fraudulent as to creditors, is rendered void ab initio by the use of said agreement as a means to defraud creditors.—Bigelow v. Sheehan, 150 Mich. 507.

§ 3. ——Implied or constructive fraud.

Presumptions and inferences of fraud, see post § 18.

¶ 8. Acts are constructively fraudulent as to creditors when injurious to their rights, without of necessity involving actual fraud or an intent to defraud.—Sweet v. Converse, 88 Mich. 1.

¶ 9. Under How. St., § 6203, providing that every conveyance or assignment made to hinder, delay, or defraud creditors is void, a conveyance or assignment is void if it operates to delay, hinder or defraud creditors, even though there is no actual fraud, and though fraud was not practiced or intended to be practiced upon the part of the grantee or assignee.—Cutcheon v. Buchanan, 88 Mich. 594.

§ 4. Failure to record as badge.

See also post ¶¶ 202, 208, 408.

Long delay in recordation as evidence of fraud, see also post ¶ 614.

Delay in recordation as evidence of fraud, see also post ¶ 318.

Withholding of chattel mortgage from files to shield mortgagor, see Chattel Mortgages § 55.

¶ 10. Withholding conveyances of real estate from record does not tend to show fraud. —Blish v. Collins, 68 Mich. 542.

¶ 11. In a case where a bank has been given by a debtor a land contract and mortgage, and the same have not been recorded, these will not be held void as to creditors except on a showing of fraud.—Haug v. Third Nat. Bank, 95 Mich. 249.

¶ 12. Failure to record a mortgage operated as a legal fraud upon creditors from whom the mortgagor was enabled to obtain credit which they would not have extended had the mortgage been recorded.—Belcher v. Curtis, 119 Mich. 1.

§ 5. Making discharged mortgage appear as lien.

Assertion of mortgage lien by mortgagee after discharge as fraud upon other creditors of mortgagor, see Chattel Mortgages § 119.

¶ 13. If a mortgage is in fact paid, but instead of being discharged is fraudulently assigned with intent to defraud creditors, it is not a valid lien; and those who have received a grant of the property from the mortgagor's assignee in bankruptcy are entitled to have the mortgage declared paid, and the fraudulent assignment adjudged void.—McMaster v. Campbell, 41 Mich. 513.

¶ 14. The mortgagee of a stock of goods foreclosed and bid it in, but allowed the mortgagor to remain in possession and continue the business under an arrangement that he should have title to the stock when he paid the amount of the mortgage. This was paid; but the mortgagee, at the mortgagor's request, and to hinder creditors, sold the stock to a third person without consideration, who secretly sold to the mortgagor, the latter being still in possession, and afterwards the stock was transferred ostensibly by such third person to a bona fide purchaser. Held, that under the arrangement the mortgagor held an equitable title, which became a legal one on payment; that the transfer to the third person was void, and that the notes in his possession given by the bona fide purchaser could be garnished as the mortgagor's property by his creditors.—Robinson v. Smith, 63 Mich. 350.

¶ 15. The failure of a mortgagee of chattels to indorse payments on the mortgage, or a copy thereof, on file in the office of the township or city clerk, or to volunteer a statement of the amount unpaid to a creditor of the mortgagor who refuses to recognize the validity of the mortgage for any sum or to ask the amount due on the mortgage, will not avoid it as to creditors.—Anderson v. Cook, 100 Mich. 621.

§ 6. Acquiescence of debtor in loss of property.

¶ 16. Where property is sold by one not its true owner, the rights of the owner's creditors to follow the same are not affected by the owner's acquiescence in the sale.—Pierson & Hough Co. v. Noret, 154 Mich. 267.

§ 7. Hindering and delaying transfers.

Conversion and secretion of assets from levy, see post § 8.

Transfers on eve of suit or levy, see post § 9.

Bulk sales of merchandise, see post §§ 10-12.

Transfer back to grantor or seller, see post § 13.

Transfers of life insurance, see post § 14.

Transfer of exempt or nonleviable property, see post § 15.

Transfer of homestead, see post § 16.

Conversion of property into homestead or exemption, see post § 17.

Transfers to creditors or claimants as hindering or delaying transfers, see post, I, E.

Partially valid transfer or mortgage, see post § 121.

Admissibility and sufficiency of evidence of hindering and delaying transfers, see post ¶¶ 65, 68, 73.

Chattel mortgages fraudulent as to creditors and third persons, see Chattel Mortgages §§ 55-60.

Nonleviability of lands purchased and placed directly in name of third person, see Executions § 25.

Withdrawal and redeposit in fraud of creditors as terminating bank's debt to depositor, see Banking ¶ 28.

¶ 17. To bring a transaction within the statute against fraudulent conveyances it is not necessary that the transfer should actually defraud creditors. It is sufficient if it only hinder and delay them.—Wood v. Eldredge, 147 Mich. 554.

¶ 18. Fraud in fact, or an express intent to commit fraud, is not necessary in order to render a conveyance fraudulent as against creditors. It is sufficient if the effect of the conveyance is to delay or hinder creditors in the collection of their debts.—Buck v. Sherman, 2 D. 176.

¶ 19. Concealment of a sale of goods from creditors is not necessarily a badge of fraud, especially if necessary to prevent sacrifices; neither is a sale of selected goods at a discount of thirty-five per cent, if neither vendor nor purchaser supposes the concern to be insolvent, and the only purpose is to raise money to meet pressing demands.—Barnes v. Foxen, 53 Mich. 475.

¶ 20. The fact that two chattel mortgages executed on the same day by an insolvent corporation were authorized by the board of directors at the same meeting, does not constitute them parts of the same transaction, so that one's being fraudulent as to creditors vitiates the other; though the theory is that the second was given to keep creditors from redeeming from the first.—Kock v. Bostwick, 113 Mich. 302.

¶ 21. An agreement whereby A. is to work land for B.'s benefit, who is to own and have the crops raised and apply the proceeds upon A.'s indebtedness to him, is fraudulent as to pre-existing creditors, if its real intent is to protect the fruits of A.'s labor against them. —Haynes v. Ledyard, 33 Mich. 319.

¶ 22. A statement in a chattel mortgage that it shall be a continuing security until discharged by writing, and, at the option of the mortgagee, shall be as binding in all respects upon the assigns of the mortgagor's business as if made by them in person, only states the legal effect of the mortgage, and is not a badge of fraud.—Armstrong v. Cook, 95 Mich. 257.

¶ 23. It is not a fraud on the creditors of the promisor for the promisee to enforce a contract obligation for more than the balance due as recited in a contract by plaintiff with third persons in the absence of any showing that a creditor was deceived by the recital, or that if such deception resulted, the claimant was in any way chargeable therewith.—Fisher v. Burroughs Adding Machine Co., 157 Mich. 126.

§ 8. Conversion and secretion of assets from levy.

Concealment of sale of assets as badge of fraud, see ante ¶ 19.

Criminal concealment or removal to defraud, see Crimes § 88.

Disposal or concealment as ground for attachment, see Attachment § 9.

Exempt property of debtor and right to dispose of same, see generally Exemptions; Homesteads.

¶ 24. The legal effect of disposing of property, and converting the avails into negotiable paper, and secreting it from creditors, is a fraud upon them.—Barnes v. Wayne Circuit Judge, 81 Mich. 374.

¶ 25. A sale not made in payment of a debt is void as against creditors if made to delay or defraud them and to enable the debtor to put his property in a shape in which they cannot reach it; sales on long time or for assets not readily convertible nor subject to levy may be of this class.—Jordan v. White, 38 Mich. 253.

§ 9. Transfers on eve of suit or levy.

Transfer on eve of suit as evidence of fraud, see also post ¶ 318.

¶ 26. Changing the title to land which at the time of the rendition of a decree was subject to levy and sale, so that it could not be reached by such levy and sale, is in effect legal fraud, whatever the motive.—Foster v. Whelpley, 123 Mich. 350.

¶ 27. How. St., § 6203, which avoids a conveyance if made with intent to hinder, delay, or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts, or demands, protects the holder of a demand against the grantor for the taking and converting of personal property upon which suit had been commenced before the deed was made, and upon which judgment is afterwards obtained.—Schaible v. Ardner, 98 Mich. 70.

¶ 28. A conveyance of real estate by defendant to his brother pending suit against the grantor, all the circumstances of which conveyance indicate that it was a sham throughout and the grantee's name was used to hold what had never been anything but the grantor's property, is fraudulent as against the creditor recovering judgment in such suit.—Webber v. Jackson, 79 Mich. 175.

¶ 29. Where, after the recovery of judgment against the principal in a liquor bond, suit has been brought on such judgment against a surety in the bond, a conveyance by such surety, made for the purpose of preventing the collection of the judgment, may be set aside as fraudulent against the judgment creditor, whose claim may be held as not an unliquidated demand.—People, for use of Clinton v. Rice, 79 Mich. 354.

¶ 30. A bill by a judgment creditor, a building contractor to have a deed by the owner of the property, on which complainant worked, to the owner's wife decreed to be subject to complainant's levy, on the ground that the deed was without consideration and was in fraud of creditors was sustained, where the deed was given and recorded after complainant's claim on the contract accrued, but before judgment thereon.—Shippey v. Sullivan, How. N. P. 272.

§ 10. Bulk sales of merchandise stocks.

"Fixtures" and property used in connection with business, see post § 11.

Exercise of mortgagee's or seller's reserved rights, see post § 12.

Effect between parties of sales in violation of Bulk Sales Law, see post § 113.

Liability of transferee under Bulk Sales Law, see post §§ 123, 124.

Who are creditors within meaning of Bulk Sales Law, see post ¶ 439.

Necessity for judgment or lien to entitle to relief from violation of Bulk Sales Law, see post § 102.

Delay and laches in securing relief under Bulk Sales Law, see post § 99.

Inventories, affidavits and notices under Bulk Sales Law, see post § 125.

Defenses to proceedings under Bulk Sales Law, see also post ¶ 550.
Application of Bulk Sales Law to transfer of exempt property, see also post ¶ 48.
Due process in Bulk Sales Law, see Constitutional Law § 163.
Bulk sale by corporate manager without authority or compliance with statute, invalidity against creditors, see Corporations § 133, ¶ 487.
Bulk Sales Law, see Comp. L. 1915, §§ 6346-6348.

¶ 31. The terms, "sale, transfer or assignment" used in the title and in the body of the sales-in-bulk act (Pub. Acts 1905, Act No. 223), mean the disposition of the entire title of the seller.—Hannah & Hogg v. Richter Brewing Co., 149 Mich. 220.

¶ 32. A chattel mortgage on a stock of goods is not a sale, transfer or assignment in bulk within the meaning of the Bulk Sales Act.—American Steel & Wire Co. v. Dedrick, 196 Mich. 731.

¶ 33. A chattel mortgage upon a stock of goods is not a sale, transfer, or assignment in bulk within the meaning of the sales-in-bulk act (Pub. Acts 1905, Act No. 223).—Hannah & Hogg v. Richter Brewing Co., 149 Mich. 220.

¶ 34. A regular foreclosure of a chattel mortgage, although resulting in the sale of the incumbered chattels, is not a voluntary sale, transfer or assignment within the meaning of the Bulk Sales Act (Act No. 223, Pub. Acts 1905, §§ 2612-2614, How. St., 2nd Ed.).—Symons Bros. & Co. v. Brink, 187 Mich. 43.

¶ 35. A sale in bulk by an undertaker, of caskets, steel vaults, robes, and casket hardware, is a sale of merchandise within the meaning of the Bulk Sales Law, Act No. 223, Pub. Acts 1905.—People's Sav. Bank v. Van Allsburg, 165 Mich. 524.

¶ 36. The terms of Act 223, P. A. 1905, How. 2nd Ed., § 2612, embrace any sale of the whole or a part of a stock of merchandise and the fixtures pertaining to the business.—McCormick v. Kistler, 175 Mich. 422.

¶ 37. One George D. Hanna went on an appeal bond. Shortly afterwards he was advised that he might have to pay the amount of the judgment if the appeal was lost. He then conveyed his stock of groceries and fixtures to plaintiff, his brother, but retained possession. Such deed was not recorded until after the decision of the appeal adversely to Hanna. The goods were seized on execution to satisfy the judgment. Plaintiff replevied. Held, under No. 223, Pub. Acts 1905, the Bulk Sales Act, the conveyance to plaintiff was fraudulent and void.—Hanna v. Hurley, 162 Mich. 601.

¶ 38. Act No. 223, Pub. Acts 1905, invalidating sales of stocks of goods in bulk, does not violate section 32, art. 6 of the State Constitution, which provides that no person shall be deprived of life, liberty, or property without due process of law, nor is it in conflict with the Fourteenth Amendment of the Federal Constitution, which provides that no state shall deny to any person within its jurisdiction the equal protection of the laws.—Musselman Grocer Co. v. Kidd, Dater & Price Co., 151 Mich. 478, affirmed in 217 U. S. 461, 54 L. ed. 839, 30 Sup. Ct. Rep. 606.

§ 11. ——"Fixtures" and property used in connection with business.

¶ 39. The word "fixtures," as used in the Bulk Sales Law, Act No. 223, Pub. Acts 1905, has reference to such chattels as merchants usually possess and annex to the premises occupied by them, to enable them the better to store, handle, and display their goods and wares.—Bowen v. Quigley, 165 Mich. 337.

¶ 40. The legislature by its language in the Bulk Sales Act, Act No. 223, Pub. Acts 1905, intended the word "fixtures" should have no other or different meaning than is usually given to it in the relation of landlord and tenant.—Bowen v. Quigley, 165 Mich. 337.

¶ 41. A sale by a coal dealer of the wagons, harness, horse covers, city boxes, mud boxes, coal bags, forks, shovels, coal screens, metal baskets, desks, safes, chairs, stoves and chutes used by him in connection with conducting his coal business, is not a sale of "fixtures" within the meaning of the Bulk Sales Law, Act No. 223, Pub. Acts 1905.—Bowen v. Quigley, 165 Mich. 337.

¶ 42. A sale of goods, consisting of wagons, harness, horses, horse covers, city boxes, mud boxes, coal bags, forks, shovels, coal screens, metal baskets, desks, safes, chairs, stoves and chutes, which said property was used in running a coal business, is not a sale of merchandise within the meaning of the Bulk Sales Law, Act No. 223, Pub. Acts 1905.—Bowen v. Quigley, 165 Mich. 337.

¶ 43. A sale by an undertaker of a funeral car, casket, wagon, bobs, harness, buggy, lowering device, floor rugs, church truck, slumber robe, door badges, pedestals, embalming tools, and other similar articles used in connection with his business, is not a sale of fixtures within the meaning of the Bulk Sales Law, Act No. 223, Pub. Acts 1905.—People's Sav. Bank v. Van Allsburg, 165 Mich. 524.

§ 12. ——Exercise of mortgagee's or seller's reserved rights.

¶ 44. Where a mortgagee under a chattel mortgage took possession of the mortgaged property, under authority to do so contained in the mortgage, with the purpose of selling it and applying the proceeds as far as they would go to the payment of the mortgagor's

indebtedness to him, but was restrained by order of the court from proceeding with the sale, held that, there being no fraud shown, such taking possession of the property was not a violation of the Bulk Sales Law, Act No. 223, Pub. Acts 1905.—Symons Bros. & Co. v. Brink, 194 Mich. 389.

§ 13. Transfer back to grantor or seller.

Preference by retransfer to seller of property not paid for, see post § 73.

Preference by reconveyance of lands to satisfy vendor's lien, see post ¶ 369.

¶ 45. Where land is conveyed in consideration of an agreement by the grantee to support the grantor for life, a reconveyance to the grantor upon grantee's becoming indebted and embarrassed, reserving part of the premises as compensation for the support already furnished, is not a fraud upon intervening creditors of the grantee, in the absence of an actual intent to defraud, although the land is thereupon conveyed to the wife of the grantee under a similar agreement.—Gustin Co. v. Arn, 107 Mich. 231.

§ 14. Transfer of life insurance.

¶ 46. An assignment by an insolvent debtor of a life insurance policy payable to himself, his executors, administrators or assigns, with intent to avoid the payment of his debts, is void as to creditors.—Ionia County Savings Bank v. McLean, 84 Mich. 625.

§ 15. Transfer of exempt or nonleviable property.

Conversion of property into exemptions, see post § 17.

Transfer of exempt or nonleviable property for inadequate consideration, see post § 40.

Right of parties to relief on transfer of exempt property, see post § 106.

¶ 47. A debtor may put his exempt property, real or personal, to such use as he pleases, and creditors cannot complain of his dealings with it or attack as fraudulent his conveyances or incumbrances of it.—Smith v. Rumsey, 33 Mich. 183; Dart v. Woodhouse, 40 Mich. 399; Rosenthal v. Scott, 41 Mich. 632; Rhead v. Hounson, 46 Mich. 243; Anderson v. Odell, 51 Mich. 492; Buckley v. Wheeler, 52 Mich. 1; Emerson v. Bacon, 58 Mich. 526; Riggs v. Sterling, 60 Mich. 643; Freehling v. Bresnahan, 61 Mich. 540; Fischer v. McIntyre, 66 Mich. 681; Farrand v. Caton, 69 Mich. 235; Dull v. Merrill, 69 Mich. 49.

¶ 48. Where a debtor not complying with the Bulk Sales Law sells his stock which in value is exempt to plaintiff, a creditor, the bill of sale being recorded and afterward defendant, a constable, levies on the property in the possession of the debtor to enforce a judgment in favor of another creditor, plaintiff is entitled to the property since the Bulk Sales Law does not invalidate the sale of exempt property.—McCormick v. Kistler, 175 Mich. 422.

¶ 49. Whether a conveyance of the equity of redemption could be fraudulent as against the mortgage creditor in view of the statute forbidding levy on it for the mortgage debt, query.—Preston v. Ryan, 45 Mich. 174.

¶ 50. There is no fraud in preventing creditors from seizing property not belonging to the debtor and in which they have no right to seize.—Bloomingdale v. Chittenden, 74 Mich. 698.

§ 16. Transfer of homestead.

Conversion of property into homestead, see post § 17.

Right of parties to relief on transfer of homesteads, see post § 106.

Transfer of homestead for inadequate consideration, see post § 40.

Transfer of all property except homestead, see post ¶ 79.

Transfer of homestead as evidence of fraudulent intent, see post ¶ 325.

¶ 51. The conveyance by a debtor of land that is exempt as a homestead from creditors' demands cannot be considered as fraudulent against them.—Smith v. Rumsey, 33 Mich. 183; correcting on this point Herschfeldt v. George, 6 Mich. 456.

¶ 52. Conveyance of a homestead cannot be attacked by creditors.—Michigan Trust Co. v. Comstock, 130 Mich. 572.

¶ 53. The homestead being not only a privilege but a right under Article 16, Section 2 of the Constitution, and 3 Comp. L. 1897, § 10362, a voluntary conveyance of a homestead to adopted children during a last illness is valid as against creditors, though there be neither wife nor children surviving.—Eagle v. Smylie, 126 Mich. 612.

¶ 54. Where a homestead is conveyed in good faith, and in consideration of the agreement of the grantee, the performance of which is secured by a mortgage on the land, to furnish the grantor with a life support, the land is not subject to levy and sale under an execution issued upon a judgment against the grantor, and the execution creditor has no interest in proceedings to foreclose the mortgage.—Chandler v. Parsons, 100 Mich. 313.

¶ 55. In determining the solvency or insolvency of the debtor as an element of fraud in a transfer, a debtor is solvent where evidence shows that he has sufficient unincumbered property apart from the property alleged to have been fraudulent conveyed to another creditor to fully pay his indebtedness to a particular creditor.—Downing v. Brooks, 194 Mich. 490.

§ 17. Conversion of property into homestead or exemption.

See also post ¶ 71.

Conversion of property into homestead as evidence of fraudulent intent, see post ¶ 71.

¶ 56. One whose indebtedness equals or exceeds his resources may take part of his property to purchase a homestead; this is not a fraud upon creditors nor a concealment of his property.—Meigs v. Dibble, 73 Mich. 101.

¶ 57. A debtor's assignment of mortgages held by him to one who has bought him a homestead, if such an assignment is in good faith and by way of security for repayment, is not open to attack of creditors. Nor are his creditors concerned with his leaving the title to the homestead in the purchaser to keep it safe.—Bostwick v. Benjamin, 63 Mich. 289.

§ 18. Burden of proof, presumptions and inferences.

Implied or constructive fraud, see ante § 3.

Burden of proof, see also post ¶ 73.

Burden of proof as to intention to defraud, see also post ¶ 112.

Burden of proof and presumptions as to matters not related to specific elements and indicia of fraud, see post § 132.

¶ 58. Burden of proving fraud is upon him who alleges the conveyance to be fraudulent.—Peasle v. Collier, 83 Mich. 549.

¶ 59. Fraud against creditors in a transfer of securities is not inferable from suspicious circumstances, with uncontradicted testimony to the contrary.—Miller v. Beadle, 65 Mich. 643.

¶ 60. A party is presumed to intend the natural and necessary consequences of his own acts, and when prejudice to the rights of creditors results from an act of the debtor such act will be held constructively fraudulent notwithstanding good motives and intentions.—Wood v. Eldredge, 147 Mich. 554.

¶ 61. Where a bill is filed in aid of execution, and the question at issue is the good faith of a transfer of the land, and the purchaser is made a party defendant, and evidence is given tending to show that the sale was made with an evident intent to defraud creditors, his neglect to make an affirmative showing to support the sale will warrant a court in giving their full force to any legitimate inferences drawn from the evidence given against it.—Whitney v. Rose, 43 Mich. 27.

¶ 62. The fact that an agreement of defeasance in a trust accompanied a warranty deed absolute in form given as security, and that the deed alone was recorded, raises no inference of fraud.—McDonald v. Preston Nat. Bank, 111 Mich. 649.

¶ 63. The courts will not infer a dishonest intent to defraud creditors from a chattel mortgage where it is possible to place an honest construction on it which is consistent with the whole tenor of the instrument.—Gay v. Bidwell, 7 Mich. 519.

§ 19. Admissibility and sufficiency of evidence.

Evidence as to insolvency and irresponsibility, see post § 20.

Admissibility of evidence relative to matters other than specific elements and indicia of fraud, see post § 133.

Weight and sufficiency of evidence as to matters not related to specific elements and indicia of fraud, see post § 134.

Admissibility of evidence of motives of debtor, see also post ¶ 394.

Admissions by letter to prove good faith in execution of chattel mortgage, see Chattel Mortgages ¶ 246.

Admissibility of other fraudulent mortgages as showing plan or intent, see also Chattel Mortgages § 59.

Admissibility of declarations as showing fraudulent intent or good faith or knowledge, see Evidence § 333.

¶ 64. Anything said or done by a vendor, before or at the time of an alleged fraudulent sale, showing his intent thereby to defraud his creditors, is admissible as evidence of such intent; and it is not necessary to its admission for that purpose that it should have been said or done in the presence of the vendee.—Buckingham v. Tyler, 74 Mich. 101.

¶ 65. Subsequent acts and representations, the immediate tendency of which would be to prevent action by the vendor to protect himself, is relevant and competent on the question of fraud at the time of the purchase of goods when tending to show a dishonest scheme.—Ross v. Miner, 64 Mich. 204.

¶ 66. Declarations of a vendor to a vendee, made after the transfer of the goods, are inadmissible to show the good faith of the sale when it is attacked as fraudulent.—Buckingham v. Tyler, 74 Mich. 101.

¶ 67. Where the good faith of one who buys a stock of goods is in question in a contest between himself and an officer who has taken them under an attachment, the purchaser may properly testify that he bought them in good faith for what he considered a full consideration and with no other purpose than to get the stock at a fair price.—Bedford v. Penny, 58 Mich. 424.

¶ 68. Where the seller of cordwood had agreed that the price therefor should be paid to certain creditors by the purchaser, evidence that after another creditor not included had attached the wood, the seller had told the purchaser not to pay his indebtedness but to apply the money on his own indebtedness has no tendency to prove that the original sale was fraudulent.—Thompson v. Newland, 144 Mich. 595.

¶ 69. Fraud, as in mortgaging property liable to execution after judgment, must be clearly made out; it is not enough to merely raise suspicion of good faith.—Pogodzinski v. Kruger, 44 Mich. 79.

¶ 70. A debtor mortgaged his lands in consideration of the negotiable notes of the mortgagee of equal amount, payable on time. Actual fraudulent intention was denied, and it did not appear whether the notes had been negotiated. It was held that fraud was not sufficiently established by the facts to authorize the court to decree a release of the mortgage.—Buck v. Sherman, 2 D. 176.

¶ 71. Where a merchant obtains goods on credit with the intention of at once placing them beyond the reach of his creditors by exchanging his whole stock for a homestead, the proceeding is evidence of a fraudulent intent in the purchase of the goods at the outset.—Meigs v. Dibble, 73 Mich. 101.

¶ 72. A bill in aid of execution will lie where the evidence clearly shows a conveyance of the land which it is sought to reach, from the debtor to a third person, with fraudulent intent on the part of both grantor and grantee.—Coon v. Henry, 49 Mich. 208.

¶ 73. In trover by a firm for goods sold under execution by defendants against a person claiming to be the firm's agent, defendants claimed that the so-called firm was only a name used by such person as a device to shield such person from creditors' claims, and that in fact he owned all the property vested in the business. Held, that the burden of establishing such fraudulent conduct was upon defendants, and that positive proof was not required, but that proof by facts and circumstances from which the inference of fraud could be drawn was sufficient.—Freedman v. Campfield, 92 Mich. 118.

¶ 74. Intent to defraud subsequent creditors is not shown by the making of a deed of all his real estate by the debtor, where at the time he owned a note for $4,000 and realty worth $17,000 and the total of claims against him was little more than $8,600 of which $7,880.35 was disputed and was afterwards settled for $200 besides a judgment for $80.35, and where after the conveyance was made plaintiff firm, one of the former creditors whose claim was not disputed and was paid, extended further credit on the belief that he still owned the real estate, the deed not having been yet recorded because the taxes on the land were not paid.—Barkworth v. Palmer, 118 Mich. 50.

§ 20. ——Insolvency and irresponsibility.

Insolvency or solvency and possession of resources as evidence on issues of fraud between the parties, see Fraud § 17.

¶ 75. Evidence of a seller's insolvency at time of sale is admissible in an action by the buyer against an officer who attached the property as the seller's claiming it was sold in fraud of creditors.—Whittle v. Bailes, 65 Mich. 640.

¶ 76. An assignee of goods, bringing replevin against a constable who had levied on them under an execution against the assignor, may be cross-examined as to whether he was not wholly irresponsible at the time of the assignment, if the purpose is to show that it was a fraud on creditors.—Jennings v. Prentice, 39 Mich. 421.

¶ 77. Where a sheriff, sued in trover for the value of goods attached, claims that the title of the trover plaintiff is fraudulent as to the creditors of the attachment defendant, the embarrassed condition of the attachment defendant is material, and may be shown on cross-examination of plaintiff's witnesses.—Adams v. Kellogg, 63 Mich. 105.

¶ 78. In trover by a person claiming under a chattel mortgage attacked as fraudulent, the records in several attachment suits against the mortgagor are admissible as evidence tending to show the debtor's insolvency at the time he executed the mortgage, although the sale of the goods in question had only taken place in one of such suits.—Eureka Iron & Steel Works v. Bresnahan, 66 Mich. 489.

¶ 79. A transfer by a debtor of all his property but the homestead, of whose value there is no evidence, cannot be said to have been fraudulent as to creditors; since the homestead may have been of such value as to enable payment of the creditors and make it unnecessary for them to attack the transfer for fraud.—Hill v. Mallory, 112 Mich. 387,

§ 21. Questions for jury and instructions.

Questions of law and fact as to matters not related to specific elements and indicia of fraud, see post § 135.

Instructions not involving specific elements and indicia of fraud, see post § 136.

Fraudulent intent on transfer from one spouse to other as jury question, see also post ¶ 336.

Fraudulent intent as question of fact, see Comp. L. 1915, § 12001.

¶ 80. Where a chattel mortgage is valid on its face the question of fraudulent intent is for the jury.—Oliver v. Eaton, 7 Mich. 108; Bagg v. Jerome, 7 Mich. 145; Haynes v. Ledyard, 33 Mich. 319; Fearey v. Cummings, 41 Mich. 376; Root v. Potter, 59 Mich. 498; Eureka Iron & Steel Works v. Bresnahan, 60 Mich. 332.

¶ 81. The question of fraudulent intent in a conveyance to hinder, delay and defraud creditors is one of fact under Comp. Laws 1897, § 9536, How. St., 2nd Ed., § 11420.—McRae v. Sleeper, 188 Mich. 168.

¶ 82. The good faith of a chattel mortgage on a stock of goods, where the mortgagor remains in possession and prosecutes his business in the ordinary mode, is a question of fact for the jury.—People's Sav. Bank v. Bates, 120 U. S. 556, 30 L. ed. 754, 7 Sup. Ct. Rep. 679.

¶ 83. The question of bona fides of a debt from the defendant to the garnishee is a question for the jury, where there is evidence indicative of a simulated sale of an unprosperous business to a relative and that the debt was designed to absorb assets of it.—Banner Cigar Mfg. Co. v. Treusch, 125 Mich. 265; Gumberg v. Treusch, 103 Mich. 543.

¶ 84. Where an officer who has attached goods as mortgaged in fraud of creditors is sued for conversion, the questions whether the indebtedness named in the mortgage existed in good faith, and whether the instrument was executed to hinder, delay or defraud creditors, should be submitted to the jury.—Warner v. Littlefield, 89 Mich. 329.

¶ 85. Under Comp. L. 1871, § 4716, whether a conveyance is made with intent to defraud creditors is, in the first instance, a question of fact; and, if a prima facie case, or one which raises a presumption of fraud, is made out, the question whether it is rebutted is also a question of fact.—Howe Machine Co. v. Claybourn, 6 Fed. 438.

¶ 86. The question of fraudulent intent is a question of law and not one of fact, where on its face the legal effect of the instrument is to hinder and delay creditors, though Comp. L. 1897, § 9536, declares it shall be a question of fact and not of law.—Wood v. Eldredge, 147 Mich. 554. [In the foregoing paragraph although the language of the court is followed, it is suggested that the rule might be expressed and was intended to mean that the "fraudulency" of a conveyance which upon its face hinders or delays creditors is for the court, though the question of fraudulent intent is by the statute made one for the jury. Editor.]

¶ 87. A conveyance is fraudulent if the grantor meant to hinder or defraud any of his creditors, and a charge conveying the idea that he must have meant to defraud all his creditors is misleading.—Allen v. Kinyon, 41 Mich. 281.

¶ 88. Where the debt of plaintiff was contracted after defendant conveyed her property to the garnishee defendant, the court erred in refusing an instruction that actual intent to defraud plaintiff must be shown to entitle plaintiff to compel the garnishee defendant to pay the debt, and in instructing the jury that if the credit was extended on defendant's apparent ownership of the land, and there was sufficient estate remaining from the debts that had been paid to satisfy plaintiff's claim, a verdict should be entered against the garnishee defendant.—Lovell v. Denison, 171 Mich. 599.

B. NOTICE OR PARTICIPATION OF TRANSFEREE IN FRAUD.

§ 22. In general.

See also post ¶¶ 122, 525.
Sufficiency of knowledge or notice of transferee, see post §§ 23-25.
Involuntary transfers to persons with notice, see post § 26.
Fraud of one of several transferees or mortgagees, see post § 27.
Presumption, evidence, instructions and jury questions, see post §§ 28-30.
Transfers to family, relatives or business associates, see post, I, D.
Good faith required of transferee receiving security for debt, see also post ¶ 352.
Pleading notice and participation of transferee or mortgagee, see post ¶ 581.
Persons against whom fraudulent transfers invalid, see post, II.
Effect between parties and as to third parties not creditors, see post, III.
Rights and liabilities of grantee towards defrauded creditors, see post, IV.
General matters as to doctrine of bona fide purchaser, see Notice and Record of Title, I.
Title of purchaser without notice, see Comp. L. 1915, § 12002.

¶ 89. To render a conveyance void for fraud against creditors the grantee must have a knowledge of, and in some way participate in, the fraud.—Fraser v. Passage, 63 Mich. 551.

§ 23. Sufficiency of knowledge or notice of transferee.

See also post ¶¶ 377, 415.
Transfers in payment of debts, see post § 24.
Mortgages received for bona fide debts, see post § 25.
Rights of grantees and purchasers without notice, see also post § 115.
Evidence of notice or knowledge of transferee, see post ¶¶ 114-117.
Transferee's knowledge of fraudulent intent as jury question, see post ¶ 119.
Knowledge of wife as transferee as to husband's representations to creditors as to his assets, see also post ¶¶ 282, 283, 285.

¶ 90. Actual participation by the transferee in the fraudulent intent of the insolvent transferor of goods is not necessary to defeat the transfer as fraudulent. If the purchaser is not a creditor it is enough that he knows what would put a prudent man upon inquiry as to the motive of the sale.—Hough v. Dickinson, 58 Mich. 89; Bedford v. Penny, 58 Mich. 424.

¶ 91. The fact of the fraudulent intent of a vendor in making a sale cannot affect the vendee, if ignorant of such intent; but such fact, if established, may be weighed with the

other circumstances in the case, to determine whether or not the vendee was a party to such fraudulent intent, or had such knowledge that he was put upon inquiry as to the good faith of the vendor in making the transfer.—Buckingham v. Tyler, 74 Mich. 101.

¶ 92. Credit was given a firm in reliance on representations as to the wealth of one of the partners, part of whose property had, however, been transferred to his wife by a deed that was placed on record before the credit was given. Held, that a bill in aid of execution to set aside the deed as a fraudulent transfer would not lie, at least as against the wife, who neither made nor was privy to the representations, and was not alleged to have done or omitted any act so as to mislead complainants.—Hedstrom v. Kingsbury, 40 Mich. 636.

¶ 93. Knowledge of facts sufficient to put an ordinary prudent man on inquiry will affect the good faith of one who takes a transfer of property from an embarrassed owner, actual participation in the fraudulent intent of the latter not being necessary to defeat the conveyance.—L. Starks Co. v. Eppink, 185 Mich. 233.

¶ 94. A grantee who makes final payment for land after notice of facts sufficient to put him on inquiry as to the grantor's intent to defraud his creditors, cannot, under § 9224, Comp. Laws 1897, § 11386, How. St., 2nd Ed., be regarded as a bona fide purchaser.—L. Starks Co. v. Eppink, 185 Mich. 233.

¶ 95. One who buys land after having been notified by an administrator that he claims the right to recover the property on the ground that it was conveyed by his decedent in fraud of creditors is not a bona fide purchaser.—Walker v. Cady, 106 Mich. 21.

¶ 96. An agreement by a debtor to sell and deliver certain property to his creditor for a price exceeding $50, to be credited therefor on the latter's books, which credit was immediately given, but without the vendor's knowledge, there being no delivery or payment of earnest money, nor any memorandum of sale signed by the vendor remained executory; and hence was fraudulent where the purchaser knew of an outstanding execution.—Webster v. Bailey, 40 Mich. 641.

¶ 97. The assignment to a bank of a mortgage on property, although made by the debtor with the intent to avoid the payment of a claim to a particular creditor, is not fraudulent as to such creditor where the bank acts in the customary way and in line with its business, and does not knowingly participate in any fraudulent attempt to defeat the creditor in his efforts to collect indebtedness from the debtor.—Downing v. Brooks, 194 Mich. 490.

§ 24. ——Transfers in payment of debts.

See also ante ¶ 96.
Right of debtor to prefer creditors, see post §§ 68-71.

¶ 98. Knowledge, either actual or constructive, by a creditor, of an intention on the part of his debtor to defeat other creditors by a transfer to him, is sufficient to avoid the transaction, where part of the consideration is cash paid to the debtor, although the other part is the discharge of the transferee's claim. Such is not a mere preference.—Gumberg v. Treusch, 110 Mich. 451.

¶ 99. A transfer by an insolvent debtor is void as against a creditor, although it was made in payment of an honest debt of an amount equal to the fair value of the property, where the transferees knew that the debtor had made false statements in regard to, or had purposely concealed, his financial condition in order to obtain credit on purchase of the goods so transferred from such creditor, or knew that the purchases were made from the latter for the purpose of obtaining goods to secure their claims.—Hill v. Mallory, 112 Mich. 387.

¶ 100. One who, holding a third mortgage and being thereby fully secured for his debt, accepts a deed of the mortgaged premises, obligating himself to pay no more as a consideration than he would have been compelled to pay in order to protect his rights as third mortgagee and the consideration named in the deed being at least $2,000 less than what the property is fairly worth, is not a purchaser in good faith, his knowledge of facts being sufficient to put him on inquiry.—Allen v. Stingel, 95 Mich. 195.

§ 25. ——Mortgages received for bona fide debts.

See also post ¶ 349.
Right to prefer creditors by mortgage or security, see post §§ 69, 70.
Presumption of fraudulent purpose from acceptance of security for debt, see also post ¶ 108.
Purchasers at execution sale as subsequent creditors, see also post ¶ 452.

¶ 101. A chattel mortgage is not invalidated by the mere fact that the creditor knows the debtor is in failing circumstances and that the intended effect of giving the security will be to delay or defeat other creditors in the collection of their dues.—Olmstead v. Mattison, 45 Mich. 617; Sweetzer v. Higby, 63 Mich. 13.

¶ 102. A chattel mortgage given for a bona fide debt is not invalidated by the fact that it was given by the debtor with intent to defraud his other creditors, even though the mortgagee knew of such intent, unless the latter participated in it.—Eureka Iron & Steel Works v. Bresnahan, 66 Mich. 489.

¶ 103. A chattel mortgage taken as security for a debt is not rendered fraudulent as to other creditors by the mortgagee's knowledge that the mortgagor intends to make an assignment for the benefit of creditors, and that his mortgage will postpone or cut off the claims of such other creditors, or even by his further knowledge—provided he renders no collusive assistance—that the debtor consents to give the mortgage expecting that it will be a shield to him.—Oshkosh Nat. Bank v. First Nat. Bank, 100 Mich. 485.

§ 26. Involuntary transfers to persons with notice.

¶ 104. An execution sale when tainted with fraud to which the purchaser is a party is subject to the same infirmity that attaches to other fraudulent transfers of the debtor's property.—Aldrich v. Maitland, 4 Mich. 205.

¶ 105. Where a purchaser at a sheriff's sale, by a fraudulent combination with the sheriff and judgment debtor to prevent competition at the sale, is enabled to purchase property at much less than its value, the sale is void as to creditors.—Aldrich v. Maitland, 4 Mich. 205.

§ 27. Fraud of one of several transferees or mortgagees.

¶ 106. The honesty of one of two mortgagees will not save the mortgage, if there was any fraud or wrong in the other.—Showman v. Lee, 86 Mich. 556.

¶ 107. A partially wrongful purpose may invalidate a mortgage; and when taken by two mortgagees, the honesty of one will not help it if the other commits any fraud or wrong in taking it.—Adams v. Niemann, 46 Mich. 135.

§ 28. Presumptions and burden of proof.

Burden of proof and presumptions as to matters not related to specific elements and indicia of fraud, see post § 132.

¶ 108. A creditor's participation in the purpose of his debtor to defraud other creditors cannot be inferred from his acceptance as security for his debt of a mortgage covering all of the debtor's property.—Beckman v. Noble, 115 Mich. 523.

¶ 109. Good faith in the purchase of partnership assets is not presumable from the payment of a valuable consideration if it appears that the purchaser knows that creditors are urgent, and that there is no change in possession or in the control of the business.—Parshall v. Fisher, 43 Mich. 529.

¶ 110. A letter written in plaintiff's office after a conference upon a mortgage claimed to be fraudulent, containing direct reference to the transaction, by the man who had acted for all parties, stating what both had adopted as their scheme to influence creditors, and conveying suggestions and proposed explanations to make it appear valid which infer a common purpose, is open to inference that plaintiff was implicated in it in spite of assurances to the contrary.—Krolik v. Graham, 64 Mich. 226.

¶ 111. In an action involving the good faith of a transfer of goods the transferee may properly show what he had been told as to the financial standing of the other party to the transaction, by way of rebutting any presumption that he knew it was bad.—Hough v. Dickinson, 58 Mich. 89.

¶ 112. The burden of proving good faith and an absence of intention to defraud was held, under R. S. 1838, to be on the party claiming under an assignment made by way of security.—Jackson v. Dean, 1 D. 519.

¶ 113. Where a person, against whom an action is pending, transfers his real estate, the plaintiff, on recovering judgment, cannot maintain ejectment against the purchaser of the real estate on the ground that it was fraudulently transferred unless he shows that the transferee participated in the fraudulent purpose or had notice thereof.—Brown v. Dean, 52 Mich. 267.

§ 29. Evidence.

See also ante ¶ 91.

Admissibility of evidence of intent of transferee, see also post ¶ 597.

Admissibility of evidence relative to matters other than specific elements and indicia of fraud, see post § 133.

Weight and sufficiency of evidence as to matters not related to specific elements and indicia of fraud, see post § 134.

Cross-examination as to fraud or good faith and notice, see Examination of Witnesses § 58.

¶ 114. In trover against a sheriff for goods attached by him for the vendor's creditors after they had been sold and delivered to plaintiff, testimony for defendant that the vendor was intoxicated when the sale to plaintiff was made was admissible as bearing upon the question of notice to the vendee of an intended fraud against creditors.—Bendetson v. Moody, 100 Mich. 553.

¶ 115. Where, in replevin by a mortgagee of chattels, the mortgage is attacked as fraudulent as against creditors, the mortgagee may be asked on cross-examination whether he did not know when he took the mortgage that the mortgagor was indebted to one from whom defendant purchased the property at execution sale.—Watson v. Mead, 98 Mich. 330.

¶ 116. Where a stock of goods worth from $2,000 to $2,500 was hastily appraised in the nighttime and purchased for $850 by one who knew of the vendor's indebtedness to third persons and of said vendor's anxiety to dispose of such stock, it cannot be said as

matter of law that there is no evidence that the sale was made with intent to defraud creditors, or that the circumstances attending it were not sufficient to put the vendee upon inquiry.—Bendetson v. Moody, 100 Mich. 553.

¶ 117. In a suit by a trustee in bankruptcy to set aside certain conveyances of land as fraudulent to creditors, evidence examined, and held not to prove that the holder of the present title was a party to the fraudulent purpose of his grantor and the bankrupt, but that he was without notice of any defect in the title he received.—Weatherwax v. Gorman, 150 Mich. 316.

§ 30. Instructions and questions for jury.

Questions of law and fact as to matters not related to specific elements and indicia of fraud, see post § 135.

Instructions not involving specific element and indicia of fraud, see post § 136.

¶ 118. A charge that a transfer to a creditor in payment of an honest debt at a fair valuation is valid, though it defeats other creditors and is intended to do so, is inapplicable and erroneous; where it is in issue that the transferees had notice of a purpose to buy goods on credit and then transfer them to defeat the seller, or had notice that the transferor's financial condition had been falsified to gain the credit on which they were purchased.—Hill v. Mallory, 112 Mich. 387.

¶ 119. In replevin by a vendee to recover a stock of goods seized at the suit of the vendor's creditors, plaintiff relied upon his bill of sale as evidence of his title, the consideration for which he claimed was two chattel mortgages held by him on the property. The creditors claimed that one of the mortgages was given without any valuable consideration, and that the other was increased in amount, all with intent to defraud them, and with the knowledge of the vendee; held a question for the jury, and if found in favor of the creditors, the fraud tainted the whole transaction, and prevented a recovery by plaintiff.—Clark v. Lee, 78 Mich. 221.

C. VOLUNTARINESS AND INADEQUATE CONSIDERATION AS BADGE.

§ 31. In general; voluntary transfers.

See also post ¶ 524.

Voluntary mortgages, see post §§ 32, 33.

Inadequacy of consideration, see post §§ 34, 35.

Excessive mortgages and liens, see post § 36.

Future consideration or security, see post §§ 37, 38.

Past consideration and corrective transfers, see post § 39.

Transfers of homestead or exemption, see post § 40.

Consideration furnished by debtor, see post § 41.

Burden of proof, presumptions and evidence, see post §§ 42-44.

Voluntary conveyances, gifts and settlements from one spouse to other, see also post § 49.

Notice and participation of transferee in fraud, see ante, I, B.

Reality and sufficiency of consideration on transfers to family, relatives and business associates, see post § 50.

Transfers to creditors or claimants, see post, I, E.

Family settlements, see post ¶¶ 222-225.

Voluntary transfers from parent to child, see also post ¶¶ 206, 207, 209.

Sufficiency of evidence to establish voluntary transfer fraudulent, see post ¶¶ 189, 190.

Persons against whom fraudulent transfers invalid, see post, II.

Effect of voluntary transfers between parties and as to third parties not creditors, see post, III.

Rights and liabilities of grantee towards defrauded creditors, see post, IV.

Transfer without consideration for purpose of making transferee eligible as surety for bond, see also post ¶ 526.

Validity of voluntary transfer as to subsequent creditor, see also post ¶ 451.

Necessity of fraudulent intent to set aside voluntary transfer as to subsequent creditor, see also post ¶¶ 453, 454.

Issuance of corporate stock for property or services at excessive valuation, see Corporations §§ 266-268, 322.

Disability of equity to relieve from voluntary conveyance, see also Equity § 13.

Invalidity of accord to be satisfied in future where consideration is lacking, see Accord and Satisfaction ¶ 28.

Voluntary character of payments within Bankruptcy Act, see Bankruptcy § 8.

¶ 120. Voluntary conveyances are not necessarily fraudulent, even when made by a person indebted at the time.—Herschfeldt v. George, 6 Mich. 456.

¶ 121. A voluntary conveyance is not void as to creditors, even though the grantor is indebted at the time, if he retains ample means to pay his debts.—Wooden v. Wooden, 72 Mich. 347.

¶ 122. Where a voluntary conveyance operates to the injury of creditors, it is immaterial whether or not the grantee participated in the fraudulent design.—Schaible v. Ardner, 98 Mich. 70.

¶ 123. An actually fraudulent design is not necessary to defeat a voluntary conveyance as against existing creditors.—Fellows v. Smith, 40 Mich. 689.

¶ 124. A voluntary conveyance from husband to wife without valuable consideration is void in law as against creditors.—Fellows v. Smith, 40 Mich. 689.

¶ 125. A voluntary conveyance is good when made without any fraudulent intent

and by a person not indebted at the time, or, if indebted, whose debts are so small in amount, when compared with the means retained to pay them, as to repel all presumption of fraud on their account.—Herschfeldt v. George, 6 Mich. 456.

¶ 126. A son bought a farm from his mother and gave her a mortgage on it to secure part of the purchase price. They afterwards agreed that she should take back the farm, and, in consideration of the wheat growing on it, should indorse its value on the mortgage. Held, that, as the reconveyance of the farm canceled the mortgage, the transfer of the wheat was without consideration and void as to creditors.—Jackson v. Evans, 44 Mich. 510.

¶ 127. Even if decedent's widow is the only creditor of his estate it cannot be urged that a voluntary deed by him to take effect on his death conveying his realty to such widow and to his daughters cannot be set aside and a sale thereof had to pay the debt on the ground that the deed which was greater in value than the amount of the debt operated as a payment where it was a voluntary conveyance without consideration.—Barris v. Emmons, 173 Mich. 590.

¶ 128. A contract for the sale of definitely described, identified and located personalty and referring to an invoice taken in that connection and clearly setting forth the terms of payment, is not void as against creditors as transferring an uncertain amount of property for an uncertain consideration.—Angell v. Pickard, 61 Mich. 561.

§ 32. Voluntary mortgages.

Mortgages for benefit of third persons, see post § 33.
Right to prefer creditors by mortgage or security, see post §§ 69, 70.
Making discharged mortgages appear as lien, see ante § 5.
Against whom invalid, see post § 89, ¶ 435.
Validity of voluntary mortgage between parties, see post ¶ 491.
Validity of voluntary mortgage as to subsequent mortgagee with notice, see also post ¶ 457.

¶ 129. A chattel mortgage is invalid if instead of being taken as security it was taken to prevent the vendor of the mortgaged goods from recovering them or their value.—Robinson v. Walsh, 54 Mich. 506.

¶ 130. A mortgage intended for a fraudulent purpose, voluntarily given, and not asked for, to secure a debt which had never been regarded as a debt, and was allowed to be fixed at an unreasonable rate by the debtor himself, cannot be sustained against the party intended to be defrauded.—Hunt v. Shier, 59 Mich. 286.

¶ 131. A chattel mortgage given without consideration to secure the antecedent individual debt of one of the partners is fraudulent as against creditors of the firm if at the time it was given the firm was insolvent or would become so by such a shrinkage in outstanding accounts as might reasonably be expected.—Heineman v. Hart, 55 Mich. 64.

¶ 132. The voluntary assignment of a mortgage to the mortgagee's wife, by substituting her name as mortgagee after the instrument has become operative by delivery, and without consideration, will not prevent the subjection of the mortgage to the equitable remedies of a judgment creditor of the husband, in order to apply it in satisfaction of the judgment.—Keam v. Conkwright, 78 Mich. 58.

§ 33. Mortgages for benefit of third persons.

Excessive mortgages and liens, see post § 36.

¶ 133. A mortgage representing an indebtedness to the mortgagor's sister, providing that the principal should be paid to the mortgagor's children and the interest to the sister for life, was not subject to attack by creditors of the mortgagor to the extent of the children's part, on the ground that it was void because there was no privity between the children and the mortgagor; since it was a promise direct to the children for whose benefit the promise was made, and even if not so they might enforce it in equity in their own names.—Palmer v. Bray, 136 Mich. 85.

§ 34. Inadequacy of consideration.

On foreclosure or judicial sale, see post § 35.
Reality and sufficiency of consideration on transfers to family, relatives or business associates, see post § 50.
Sufficiency of evidence to show inadequate consideration, see also post ¶ 327.
Sufficiency of evidence of inadequacy of consideration, see post ¶¶ 186-188.
Effect of consideration where transfer fraudulent, see also post ¶ 437.
Adequacy of consideration as between parties, see post ¶ 492.

¶ 134. Inadequacy of price in a debtor's sale to another is not, unless gross, a circumstance of fraud.—Shay v. Wheeler, 69 Mich. 254.

¶ 135. A transfer of property in payment of a debt is fraudulent and void if the property was transferred at a price greatly below its real value, with intent to defraud other creditors.—Dyer v. Rosenthal, 45 Mich. 588.

¶ 136. Fraud in making a conveyance must be found as a fact before the conveyance can be avoided as fraudulent; and mere disparity of consideration and value without actual fraud is not enough.—Spear v. Rood, 51 Mich. 140.

¶ 137. A sale for the nominal purpose of raising money, but for a grossly inadequate

sum, and to a person who has no means, is apparently fraudulent.—Morford v. Dieffenbacker, 54 Mich. 593.

¶ 138. Where a valuable consideration is paid for goods the fact that it is much below their value is not conclusive against the purchaser's good faith.—Boydson v. Goodrich, 49 Mich. 65.

¶ 139. That a part of the price paid for land conveyed by a decedent was an outlawed obligation of his does not affect the consideration for a deed from him on the question whether the transfer is or is not in fraud of creditor.—Fraser v. Passage, 63 Mich. 551.

¶ 140. The fact that the value of a stock of goods was greater than the price for which it was sold by an insolvent debtor does not conclusively establish the fraudulent character of the transaction in favor of the one from whom some of the goods were fraudulently purchased by the debtor.—Schloss v. Estey, 114 Mich. 429.

¶ 141. A sale of the merchandise business of an insolvent cannot be said to be without sufficient consideration where negotiable demand notes were given by the purchaser, and by him turned over to another for payment of a debt of the insolvent and where part of the purchase price reimbursed the purchaser for the amount of a note which he had indorsed for such insolvent.—Gordon v. Alexander, 122 Mich. 107.

§ 35. ——On foreclosure or judicial sale.

¶ 142. A creditor's bill to set aside a conveyance as fraudulent, and to subject the property involved to the payment of amounts due a wife under a decree in a divorce case, cannot be maintained although the property involved was bought by a mortgagee on foreclosure at less than its value, and was sold cheaply to another person who purchased it at the suggestion of the husband, it appearing that the husband had no interest in the property, although the purchaser advanced money to him with a chattel mortgage as security.—Reeves v. Miller, 121 Mich. 311.

§ 36. Excessive mortgages and liens.

Foreclosing for small amount mortgage almost wholly paid, see post ¶ 363.

Evidence of excessive mortgage, see also post ¶ 182.

Judgment for excessive amount including immature debt as fraud on other creditors, see also Attachment ¶ 241.

¶ 143. Taking a mortgage for an amount in excess of the debt or of the assumed liability is a badge of fraud.—Showman v. Lee, 86 Mich. 556.

¶ 144. The fact that the value of the property greatly exceeds the debt secured bears upon the validity of a mortgage, as having been given to defeat, delay and defraud creditors.—Warner v. Littlefield, 89 Mich. 329.

¶ 145. That a chattel mortgage taken from a merchant in failing circumstances to secure an existing debt is given for more than the amount of the actual indebtedness is a badge of fraud, and avoids the mortgage unless the amount so inserted in excess was by mistake, and with no intent to defraud or hinder creditors.—Ferris v. McQueen, 94 Mich. 367.

¶ 146. On the question of fraud on creditors in a chattel mortgage the disproportionate value of the goods to the debt may be considered as bearing on the good faith of the transaction.—Ganong v. Green, 71 Mich. 1.

¶ 147. A mortgage given in excess of the amount due or of the liability assumed is fraudulent if the purpose is to protect the mortgagor's interest from other creditors.—Showman v. Lee, 86 Mich. 556.

¶ 148. It is a badge of fraud if a chattel mortgage is given and received for much more than is due the mortgagee; and it is fraud in law if the purpose is to protect the debtor's interest from other creditors.—King v. Hubbell, 42 Mich. 597.

¶ 149. Where a chattel mortgage security largely exceeds the debt the fact may be considered as tending to show that the creditor's intention in taking it is not in good faith to secure himself, but to hinder, delay or defraud other creditors.—Olmstead v. Mattison, 45 Mich. 617.

¶ 150. The taking of a chattel mortgage for an amount in excess of the debt or the assumed liability is a badge of fraud, and is a fraud in law if the purpose is to protect the debtor's interest in the property mortgaged from other creditors.—Patrick v. Riggs, 105 Mich. 616.

¶ 151. A man filed a mortgage on his present and future stock to secure a greater sum than he owed, and kept possession. He had nothing else liable to execution. Held, that these facts, though not conclusive, tended to show that he had disposed of property in fraud of creditors, and should go to the jury with other facts.—Willison v. Desenberg, 41 Mich. 156.

¶ 152. The fact that a small part of a mortgage debt is valid and unquestioned does not necessarily preclude any question as to the good faith of the mortgage for inadequacy of consideration.—King v. Hubbell, 42 Mich. 597.

¶ 153. The amount found due on a chattel mortgage given to secure a debt to the mortgagee, and also to secure her against liability on notes given for the mortgagor's debts, was less than the amount of the mortgage. The mortgagor testified that he supposed, at the

time he made the mortgage, that the indebtedness to the mortgagee amounted to the face of the mortgage, and the mortgagee testified that she had not figured up the amount at the time she accepted the mortgage. Held, that the fact that the mortgage was given for more than the amount due was a badge of fraud, but not conclusive evidence thereof, and that the question of the bona fides of the transaction was properly submitted to the jury.—Louden v. Vinton, 108 Mich. 313.

§ 37. Future consideration or security.

Services to be rendered in future, see post § 38.

¶ 154. A mortgage is not fraudulent for including contemplated advances.—Newkirk v. Newkirk, 56 Mich. 525.

¶ 155. That the whole amount secured by a mortgage was not advanced at the time of its execution does not render it fraudulent as to creditors of the mortgagor, in the absence of an intent to hinder, delay, or defraud creditors, although it does not state on its face that it is given to secure future advances.—Dummer v. Smedley, 110 Mich. 466.

¶ 156. Where, in replevin, by chattel mortgagees against the mortgagor's attacking creditors the testimony shows that the mortgage was given to secure not only an existing debt but also certain future advances, and the court instructs the jury that the mortgagees had no right to place on file an instrument that bears upon its face a false statement as to their claim, it is error to refuse to charge further that if the jury finds the mortgagees agreed, when they took the mortgage, to make such advances, and that the rest of the sum secured was a valid existing indebtedness to the mortgagees, the taking of the mortgage for the amount so to be advanced would not affect its validity.—Brace v. Berdan, 104 Mich. 356.

§ 38. ——Services to be rendered in future.

See also post ¶ 335.

¶ 157. An agreement to pay the assignor's funeral expenses was held insufficient to support a transfer of property to the amount of over $1,000 as against one to whom the assignor owed a debt payable out of such property as he might die the owner of; and as against such creditor the transfer was held voluntary.—Cicotte v. Gagnier, 2 Mich. 381.

¶ 158. An agreement to support one's parents is not, as against creditors, a valid consideration for a deed from the parents if made with the purpose of putting the property beyond the reach of execution; such an agreement is for the direct benefit of the grantors.—Rynearson v. Turner, 52 Mich. 7.

¶ 159. An agreement for future support is not a sufficient consideration for a conveyance as against creditors, it being for the direct benefit of the grantor.—Michigan Trust Co. v. Comstock, 130 Mich. 572.

§ 39. Past consideration and corrective transfers.

See also ante ¶ 139.

Sufficiency of evidence of past consideration, see also post ¶ 326.

Evidence of past consideration, see also post ¶ 185.

¶ 160. A revived claim, to constitute a sufficient consideration to sustain a conveyance by an insolvent debtor, must be founded upon an acknowledged and recognized indebtedness theretofore existing.—Case Mfg. Co. v. Perkins, 106 Mich. 349.

¶ 161. A husband's ancient debt to his wife is a good consideration between them even as against creditors for his conveyance of land to her.—Glaze v. Three Rivers Farmers' Mut. Fire Ins. Co., 87 Mich. 349.

¶ 162. A conveyance of land by a man and wife to the latter's father, held founded on a good consideration consisting of previous advances, and valid as against the grantor's creditors.—Hummell v. Smale, 186 Mich. 199.

¶ 163. Services rendered by an adult daughter to her father while living as a member of his family, without any express contract for hire, do not show a valuable consideration for a transfer to her in prejudice of creditors.—Ionia County Savings Bank v. McLean, 84 Mich. 625.

¶ 164. Dividends upon stock owned by a wife but purchased in part with the husband's money, paid over by the wife to the husband for 12 years without any understanding and during affluent circumstances, will not after the insolvency of the husband support a conveyance of realty by the husband to the wife as against creditors of the husband.—Preston Nat. Bank v. Leonard, 122 Mich. 381.

¶ 165. Where land, paid for by a wife, is by mistake conveyed to the husband, and the wife sells the land as her own and informs the purchaser that she is the owner, and both understand that a purchase-price mortgage shall be drawn in her favor, which, by a mistake of the scrivener, is drawn in favor of the husband, a correction of said mistake, after the delivery of the mortgage, by the consent of the mortgagor, by substituting the name of the wife as mortgagee, cannot be claimed to be in fraud of the husband's creditors, and need not be supported by a new consideration.—Keam v. Conkwright, 78 Mich. 58.

§ 40. Transfer of homestead or exemptions for inadequate consideration.

¶ 166. The question of adequacy of consideration for a transfer of an equitable in-

terest in homestead property on a bill in aid of execution to have the deed set aside as fraudulent to creditors is immaterial where the equity transferred does not exceed the statutory exemption.—Albert v. Patterson, 188 Mich. 378.

¶ 167. A debtor's conveyance of his homestead is not void as against creditors, on the ground of inadequacy of price, where the consideration is ample for the value of the homestead above the $1,500 exemption.—Shay v. Wheeler, 69 Mich. 254.

¶ 168. Where a husband is honestly indebted to his wife, he may satisfy her claim in preference to those of other creditors by transferring the homestead to her, if its value does not exceed the amount exempt from execution and the debt taken together. —Brigham v. Fawcett, 42 Mich. 542.

¶ 169. A conveyance by husband to wife of lots not exceeding in value the statutory homestead sustained against a creditor, though the consideration, but for the homestead right, would have been inadequate.—Pulte v. Geller, 47 Mich. 560.

¶ 170. No fraud can be said to be perpetrated as against existing creditors, by a conveyance of premises in which a homestead interest exists in the grantor and an incumbrance covering that and other property, in which the aggregate of the incumbrance and homestead interest exceeds the total value of the property.—Wolcott v. Tweddle, 133 Mich. 389.

¶ 171. A conveyance of property by a judgment debtor to his wife cannot be objected to by a creditor where a mortgage and homestead right exceeds the value of the property at the time of the conveyance. —Kozminski v. Kuzniak, 118 Mich. 621.

¶ 172. A husband's conveyance of land, including his homestead, to his wife, in payment of a bona fide indebtedness that amounts, with the homestead exemption, to the entire value of the land, is not void as to creditors.—Hicks v. McLachlan, 94 Mich. 278; Dull v. Merrill, 69 Mich. 49; Shay v. Wheeler, 69 Mich. 254.

¶ 173. Creditors had no right to complain of the conveyance by a debtor of his homestead to his son, where the entire property was worth less than $3,500 and it was incumbered by a bona fide mortgage for $2,500. —Palmer v. Bray, 136 Mich. 85.

¶ 174. As a transfer will not be set aside in behalf of creditors unless it is affirmatively shown that they have been substantially injured thereby, a conveyance by a husband to his wife of his home farm of 120 acres, valued at from $3,800 to $4,200, in consideration of her agreement, contained in the deed, to pay a mortgage of $2,550 on the land, and to account for the homestead to minor children when the youngest should come of age, was allowed to stand.—Nash v. Geraghty, 105 Mich. 382.

¶ 175. A conveyance to a mortgage creditor of property shown by undisputed evidence to have been worth no more than the debt over and above the debtor's homestead is not fraudulent towards a subsequent creditor.— Wheeler v. Losch, 143 Mich. 183.

§ 41. Consideration furnished by debtor for grant or transfer to third person.

Sufficiency of averment in bill that consideration was furnished by debtor, see post ¶¶ 578, 582.

Right of creditors to proceeds of mortgage purchased by foreclosing mortgagee with money furnished by debtor, see Foreclosure ¶ 515.

Presumption of fraud where consideration is furnished by debtor for conveyance to third person and trust resulting therefrom, see Comp. L. 1915, § 11572.

¶ 176. The purchase of a mortgage on real estate by the daughter of the mortgagor is fraudulent and for the purpose of defrauding the creditors of such mortgagor, where such mortgagor furnished his daughter the money for such purchase, and was insolvent at the time.—Hatch v. Daugherty, 145 Mich. 569.

¶ 177. How. St. § 5884, authorizing an administrator to recover any lands conveyed in fraud of creditors by decedent in his lifetime, does not, it seems, authorize the subjecting to the payment of decedent's debts land deeded to defendant by a stranger at a time when decedent had no creditors who could complain of such deed, even if the purchase-money was furnished by decedent.— White v. Newhall, 68 Mich. 641.

§ 42. Burden of proof and presumptions.

Burden of proof and presumptions as to matters not related to specific elements and indicia of fraud, see post § 132.

Conclusiveness and impeachment of stated consideration in transfer, see also Contracts § 143.

¶ 178. Where land is conveyed in fraud of creditors, the burden of proof is upon the second grantee to show that he purchased in good faith, and for a valuable consideration. —Schaible v. Ardner, 98 Mich. 70.

¶ 179. Where part of the sum a chattel mortgage is given to secure is in fact, though not so expressed in the mortgage, advances to be made in future, the burden is not cast upon the mortgagees, in replevin by them against the mortgagor's attaching creditors, to negative fraud in the transaction.—Brace v. Berdan, 104 Mich. 356.

¶ 180. A voluntary post-nuptial settlement upon a wife, by a husband who was indebted

at the time, is fraudulent and void as against existing creditors, and is prima facie fraudulent even as against subsequent creditors; but as against them, the presumption of fraud arising from the fact of indebtedness may be repelled by circumstances; as that the debts existing at the time were secured by mortgage or in the settlement. If the husband was not indebted at the time, the settlement will be valid unless actual fraud is shown.—Wood v. Savage, 2 D. 316.

§ 43. Admissibility of evidence.

Admissibility of evidence relative to matters other than specific elements and indicia of fraud, see post § 133.

¶ 181. The fact that a husband, when perfectly solvent, gave expensive presents to his wife does not concern a creditor of his claiming property adversely to her under a chattel mortgage in which her husband had included it without her knowledge or consent.—Davis v. Zimmerman, 40 Mich. 24.

¶ 182. A mere variance between the amount of a mortgage and the actual debt is not conclusive evidence of fraud, but is admissible in connection with other facts as bearing on the question whether there was any.—Willison v. Desenberg, 41 Mich. 156.

¶ 183. The extravagance of a daughter of the buyer of goods in a stock of merchandise, the seller being engaged to marry such daughter, is too remote to show whether or not the sale was fair and on a sufficient consideration as against attaching creditors of the seller.—Lewis v. Rice, 61 Mich. 97.

¶ 184. In trover against a sheriff by one claiming, as purchaser, goods seized on attachment, the sale being attacked as fraudulent, evidence is admissible to show that land given as part payment is worth no more than an incumbrance against it, since such evidence would tend to establish the fraud.—Ismond v. Scougale, 120 Mich. 353.

¶ 185. Where an assignment from master to servant purports to be in consideration of both money lent and wages earned by the latter, and is attacked as fraudulent with respect to creditors, it may be shown that the money lent was money owned by the servant before entering the master's service.—Winfield v. Adams, 34 Mich. 437.

§ 44. Weight and sufficiency of evidence.

Weight and sufficiency of evidence as to matters not related to specific elements and indicia of fraud, see post § 134.

Sufficiency of evidence of inadequacy of consideration, see also post ¶ 315.

¶ 186. Great inadequacy of consideration for an insolvent debtor's conveyances is important evidence to show fraud, varying, however, with the circumstances of each case.—Blish v. Collins, 68 Mich. 542.

¶ 187. Evidence that a grantee was without means to purchase, and that the grantor was without the proceeds which should have resulted from such purchase, tends to prove that the conveyance was without valuable consideration.—Schaible v. Ardner, 98 Mich. 70.

¶ 188. The sufficiency of the consideration for a conveyance may bear on the honesty of the grantor's intent; but excess in value over the amount of consideration is not conclusive evidence of fraud.—Spear v. Rood, 51 Mich. 140.

¶ 189. That the price paid for property was less than its value, while a relevant circumstance, if true, is no evidence of fraud, unless it was so small as to make the conveyance substantially a voluntary one.—Fraser v. Passage, 63 Mich. 551.

¶ 190. Proof that a party was indebted in the sum of $300 at the time of making a voluntary conveyance is not sufficient evidence of fraud to avoid the conveyance in favor of a subsequent creditor.—Page v. Kendrick, 10 Mich. 300.

¶ 191. The partnership of which defendant was a member had assets of $19,000 and debts of $15,000. Judgments against the firm of $6,000 were taken. Defendant got a stay of execution. Before the stay expired defendant conveyed away his farm to a grantee in Canada. Defendant's attorneys drew the deed, had it recorded, and then kept possession of it. Held, the evidence warranted a decree in equity setting aside the deed in behalf of creditors on grounds of fraud.—Welton v. McBride, 162 Mich. 193.

¶ 192. Where the husband of a chattel mortgagee withdrew from a firm the day after it opened its store for business, and financial statements rendered by the firm, by the successor and by the husband made no mention of the mortgage, it was held to lead to the conclusion that the court below was warranted in finding that the mortgages given for amounts largely in excess of the amount actually advanced, were with intent to hinder, delay, and defraud the creditors of the mortgagor, and that they were purposely kept from the files with intent to defraud, and are fraudulent and void as against creditors who sold on faith of credit reports.—Patrick v. Riggs, 105 Mich. 616.

¶ 193. Evidence that grantee, the father, had been working for the grantor and for others for more than thirteen years, his wages being received by such grantor under an agreement to pay interest thereon, is sufficient to show an adequate consideration, as against the son's creditors.—Woodhull v. Whittle, 63 Mich. 575.

¶ 194. On a bill in aid of execution by creditors to set aside a deed to land given

by a debtor to his son and son's wife held that the contention that the deed was without consideration because the grantees paid nothing to the grantor was without merit where it appeared that the father had himself paid nothing for the land and simply held the legal title to the land as security for a loan made by the mother to the son.—Atkinson v. Akin, 197 Mich. 289.

D. TRANSFERS TO FAMILY, RELATIVES OR BUSINESS ASSOCIATES.

§ 45. In general; intent to defraud or effect upon solvency.

From parent to child, see post § 46.
From one spouse to other, see post §§ 47-49.
Reality and sufficiency of consideration, see post §§ 50, 51.
Preference of family or relatives as creditors, see post §§ 52, 53.
Expenditures on real estate of another, see post § 54.
Placing title in name of child, spouse or relative, see post § 55.
Placing title in joint tenancy or entirety, see post § 56.
Transfers to or for benefit of business associates, see post §§ 57, 58.
Presumptions and burden of proof, see post § 59.
Admissibility of evidence, see post §§ 60, 61.
Weight and sufficiency of evidence, see post §§ 62-65.
Instructions and jury question, see post § 66.
Notice or participation of transferee in fraud, see ante I, B.
Effect between parties and as to third parties not creditors, see post III.
Persons against whom fraudulent transfers invalid, see post II.
Rights and liabilities of grantee towards defrauded creditors, see post IV.
Necessity of making wife party defendant to suit to set aside fraudulent transfer, see also post ¶ 570.

¶ 195. Where a conveyance is made by a debtor to his father who afterwards conveys to the debtor's children, the debtor remaining in control and possession, the transaction is not an honest preference but a cover to keep the property from the creditors and it may be impeached by the creditors.—Munson v. Arnold, 55 Mich. 134.

¶ 196. A husband gave to his wife forty acres of land valuable chiefly for pasture, upon which he paid the taxes, made improvements, and used the proceeds in common with the proceeds from the rest of the farm for the support of his family. At the same time he agreed to pay his wife a high rent for the land which was permitted to accumulate until with interest it equaled the value of 80 acres upon which the farm buildings were situated which he then conveyed to the wife in payment. At the same time a son rendered services on the farm and in payment 40 acres thereof was deeded to him, leaving nothing for creditors. Held, that the lands so conveyed were liable to levy and execution in favor of a creditor of the husband.—Winslow v. Putnam, 130 Mich. 359.

¶ 197. Where a debtor, in anticipation of proceedings against him, made a deed to his brother, the evident purpose of which was to hamper the title, and for which a very small part of the consideration was paid, the deed was held to be invalid as against creditors.—Chase v. Welsh, 45 Mich. 345.

¶ 198. Transfers from a father to his son and from the latter to his wife, held fraudulent as to creditors.—Rindge v. Grow, 99 Mich. 482.

¶ 199. Not every voluntary conveyance by a parent to a child is fraudulent against creditors; but when made in good faith by way of advancement, and abundant property is retained by the parent to pay all his debts, it is good against existing as well as subsequent creditors.—Cutter v. Griswold, W. 437.

¶ 200. Where a man, while solvent, makes provision for his wife that is not extravagant in view of existing circumstances, and does so in good faith and not in anticipation of reverses, it cannot be set aside on a bill in aid of execution for a debt incurred afterwards.—Brown v. Vandermeulen, 44 Mich. 522.

¶ 201. An absolute title under a deed by a husband to his wife cannot be affected by the fact that he long subsequently signed and did not pay a certain note and it does not subject the lands to an execution issued on a judgment rendered on the note, notwithstanding she may not have paid a valuable consideration for the lands and did not record her deed until shortly prior to maturity of the note.—Otis v. Sprague, 118 Mich. 61.

¶ 202. An allegation that a warranty deed was executed and delivered to the grantor's wife with an intent to defraud his creditors is not sustained by evidence merely that the deed was withheld from record for a number of years, and that the grantor continued to collect the rents for the property conveyed, where it appears that the grantor had at the time other property amply sufficient to pay his debts, and where it further appears that the deed to the land in controversy was withheld from record through inadvertence, and that the grantor accounted to the grantee for all rents by him collected.—Michigan Trust Co. v. Adams, 109 Mich. 181.

¶ 203. A deed of real property, executed by a husband to his wife with a view to protecting himself against the contingency of failure in his business, and purposely withheld from record in a place equally under his control and hers until, the risks of such business having increased, his assets, aside from the premises so conveyed, are less than

his liabilities, is void as against creditors, even though the grantor was solvent at the time of its execution.—Preston Nat. Bank v. Pierson, 112 Mich. 435.

¶ 204. A wife lent money to her husband which he used in his business; and, while solvent, he bought lands with her money and such lands were conveyed to her, he afterwards becoming insolvent. Held, that the wife was under no obligation to notify persons with whom her husband dealt that he was trading with her capital, or to take writings showing the state of her account with him, and that the lands were not subject to his debts.—Buhl v. Peck, 70 Mich. 44.

¶ 205. A bill in aid of execution was dismissed where the premises which the complainant sought to reach had been deeded by the judgment debtor to his daughter before complainant's claim arose, and while he was solvent, in consideration of the daughter's kindness and attention to him in sickness, and, where, though the grantor had kept the deed in his own custody he had repeatedly recognized its execution and delivery to the daughter, who had for years occupied the premises with the understanding, on the part of the family, that they were hers.—Dunham v. Pitkin, 53 Mich. 504.

§ 46. From parent to child.

See also ante ¶¶ 194, 205, and post ¶ 637.
Transfer to child who transfers to third person, see also ante ¶ 198.
Transfer from parent to child where made in good faith by way of advancement, see also ante ¶ 199.
Agreement to support parents in future as consideration for transfer, see ante ¶ 158.
Evidence admissible as to transfers from parent to child, see post ¶¶ 274, 275.
Burden of proof on transfer from parent to child, see post ¶ 269.
Weight and sufficiency of evidence to show transfer from parent to child fraudulent, see post ¶¶ 291, 294-297, 301.

¶ 206. A transfer by an aged and infirm debtor to his son as a voluntary provision for the grantor and his family was avoided in favor of creditors.—Pursel v. Armstrong, 37 Mich. 326.

¶ 207. A transfer by a father, aged and in poor physical condition, of property to a son without consideration, for the purpose of defeating the claims of creditors, will be set aside.—Terry v. Terry, 170 Mich. 330.

¶ 208. A conveyance of land by parent to child, when based on a valuable consideration, although the deed is withheld from record, is not void as to one who subsequently extends credit to a third person in reliance on the grantor's guaranty, where the grantor does not make any representations as to the extent of his property.—Reed v. Brown, 184 Mich. 515.

¶ 209. Where a judgment debtor conveyed forty acres of land to his son, the same being his only property subject to execution, under suspicious circumstances, characterizing the transaction as a fraud, such conveyance, on a bill in aid of execution, will be vacated and set aside as to such judgment.—Yates v. McGahen, 174 Mich. 211.

§ 47. From one spouse to other.

See also post ¶¶ 408, 578.
Through agent or intermediary, see post § 48.
Gifts and settlements, see post § 49.
Weight and sufficiency of evidence as to transfer from one spouse to other, see post § 63.
Transfer from one spouse to other in good faith and not in anticipation of reverses, see also ante ¶¶ 200, 201.
Instructions as to transfer from one spouse to other, see post ¶ 328.
Following property transferred to wife by husband after its conversion into another form, see also post § 120, ¶ 538.
Transfer to make wife eligible as surety on bond for husband, see also post ¶ 526.
Burden of proof on transfer from one spouse to other, see post ¶¶ 270, 271.
Presumptions arising from transfer from one spouse to other, see post ¶¶ 266-268.
Sufficiency of past consideration, see ante ¶ 161.
Effect between parties, see post ¶¶ 497, 498.
Creation of estates by the entireties as fraud of creditors' rights, see Husband and Wife ¶ 106.

¶ 210. A transfer of property by a man to his wife may be in effect a conveyance in fraud of creditors although made with no actual intent to defraud creditors.—Felker v. Chubb, 90 Mich. 24.

¶ 211. If a husband who is insolvent at the time causes real estate to be conveyed to his wife, the conveyance will be void both as to existing and as to subsequent creditors.—Beach v. White, W. 495.

¶ 212. A transfer of land by a debtor to his wife immediately after his refusal to give such land as security for an obligation to his creditor, was justly declared fraudulent as against such creditor, in a decree on a bill in aid of execution.—Gasser v. Crittenden, 140 Mich. 301.

¶ 213. A husband transferred certain village lots to his wife while divorce proceedings were pending between them, and she occupied them as a home, but secretly conveyed them back to him after her solicitor had recovered a judgment against her for his services; held, that such conveyance was fraudulent and void as against the levy and sale under such judgment.—Smith v. Brown, 34 Mich. 455.

¶ 214. A creditor's bill may be maintained to reach assets of a partnership in the hands of the executor, it being alleged that a partner transferred property of the partnership to his wife, without consideration, before his death, which assets were in the possession of the wife's executor.—Murdoch v. Walls, 121 Mich. 164.

¶ 215. A conveyance by a husband, liable as an indorser upon promissory notes, to his wife, without sufficient consideration, for the purpose of covering up the property, and keeping it beyond the reach of creditors, will be set aside as fraudulent.—Treadwell v. Wilsey, 110 Mich. 646.

§ 48. ——Through agent or intermediary.

See also post ¶ 415.

Weight and sufficiency of evidence as to transfers through intermediaries to family or relatives, see post § 64.

¶ 216. A conveyance by a husband through a third person to himself and wife, at a time when he had become deeply involved, is fraudulent as to creditors where it appears that he had made false statements regarding his property, and incumbered his personal property by chattel mortgages which were not recorded, the deeds effecting the conveyance being executed at night and indorsed "please do not publish," before they were recorded, the claimed consideration for the transfer being money loaned by the wife, to which the husband was entitled.—Lansing State Sav. Bank v. Harrington, 151 Mich. 268.

¶ 217. An insolvent merchant who had mortgaged to a bank a building containing both his store and residence, conveyed the premises to the bank, which returned the mortgage notes but retained the mortgage, and at the same time executed a contract of purchase to the mortgagor's wife. The latter afterwards paid $1,000 upon the contract. It appearing that the merchant entered into the arrangement with the bank for the purpose of placing the title in his wife and defeating his creditors, and that the payment by his wife was in fact made by him and reduced the bank's claim by that amount, the contract was set aside, the deed treated as a mortgage, and the premises sold subject to the balance unpaid on the mortgage, and to the wife's dower and homestead interest.—Desbecker v. Mendelson, 117 Mich. 293.

§ 49. ——Gifts and settlements.

See also ante ¶¶ 124, 181, and post ¶ 493a.

¶ 218. The fraudulent effect of a gift from a man to his wife by which the property is placed beyond the reach of creditors is not changed by the fact that the wife, while she knew her husband was indebted, did not know that he could not give her his property under the circumstances.—Matson v. Melchor, 42 Mich. 477.

¶ 219. One who owns lands subject to a contract to sell and convey the same to his wife upon which a part of the purchase price remains unpaid cannot, pending suit against him and on the eve of a judgment, make a valid deed of gift of his interest in the lands to his wife to defeat an execution levy.—Doak v. Runyon, 33 Mich. 75.

¶ 220. When the effect of a voluntary conveyance by a husband to his wife is to defraud his creditors, no actual intent to defraud need be shown.—Felker v. Chubb, 90 Mich. 24.

¶ 221. Where a judgment creditor's bill is filed to set aside voluntary conveyances made by a man to his wife long before he became indebted to complainant, the latter must show that they were made with intent to defraud either existing or subsequent creditors.——Brown v. Vandermeulen, 44 Mich. 522.

¶ 222. Before the statute of 1844, a settlement after marriage, on the wife, of property belonging to her before marriage, in pursuance of an ante-nuptial parol agreement, was void as against creditors; the promise to make such settlement being founded solely upon the consideration of marriage, and therefore void as within the statute of frauds.—Wood v. Savage, 2 D. 316, reversing W. 471.

¶ 223. Where one makes a settlement upon his wife under such circumstances as, if voluntary, would render it void as to creditors, and receives from her a small and inadequate consideration, such settlement will be sustained in equity only so far as to secure to her the repayment of that sum.—Herschfeldt v. George, 6 Mich. 456.

¶ 224. Post-nuptial settlements by the husband upon the wife are good, if made without fraud, by a party not indebted at the time, or whose debts are trifling compared with his property.—Beach v. White, W. 495.

¶ 225. A parol ante-nuptial promise by a husband to hold money belonging to his wife at the time of marriage as her trustee, and invest it in real estate in her name and for her separate use, cannot sustain a post-nuptial settlement upon the wife as against creditors.—Wood v. Savage, 2 D. 316, reversing W. 471.

¶ 226. A conveyance of property by a husband to the wife is in fraud of creditors where made without consideration, leaving to the husband no property except an interest in a failing corporation, which interest subsequently sold for $1,500, the indebtedness being proximate to $4,000.—Palmer v. Smith, 126 Mich. 352.

§ 50. Reality and sufficiency of consideration.
See also ante ¶¶ 126, 127.
Release of dower, see post § 51.
Sufficiency of past consideration, see ante ¶¶ 161-164.
Right of parents to compensate children for supporting them, see also post ¶ 238.
Right of creditors to proceeds of mortgage purchased by daughter of debtor with money furnished by him, see Foreclosure ¶ 515.
Sufficiency of evidence of consideration, see also post ¶ 308.

¶ 227. The services of a wife as clerk in the bakery of the husband belong to him and do not furnish an adequate consideration, as against creditors of the husband, for a conveyance of real estate by the husband to the wife.—Henze v. Rogatzky, 199 Mich. 558.

¶ 228. A conveyance by a husband to his wife, without a present consideration, made at a time when the husband is sought to be held as surety upon the bond of a defaulting township officer, and embracing property the title to which has stood in his name for twenty-five years, and which was included in his estimate of assets when he gave the bond and justified as to his responsibility, is fraudulent as to the township, even though the property was originally purchased under an arrangement entered into by the wife without the knowledge of the husband, and was paid for out of a common fund to which her earnings contributed.—Township Maple Valley v. Foley, 113 Mich. 622.

¶ 229. An indebtedness of a husband to his wife of about $1,100 does not furnish an adequate consideration, as against creditors, for the conveyance of property worth $15,000 by the husband to the wife.—Henze v. Rogatzky, 199 Mich. 558.

¶ 230. A wife who voluntarily gives money to her husband, there being no express agreement that his property is to be conveyed to her in consideration of the loan, is not a bona fide purchaser of such property when conveyed to her before his death.—Williams v. Williams, 118 Mich. 477.

¶ 231. An agreement whereby a husband is to pay to his wife a specified sum per year for her services as housekeeper is contrary to public policy, and a claim founded thereon will not support a conveyance to the wife as against the rights of creditors.—Michigan Trust Co. v. Chapin, 106 Mich. 384.

¶ 232. Property conveyed by a husband to his wife is properly subjected to execution against him, although the husband was indebted to the wife, where the value of the property so conveyed, together with a mortgage received by her on the transfer of other property, exceeds the indebtedness to the wife and the homestead valuation to an amount substantially equaling the execution debt.—Ryan v. Meyer, 108 Mich. 638.

¶ 233. A conveyance by an indebted husband of the homestead to the wife, whose contributions had gone towards its purchase, is not fraudulent as to existing creditors if he had enough left to pay them.—Cole v. Brown, 114 Mich. 396.

¶ 234. In 1902, before any indebtedness was contracted by defendants, they deeded certain land to their son, and delivered the instrument to him, which deed was lost. The son took charge of the land, cropped, managed, and had the proceeds from it. It was thereafter assessed to him and he paid the taxes thereon. In 1906, after defendants had incurred indebtedness and were involved in litigation, the old deed having been lost, they made a new deed to the son. Held, the judgment creditors were not entitled on a creditor's bill and one in aid of execution to reach the land deeded to the son.—Rohrabacher v. Walsh, 170 Mich. 59.

¶ 234a. Where by mutual understanding between husband and wife their mutual acquisitions were to be equally divided and owned, and a certain amount of property was vested in the wife accordingly, if she afterwards allowed her husband to dispose of this property for his own benefit, she became to that extent his creditor.—Hyde v. Powell, 47 Mich. 156.

§ 51. ——Release of dower.

¶ 235. A husband's conveyance of land to his wife, in consideration of her giving up her right of dower in lands which came to be worth many times the land conveyed to her, is not fraudulent as to creditors.—German American Seminary v. Saenger, 66 Mich. 249.

¶ 236. On a bill filed in aid of execution to set aside a mortgage claimed to be fraudulent, held the conveyance of a mortgaged homestead and other land, by a husband to his wife, in consideration of her releasing dower in other realty of his which he desired to dispose of, and of $200 claimed to be due her for improvements made upon the homestead, was not fraudulent, the consideration being a good though perhaps not an adequate one.—Peaslee v. Collier, 83 Mich. 549.

¶ 237. A husband who was deeply indebted which fact was known to his wife, sold some property, the wife joining in the conveyance, and shortly thereafter conveyed to his wife certain other property and also some lots received upon the sale, the value of the whole being in excess of her dower right in the land sold. In a suit to set aside the deed as in fraud of creditors, held, that the conveyance could not be sustained as being in consideration of joining in the deed of the property sold where her testimony showed that the value of her dower right was not

considered in the transaction.—Riggs v. Whitaker, 130 Mich. 327.

§ 52. Preference of family or relatives as creditors.

By conveyance of lands, see post § 53.
Right to prefer creditors generally, see post §§ 68-71.
Right of wife as creditor of her husband where she fails to make known her claim, see post ¶ 472.
Right to prefer wife by transfer of property to her which includes homestead, see ante ¶¶ 168, 169, 171-174.

¶ 238. Parents have a right, as against creditors, to compensate children for their services in supporting them.—Howard v. Rynearson, 50 Mich. 307.

¶ 239. A husband who is indebted to his wife may prefer her to other creditors, and can transfer his property to her to apply on the debt, even if it defeats the collection of other debts.—Hill v. Bowman, 35 Mich. 191; Jordan v. White, 38 Mich. 253.

¶ 240. On an accounting under a bill attacking the transfer of certain personal property from husband to wife under a former decree holding such transfer to be in fraud of creditors, record examined and held that certain credits should be allowed defendant and deducted from the amount allowed under the decree.—Jewell v. Kelley, 180 Mich. 61.

§ 53. ——By conveyance of lands.

¶ 241. A son who is actually indebted to his father has a legal right to prefer him to other creditors and to convey to him, in payment of his debt, enough of his property to meet it, even though he should not have enough left to pay the rest of his debts.—State Bank of Fenton v. Whittle, 48 Mich. 1; Woodhull v. Whittle, 63 Mich. 575.

¶ 242. A husband who is in good faith indebted to his wife has the right to prefer her to other creditors, but when a conveyance is made by an insolvent husband to his wife in payment of alleged debts, the transaction should be closely scrutinized.—Winslow v. Putnam, 130 Mich. 359.

¶ 243. A husband's conveyance to his wife, in payment of a debt due to her from him, of property worth no more than the debt, is not fraudulent as to creditors.—Dull v. Merrill, 69 Mich. 49; Wooden v. Wooden, 72 Mich. 347; Meigs v. Dibble, 73 Mich. 101.

¶ 244. A husband may lawfully prefer his wife's bona fide debt, but may not, as against other creditors, convey property to her for a grossly inadequate sum.—First Nat. Bank of Lake Linden v. Condon, 122 Mich. 457.

¶ 245. A husband's parol agreement that lands purchased in his name shall eventually be exchanged for a homestead, which shall be taken in the name of his wife, does not operate to discharge a debt that he is owing her, so as to prevent him from thereafter conveying such lands to her in payment of the debt as against other creditors, who set up the invalidity of the secret trust.—Parker v. Barkenowitz, 116 Mich. 58.

¶ 246. A deed given by a husband to his wife in payment of a bona fide debt having been recorded before the debt of a complaining creditor was contracted, and there being no evidence of a fraudulent intent on the wife's part, is valid.—Strauss v. Parshall, 91 Mich. 475.

¶ 247. A husband who is, in good faith, in debt to his wife has a right to pay her claim in preference to the claims of other creditors; and if this is done by having land deeded to her, for which he exchanged a stock of goods which had in turn been bought with the proceeds of land which had been purchased in part with her money, the deed cannot be set aside.—Leppig v. Bretzel, 48 Mich. 321.

¶ 248. A conveyance from a father to his daughter cannot be set aside as fraudulent in respect to creditors where the consideration therefor is not apparently excessive and consists of the amount due on a note from him to her, with interest, and embraces her services in their support and her agreement to support them in future.—Howard v. Rynearson, 50 Mich. 307.

¶ 249. A husband was appointed guardian of his wife's mother, an incompetent. He collected a sum of money due the mother as back pension and used the same to discharge a mortgage on his own land. He did not account for this money during the lifetime of the mother, but after her death conveyed said land to his wife for the purpose of discharging his obligation to the mother's estate. The value of the land was approximately equal to the amount due the estate. Held, a bill brought by the husband's creditors to set aside such conveyance as fraudulent was properly dismissed.—Heller Aller Co. v. Ries, 164 Mich. 501.

§ 54. Expenditures on real estate of another.

¶ 250. A husband who is solvent cannot expend all his means in erecting a building on land owned by his wife and leave creditors who have furnished the materials without redress, and such creditors may maintain a creditors' bill and a bill in aid of execution against the property improved except that the original interest of the wife must be protected.—Brand v. Connery, 132 Mich. 88.

§ 55. Placing title in name of child, spouse or relative.

See also post ¶ 564.
Adequacy where consideration furnished by debtor for grant or transfer to his child, see also ante ¶ 176.

¶ 251. Bad faith by a debtor in transactions as to real estate is not shown by proof that the debtor himself paid for such property and took a quitclaim deed in the name of his wife and that the wife subsequently conveyed such premises to another person, where the debtor at the time of such transactions was solvent.—Downing v. Brooks, 194 Mich. 490.

¶ 252. The action of a debtor in having title to purchased property quitclaimed to his wife and in having such property subsequently conveyed to another person cannot be questioned by a creditor where the debtor afterwards actually pays the indebtedness due to the creditor at the time of the conveyance, and the debtor was in fact indebted to his wife in an amount equal to the value of the property.—Downing v. Brooks, 194 Mich. 490.

¶ 253. A wife, whose husband was in debt to her, took in her own name a bond and mortgage for which certain of his and certain of her property were exchanged. Creditors of the husband sought, by suit, to reach the bond and mortgage. Held, that a suspicion of fraudulent intention on her part would not justify a finding that she was guilty of fraud, and that she was entitled to have the value of her interest in the bond and mortgage paid to her after the foreclosure in the creditors' suit, and that the creditors were entitled to the balance.—Cicotte v. Stebbins, 49 Mich. 631.

§ 56. Placing title in entirety or joint tenancy.
See also post ¶ 325.

¶ 254. Where a husband, to hinder his judgment creditor, has with his own funds taken title to land in the joint names of himself and his wife, crops subsequently sown on such land without agreement between the husband and wife as to who shall own them cannot be subjected by such creditor to levy and sale under an execution at law against the husband; and it is conversion to do so.—Dickey v. Converse, 117 Mich. 449.

¶ 255. Where a judgment-debtor and his wife jointly purchased land, which was conveyed to them jointly, held, on judgment-creditor's bill, filed to reach the husband's interest therein, that in the absence of any showing to the contrary the husband would be presumed to have paid one-half of the purchase-price, and that an undivided half of the premises should be sold for the creditor's benefit.—Newlove v. Callaghan, 86 Mich. 297.

¶ 256. Defendant, while the holder of the legal and equitable right to certain lands, became indebted to complainant. He conveyed same to a third person, who immediately reconveyed it to defendant and his wife so as to create an estate by the entireties, for the purpose of defrauding complainant and other creditors, said conveyance being made without consideration. Subsequently complainant secured a judgment at law for the amount of defendant's indebtedness. Held, the estate by the entirety apparently created by the fraudulent deeds, never in fact existed, but the legal title remained all the time in defendant, and a bill in equity would lie to set aside said conveyance and to subject the latter to levy.—Hackett v. Kenning, 170 Mich. 583.

¶ 257. Where a contract for the exchange of real estate is entered into and one purchaser takes title to the exchanged property in the names of herself and husband for the purpose of defrauding the seller and other creditors, the interest of the purchaser may be subjected to execution under Comp. Laws 1897, § 9167, How. 2nd ed., § 11321, providing that all real estate of any debtor, including legal and equitable interests in lands acquired by parties to contracts for sale and purchase of land, including lands fraudulently conveyed with the intent to defeat, delay or defraud his creditors, shall be subject to execution.—Lipp v. Jacobs, 198 Mich. 357.

§ 57. Transfers to business associates.
Transfers for benefit of business associates, see post § 58.
Weight and sufficiency of evidence as to transfers to business associates, see post § 65.
Evidence admissible as to transfers to business associates, see post ¶ 278.
Right of recourse to corporate debtor's property fraudulently got in at foreclosure sale by officers, see Corporations ¶ 318.

¶ 258. On a bill by creditors of a corporation against retiring stockholders, to set aside the sale of certain corporate stock and to enjoin the foreclosure of a mortgage, held, that the sale was made in good faith to the corporation, and not to defendant officers, to whom the stock was assigned before the claims of the creditors arose.—Clark v. E. C. Clark Mach. Co., 151 Mich. 416.

¶ 259. A conveyance was made to enable the grantee to purchase goods for the joint benefit of both parties, who were to become partners. The goods were not purchased, and a creditor of the grantor who had sued his claim before the conveyance was made levied upon the premises. It was held that the conveyance was fraudulent and void as to such creditor.—Wisner v. Farnham, 2 Mich. 472.

¶ 260. Fraud on the unsecured creditors of a firm cannot be imputed to a mortgage by it to its lawful bona fide creditor because of the fact that the creditor was also a firm in which there was a partner common to both, and on the theory to sustain the mortgage would allow that member to withdraw assets of the debtor firm for his own benefit.—Burrows v. Leech, 116 Mich. 32.

¶ 261. An agent who had effected for his principal an exchange of a parcel of land for a house and lot, taking, without his principal's knowledge, the conveyance of the house and lot in his own name, conveyed the latter premises to his principal and others to whom an interest had been sold; but before the latter conveyance had been made the premises were levied upon by the agent's creditor who claimed that the exchanged parcel was in fact the agent's, and that the transaction was fraudulent as to creditors. Upon a bill filed to set aside the levy it appeared that the principal had paid for the land, exercised control over it, and had it assessed to herself, and that the deed from the agent was executed in the absence of any claim or showing that either had at that time learned of the levy. Held, that these were controlling facts, and warranted a decree for complainant.—Petit v. Hubbell, 105 Mich. 405.

¶ 262. Where a partner executed and filed a mortgage upon the firm stock in favor of one whose money he had been handling as agent, and in the capacity of agent accepted the same for the mortgagee, justifying the transaction by the claim that he had applied certain of the mortgagee's funds to the use of the firm, such mortgage was held fraudulent at the suit of a creditor who was at the time of its execution pressing the firm for security, and who immediately afterwards accepted a mortgage upon the same stock, it appearing that the only evidence, aside from the testimony of the mortgaging partner, which was not convincing, to show that the alleged consideration ever passed to the firm, was a statement in a book wherein he kept his accounts as agent that his principal had received a firm note for the amount, and, on the date of the mortgage, an entry of interest therein.—Williams v. Baker, 116 Mich. 66.

¶ 262a. The transfer of property to a corporation of which the transferor is an organizer and the acceptance of stock for the full value of the property does not work an injury to creditors so as to justify garnishment proceedings against the corporation as garnishee of the transferor.—Plaut v. Billings-Drew Co., 127 Mich. 11.

§ 58. Transfers for benefit of business associates.

Weight and sufficiency of evidence as to transfers to business associates, see post § 65.

¶ 263. It is not necessarily fraudulent, either in fact or in law, for a firm that is solvent to give a partnership mortgage to the father of one of the partners to secure the individual debt of a partner.—Caulfield v. Curry, 63 Mich. 594.

§ 59. Presumptions and burden of proof.

Burden of proof and presumptions as to matters not related to specific elements and indicia of fraud, see post § 132.

¶ 264. The fact that the transferees are relatives does not raise a presumption that the transfer is in fraud of creditors.—Fraser v. Passage, 63 Mich. 551.

¶ 265. A conveyance by an insolvent debtor will not be presumed fraudulent because executed to a relative.—Kalamazoo Spring & Axle Co. v. Winans, Pratt & Co., 106 Mich. 193.

¶ 266. There is no rule of law whereby a husband cannot give his property to his wife without raising a presumption of fraud.—Manke v. Manke, 75 Mich. 435.

¶ 267. The alleged fraudulent conveyance being by a man to his intended wife, whom he soon after married, it was held that the continued occupation of the land by him after the marriage, the neglect for some years to record the deed, and the mortgaging of the land by husband and wife for the husband's benefit, did not raise a presumption of fraudulent intent in making the conveyance.—Page v. Kendrick, 10 Mich. 300.

¶ 268. Where creditors attack a husband's conveyance to his wife of land in payment of his debt to her, the burden is upon them—if they rely on such representations—of bringing home to her knowledge that he was making representations at the time he became indebted to them, that he owed no debts and had money at interest.—Dull v. Merrill, 69 Mich. 49.

¶ 269. A claimant whose only title consisted of a tax-deed and a quitclaim from a party who denied having any title sold to his son for $100, none of which was paid, a parcel worth $1,000. Held that, although the same strictness is not always to be looked for between father and son as between strangers, the burden of proving that this sale was in good faith and for a valuable consideration was on the parties thereto, in a suit to quiet title, to which they had been made defendants.—Hammontree v. Lott, 40 Mich. 190.

¶ 270. Under Pub. Acts 1897, No. 99, the burden was on the husband and wife, defendants in a bill in aid of execution upon a judgment against the husband alone, to show the bona fides of a transfer of realty from the husband to the wife during the pendency of such suit against the husband, and two days before the entry of judgment therein.—Preston Nat. Bank v. Leonard, 122 Mich. 381.

¶ 271. A conveyance from a husband to his wife, made in pursuance of an agreement whereby money was borrowed will be sustained where the evidence clearly shows such facts, although Pub. Acts 1897, No. 99, provides that a complainant shall make a prima facie case on a bill filed in aid of execution by introducing his judgment, execution, and levy, and proof of the conveyance complained of, and thereafter the burden of proof shall

be upon the judgment debtor to show that the transaction is bona fide.—Keegan v. Loranger, 118 Mich. 481.

§ 60. Admissibility of evidence.

Transfers from husband to wife, see post § 61.

Admissibility of evidence relative to matters other than specific elements and indicia of fraud, see post § 133.

¶ 272. The fact that an insolvent debtor is related to persons with whom he has dealings does not necessarily show that such dealings are fraudulent, though it is a circumstance calling for greater scrutiny, and the relationship is always admissible for that purpose.—Blish v. Collins, 68 Mich. 542.

¶ 273. In assumpsit by the trustee in bankruptcy to recover the value of goods alleged to have been fraudulently conveyed, evidence that the transferee was the father of one bankrupt, that he knew that only $3,000 had been put into the business, that he purchased the partnership stock for $5,000 knowing that the partners had partnership debts and personal debts aggregating more than the proceeds, is not sufficient to authorize a directed verdict for the plaintiff.—Lyon v. Clark, 129 Mich. 381.

¶ 274. Where a bill of sale from a son to his mother is attacked by his creditors as fraudulent, it is proper to go fully into the transactions between the two, with reference to any property which the son had owned, and their dealings respecting it, before, at or after his failure, which had any bearing on the question of fraud.—Burrill v. Kimbell, 65 Mich. 217.

¶ 275. On an issue of good faith in a transfer from a son to his father where the property has been attached as belonging to the son, it is proper to ask him whether any portion of his object in making the transfer was to hinder, delay or defraud creditors.—Hart v. Newton, 48 Mich. 401.

¶ 276. On the question whether goods were purchased by a merchant with the intent of reselling or transferring them to his relatives to whom he was indebted, and thereby applying them to payment of a factitious indebtedness claimed by the relatives, it is proper to show that immediately after acquiring the business from them he asked other dealers for quotations and samples of goods and to show what was done with the samples received, he being without capital and in debt for more than the total of his assets, it being also in evidence that large purchases were made from such other dealers and that large sales were claimed to have been made to the relatives corresponding in amount to the amount of the purchases.—Gumberg v. Treusch, 103 Mich. 543.

¶ 277. On the question whether the principal debtor related to the garnishees and in failing circumstances had transferred to them in fraud of other creditors certain merchandise out of his stock, it is competent to show how the orders of the garnishees for goods were filled, whether in the usual course of business or otherwise.—Gumberg v. Treusch, 103 Mich. 543.

¶ 278. On the question whether a mortgage by a firm was in fraud of its creditors it is relevant to show whether the money it was said to secure really passed into the firm, the mortgage having been executed by one partner who was also agent of the mortgagee and who delivered the mortgage to himself as agent, since it bore on the question whether there was any consideration for the mortgage.—Williams v. Baker, 116 Mich. 66.

§ 61. ——Transfers from husband to wife.

¶ 279. Where a wife asserts that lands conveyed to her by her husband were in payment of loans made by her to him, the nonexistence of any written evidence of the debt is at most a suspicious circumstance, open to explanation, and does not justify the rejection of her testimony.—Allen v. Antisdale, 38 Mich. 229.

¶ 280. All facts and circumstances bearing on the good faith of an alleged change of ownership from husband to wife should be admitted in evidence where the rights of the husband's creditors are involved and the only change of possession pretended is from the husband as owner to the husband as agent, though business goes on in his name.—Judge v. Vogel, 38 Mich. 569.

¶ 281. Evidence as to the source from which a wife obtained the money paid for real estate conveyed to her is admissible upon an issue whether a subsequent transfer of personalty from the husband to the wife was voluntary and fraudulent as to his creditors.—Jansen v. McQueen, 112 Mich. 254.

¶ 282. In an action by a wife against a sheriff who had seized goods, claimed by her under a chattel mortgage given her by her husband to secure alleged loans to him, for the debt of the husband, the defense being that the chattel mortgage was fraudulent, it is error to exclude evidence of statements made to R. G. Dun & Co. and to the creditor by the husband relative to his assets and liabilities; since in cases of fraud wide latitude is permitted in the admission of evidence and inferences are generally for the jury, and if, at the conclusion of the evidence, there is nothing to show that plaintiff had knowledge of the representations made by the husband the court will so instruct the jury.—Heath v. Koon, 130 Mich. 54.

¶ 283. The relation of husband and wife between the chattel mortgagor and mortgagee, the clandestine removal of part of the goods with her consent, her knowledge of his indebtedness to others, of his manner of

conducting business, and of his financial condition, and of other circumstances are admissible on the question of good faith in giving the mortgage.—Heath v. Koon, 130 Mich. 54.

¶ 284. A judgment debtor, his wife joining, conveyed his land to a third person to secure a loan, and upon the death of such third person his executors conveyed to the wife of the judgment debtor. In a suit by the judgment creditor, attacking these conveyances as being in fraud of creditors, held, that books of account kept by the trustees and executors of the third person are not admissible, as they can have no influence in determining whether the transfers of land by her and her husband to the third person, and by such third person back to her, were in fraud of creditors.—Rathbone v. Maltz, 155 Mich. 306.

¶ 285. In replevin by a wife against her husband's execution creditors for goods claimed by her under a bill of sale from her husband to secure a debt due her for money long previously lent, where no note was given or account kept, and no interest or principal paid or requested, it is proper to show on cross-examination of the husband what property he has owned since the debt originated, what the profits of his business have been, and his wife's knowledge from time to time of his business ventures and investments.—Miller v. Hanley, 94 Mich. 253.

¶ 286. In replevin by a wife against a levy against property as her husband's it is proper to show that plaintiff and her husband have made statements relative to the ownership of the property on deposit inconsistent with the claim made at the trial; and the financial condition of both husband and wife from the time when the debt originated may be inquired into, and a wide latitude of cross-examination should be allowed to the judgment creditor.—Miller v. Hanley, 94 Mich. 253.

¶ 287. In replevin against a city treasurer for property levied upon to satisfy a tax against plaintiff's husband, she may show, as bearing on the good faith of a transfer of the goods to herself from her husband, that she had insured the property and used it as her own.—Hall v. Moriarty, 57 Mich. 345.

¶ 288. Where the good faith of a pretended transfer of a debtor's property to his wife is in question, and it is shown that he carried on his business of manufacturing liquors in his own name though claiming to be her agent, the fact that he is taxed by the state as owner of the business is admissible as bearing on the question whether his wife's alleged ownership is not merely colorable.—Judge v. Vogel, 38 Mich. 569.

¶ 289. Where a wife claims as against creditors that property conveyed to her was in payment of an alleged debt, the financial condition of both herself and husband from the time the debt originated is a proper subject of inquiry.—Miller v. Hanley, 94 Mich. 253.

¶ 290. In an action by a wife for an alleged wrongful attachment, where the evidence as to plaintiff's title was mainly that of her husband who stated that he transferred the property he had employed in his business, to his wife by bill of sale reciting consideration of one dollar and other valuable consideration and that at the time of the transfer he was indebted; that the name over the door was the family name; that plaintiff was at the shop a portion of the time and that the garnished money could only be withdrawn under plaintiff's name signed by the husband, and that he was unable to state the amount paid him by his wife on the transfer; it was error for the court to treat such possession as one which cast the burden of proof upon the defendant.—Mazirioff v. Commercial Bank, 135 Mich. 390.

§ 62. Weight and sufficiency of evidence.

See also ante ¶ 251.

Transfers from one spouse to other, see post § 63.

Transfers through intermediaries to family or relatives, see post § 64.

Transfers to business associates, see post § 65.

Weight and sufficiency of evidence as to matters not related to specific elements and indicia of fraud, see post § 134.

¶ 291. Evidence that at the time a father and daughter purchased land in common he informed her that upon his death she should have it, and that both father and daughter made quitclaim deeds to each other, which were kept in the control of both until his death when hers was destroyed and his was recorded, is sufficient to justify setting aside the deed in fraud of creditors upon payment to the daughter of such sums as she has paid out as interest and principal on a mortgage on the premises.—Sullivan v. Parkinson, 128 Mich. 527.

¶ 292. Testimony of a father and his son and others to whom the son was indebted on notes indorsed by the father as to the existence of the debts, and the notes in evidence, opposed by testimony, of declarations by the father, denied by him or explained by referring them to an earlier time, that the son did not owe anything and that declarant had not signed for his son, sufficiently shows the debt secured to be bona fide.—Tarbell v. Millard, 63 Mich. 250.

¶ 293. On an issue whether a father paid full value for property transferred by his insolvent son, testimony by the father that $500 advanced by him to the son to purchase stock was a loan was overcome by his testimony given in an earlier case wherein the father declared it was a gift; and, hav-

ing formed a part of the ostensible consideration for the transfer, the father will be held as a trustee for the son's creditors to that amount.—Richards v. McCormick, 119 Mich. 7.

¶ 294. After the commencement of a suit against a father, he conveyed his land to one of his sons without any valuable consideration, and assigned to another son a mortgage, which conveyances left him without property or means to pay the judgment subsequently rendered against him. After an execution had been levied on the land it was conveyed by the son, and the grantee filed a bill to remove the cloud created by the levy. Held, that the father's fraudulent intent in making the deed was sufficiently established by proof of the foregoing facts.—Schaible v. Ardner, 98 Mich. 70.

¶ 295. On a bill by an administrator under Comp. Laws 1897, § 9363, How. St. 2nd Ed., § 11074, to set aside a deed from the intestate to his son, which was filed of record after the latter's death, upon the ground that it was fraudulent as to creditors, and particularly as to a niece to whom he had agreed to will the property as compensation for services as housekeeper, evidence held sufficient to sustain a finding that the deed was fraudulently procured by the son with full knowledge as to the agreement between his father and the housekeeper so as to authorize setting aside the deed.—Merriam v. Vandemark, 189 Mich. 226.

¶ 296. A conveyance to a son made during the pendency of a suit at law, was declared fraudulent in a bill in aid of execution, although there was no testimony of a deliberate plan to defraud, and complainant's case was made out by independent facts constituting badges of fraud.—Scandinavian Sveas Benev. Soc. v. Linquist, 133 Mich. 91.

¶ 297. A conveyance in fraud of creditors is made out by evidence that the debtor conveyed land to his son without any money consideration under an alleged agreement that the son was to work for the father for two years, that the deed was not recorded until after the father had made an assignment for creditors with assets of about $1,100 and liability of more than $4,000, that subsequently the son conveyed the land to his mother, that she reconveyed it to him and he then reconveyed one-half of it to his father.—Noble v. McKeith, 127 Mich. 163.

¶ 298. Evidence is sufficient to go to the jury on the question of a transfer to defraud creditors where the defendant conveyed all his interest in his father's estate to pay off a mortgage on property held by himself and his wife in entirety, even though at the time of acquiring the estate in entirety he did not have or use a dollar's worth of property which was liable to execution.—Caswell v. Pilkinton, 138 Mich. 138.

¶ 299. The dismissal of a creditor's bill against husband, wife and daughter, in aid of execution upon a deficiency decree against the wife, was set aside, where the course of dealing with the property in question by the defendant family, was suggestive of and strongly tended to show fraud in anticipation of the decree.—Adams v. Bruske, 135 Mich. 339.

¶ 300. Where one who was considerably indebted caused his real estate to be conveyed to his wife and soon thereafter contracted large debts, representing himself to be still the owner of this real estate, and within a few months failed and made an assignment, but showing assets to less than half the amount of his debts, and there was no explanation of these facts, held, that the settlement upon the wife was fraudulent and void as to the subsequent creditors.—Herschfeldt v. George, 6 Mich. 456.

¶ 301. A conveyance from a mother to her daughter held to be in fraud of the former's creditors, and set aside under §§ 9533, 9537, C. L. 1897, §§ 11417, 11421; How. St., 2nd Ed.—L. Starks Co. v. Eppink, 185 Mich. 233.

¶ 302. A defendant pending suit gave his brother a mortgage which, if valid, would make a judgment against him worthless. It was given ostensibly to secure a debt, the existence of which had been carefully concealed, even from the mortgagor's family, and most of which would be outlawed unless it had been renewed. The supposed debtor had always appeared to be prosperous, and the indications were that the debt would never have been heard of but for the impending judgment. The original evidence of it had been suppressed or destroyed. Held, that the case could not be treated as one in which a brother, for relationship's sake, had refrained from pressing his claims; and that he was not entitled to take precedence over others as a bona fide creditor.—First Nat. Bank of St. Johns v. Tyler, 55 Mich. 297.

§ 63. ——Transfers from one spouse to other.

See also ante ¶ 300.

Transfers from one spouse to other, see ante §§ 47-49.

¶ 303. A conveyance by a husband to his wife will be sustained as against his creditors upon evidence that money earned by her was used under express promise of repayment in purchasing and improving the land conveyed.—Hicks v. McLachlan, 94 Mich. 278.

¶ 304. In a suit brought by a wife to remove the cloud created upon her title to real estate by executions levied by her husband's creditors, she was denied relief on the ground that the deed under which she claimed was in furtherance of fraud upon such creditors; where it appeared that defendants claimed under a sheriff's sale and levy, made to satisfy claims against complainant's husband,

who was a dissipated man and unfit for carrying on business; that prior to his marriage with complainant, he deeded the property to his brother, who paid no money upon such alleged purchase until the night after the deed was redelivered; that the only testimony as to such payment of money was his own, and that his testimony showed inconsistencies; that such brother subsequent to complainant's marriage sold such land to complainant; that subsequently both deeds were recorded; that complainant's testimony as to the money with which she purchased of her husband's brother was evasive and unsatisfactory, but contained the statement that she borrowed it of a relative, who it appeared, was heavily in debt at the time; that complainant did not call upon her husband to testify as to such transactions of which he must have had knowledge.—Barrett v. Lowrey, 77 Mich. 668.

¶ 305. A verdict of fraud on creditors in acquiring a bill of sale of a horse levied on as her husband's property is not supported by evidence that the wife, who took the bill of sale, received money from an estate, part of which she gave her husband for the purchase of such horse, that he paid part of the purchase price in cash, and gave her note, with sureties, for the balance, that she recognized the validity of the transaction, and subsequently paid the note.—Clark v. Phelps, 76 Mich. 564.

¶ 306. On bill in aid of execution a deed by the debtor alleged to be for the purpose of compensating his daughter for her share of her mother's estate which consisted of moneys received and used by the debtor is held to be in fraud of creditors where the evidence shows that the daughter has title to other property purchased by the debtor and deeded to her, and sufficient apparently to cover her claim.—Steuben County Wine Co. v. Lee, 127 Mich. 698.

¶ 307. A conveyance in fraud of creditors is not shown by evidence that the husband mortgaged real estate to his wife to secure a note of approximately its entire value and subsequently deeded the property to her where her money paid for the property and she never voluntarily relinquished her right to it.—Sullivan v. Parkinson, 128 Mich. 527.

¶ 308. A conveyance by a husband to his wife will not be held fraudulent under evidence showing that it was made in pursuance of a proper agreement whereby money was borrowed from a wife by the husband, although conveyances between husband and wife will be carefully scrutinized when attacked by creditors as fraudulent.—Keegan v. Loranger, 118 Mich. 481.

¶ 309. Conveyances of land of value of $4,000 and $2,000 respectively, made by a husband to his wife shortly before his death, cannot be sustained by the husband's receipt of money from his wife thirteen years before when proof thereof rests on her testimony; if she is able to fix the amount no nearer than "two or three hundred dollars."—Felker v. Chubb, 90 Mich. 24.

¶ 310. Evidence showing that the property conveyed by the husband to the wife is worth little more than the homestead and the mortgage lien thereon, that the husband believed the complainant's note had been paid by another before he made the conveyance, and that the conveyance was to repay a bona fide loan testified to by both the husband and the wife is sufficient to affirm a decree dismissing a bill in aid of execution.—Cole v. Cole, 126 Mich. 569.

¶ 311. On a creditor's bill against husband and wife, filed in aid of an execution against the husband, evidence showing a transfer of the land from the husband to the wife, pursuant to a written contract, for a substantial consideration, in connection with other testimony, held to establish that the transaction was free from fraud.—Jewell v. Kelley, 155 Mich. 301.

¶ 312. On a creditor's bill against husband and wife, in aid of an execution against the husband, evidence showing a transfer of personal property by bill of sale from the husband to the wife, which was not required by any contract of long standing and may have been voluntary, together with doubt as to proof of the consideration and its adequacy, held, sufficient to sustain a finding that the transfer was in fraud of creditors.—Jewell v. Kelley, 155 Mich. 301.

¶ 313. Evidence held to support a decree dismissing a bill to cancel a deed executed by defendant judgment debtor to his wife.—Smith v. Tolman, 166 Mich. 651; Robson v. Same, Id.; Carl v. Same, Id.

¶ 314. Upon a review of the evidence, a decree declaring a certain transfer of corporate stock to have been made in fraud of the creditors of the assignor, and holding part of it subject to execution, was affirmed; it appearing that while the money on which part paid stock was issued to the debtor came from his wife, the transferee, yet subsequent payments were made by him.—Franks v. Burns, 110 Mich. 145.

¶ 315. Evidence by the wife alone and contradictory and uncertain as to various details and amounts of items, the husband not being called to testify, held to establish that a conveyance from a debtor to his wife was made for the purpose of placing the property beyond the reach of his creditors, and that the indebtedness to the grantee, if any existed, was so disproportionate to the value of the land as to render the consideration grossly inadequate; and a decree was entered subjecting the property to the claims of creditors.—Case Mfg. Co. v. Perkins, 106 Mich. 349.

¶ 316. Evidence that a deed to an undivided interest in land, executed by a husband to his wife in consideration of the discharge by her of a mortgage covering the whole parcel, was withheld from record for several years, and that the husband, in the meantime, obtained credit by representing himself to be the owner of the interest conveyed to the wife, is insufficient, in the absence of any showing that the wife participated in or had any knowledge of the fraud, to submit the grant to the claims of intervening creditors.—Campbell v. Remaly, 112 Mich. 214.

¶ 317. Where an insolvent debtor deeded to his wife in consideration of a debt he owed her, the fact that notes produced as evidence of loans from the wife to her husband were made as an afterthought would not render the conveyance fraudulent; the debt was independent of the notes, and being clearly proved, the right to payment would not be affected by any weak, foolish or even criminal conduct, in an attempt to sustain the case by manufactured evidence.—Hill v. Bowman, 35 Mich. 191.

¶ 318. Where the indebtedness which constituted the consideration for a debtor's conveyance was satisfactorily established, conveyance was not invalidated even by the evidence that it was from husband to wife, and of all his property, and was secretly made after suit threatened, and not recorded till sometime afterwards, and then only on the grantor's advice, and that there was no change in the possession, but the husband still continued to cultivate and enjoy the land.—Hill v. Bowman, 35 Mich. 191.

¶ 319. Upon a review of the evidence supporting a bill in aid of execution, a conveyance of certain premises by defendant to his wife was held fraudulent and void as against complainant's rights.—Lasher v. Stafford, 30 Mich. 369.

¶ 320. The case made by a bill in aid of execution to reach lands claimed to have been conveyed by the defendant to his wife in fraud of complainant's rights as a creditor was held not sustained by the proofs.—Waldby v. Howell, 30 Mich. 483.

¶ 321. Bare circumstances pointing that way cannot support a conclusion that a transfer to a wife was for the purpose of defeating creditors as against all the direct testimony in the case supporting a conclusion that the transfer was made to the wife in consideration of money advanced by her father to the transferor.—Steel v. DeMay, 102 Mich. 274.

¶ 322. Transfers by husband to wife were sustained on the evidence that they were made upon valuable consideration where the attendant circumstances did not make out fraud.—Miller v. Beadle, 65 Mich. 643; German American Seminary v. Saenger, 66 Mich. 249; Popendick v. Frobenius, 66 Mich. 317.

¶ 323. The evidence in a proceeding in aid of execution did not show that a husband in fraud of his other creditors had conveyed property to his wife for a grossly inadequate consideration under pretense of lawfully making a preference respecting a wife's bona fide debt.—First Nat. Bk. of Lake Linden v. Condon, 122 Mich. 457.

¶ 324. Under Comp. L. 1897, § 10203, putting the burden of proof on the defendant to show a deed without consideration to be bona fide and that the grantor was not insolvent, a conveyance without consideration to the debtor's wife will be set aside where the evidence shows that he had at that time disposed of trust property for which he was indebted to the cestuis, that subsequently he was found indebted to his father's estate to the amount of $50,000 and the debtor himself failed to take the stand to testify in support of the conveyance.—Wilcox v. Hammond, 128 Mich. 516.

¶ 324a. A surety on a promissory note given by a wife for an unpaid balance upon her husband's debt could not, after paying the note, recover against the wife, on a showing that the husband after contracting the debt had conveyed incumbered real estate to her, especially as it did not appear what the value of the property was or the amount of the incumbrance, or that the conveyance was fraudulent as against creditors.—Richards v. Proper, 44 Mich. 96.

§ 64. ——Transfers through intermediaries to family or relative.

Transfers from one spouse to other through agent or intermediary, see ante § 48.

¶ 325. On a bill in aid of execution to set aside as fraudulent against creditors, a transfer by a judgment debtor of his homestead to a third person, who in turn transferred it to debtor and his wife as tenants in common, evidence held sufficient to sustain a finding that debtor was insolvent at the time of the transfer so as to warrant a decree setting aside the transfer.—Rand v. Rodgers, 191 Mich. 465.

¶ 326. A bill in aid of execution attacking a conveyance by a judgment debtor to a third person and a reconveyance to himself and wife as joint tenants is properly dismissed where the evidence shows that the wife loaned the husband $500 twenty years before without any written evidence of debt ever having been taken, that she never received anything on it, that she had no notice of his insolvency at the time of the conveyance but believed it a bona fide conveyance to meet his acknowledged obligation to her.—Ullman v. Thomas, 126 Mich. 61.

§ 65. ——Transfers to business associates.

Transfers for benefit of business associates, see ante § 58.

Transfers to business associates, see ante § 57.

¶ 327. Evidence held sufficient to show that the transfer by the members of a partnership, while the partnership was insolvent, of horses used in delivering goods for a store and equipment, and copies of route sheets bearing names of customers and orders and good-will of the business to a father of one of the partners, an employee of the firm, was for an inadequate consideration, and invalid as against the creditors of the partnership, and merely a cover for the starting of a new business under a new name in a new location.—Rennells v. Potter, 198 Mich. 49.

§ 66. Instructions and jury questions.

Questions of law and fact as to matters not related to specific elements and indicia of fraud, see post § 135.

Instructions not involving specific elements and indicia of fraud, see post § 136.

¶ 328. In a controversy between execution purchasers and the wife of the judgment debtor, claiming under a bill of sale from her husband, instructions to the jury submitting to them for consideration all the facts bearing upon the good faith of the transaction between the husband and wife, and directing them that if from all the evidence they should find the making of the bill of sale was in fact an absolute sale of the property in good faith in payment of a debt due the wife, without any intent to defraud, delay or hinder any of the other creditors of the husband, their verdict should be for the plaintiff, but if they found it was made with intent to hinder, delay or defraud any of his other creditors, they should find for defendant, are held unobjectionable.—Pierce v. Rehfuss, 35 Mich. 53.

¶ 329. Where, on the trial of an action of replevin brought by a wife to recover property seized under an execution against her husband, he testifies that part of the property had belonged to the wife since its original purchase, and that he transferred the remainder to her some years before the trial for a valuable consideration, and said transfer is claimed by the defendant to have been fraudulent as to creditors, it is error to refuse to instruct the jury, on defendant's request, that in determining the question of the wife's ownership of the property they are not bound to accept and believe the husband's statement in reference to the transfer, but should consider, in connection with his evidence, that of defendant's witnesses who have testified as to statements made by the wife with regard to such ownership at the time the levy was made, as well as all the other evidence and circumstances in the case bearing upon the question of ownership.—Warren v. Carpenter, 99 Mich. 287.

¶ 330. It is error to instruct the jury in an action by a wife to recover property seized under an execution against her husband that whether the husband acted right or wrong (in making the transfer) makes no difference with the rights of the wife, and that, if she is entitled to the ownership of the property, their verdict should be for her, notwithstanding anything the husband may have done.—Warren v. Carpenter, 99 Mich. 287.

¶ 331. In trover by a wife for chattels attached by her husband's creditors but of which he had given her a bill of sale, she, to show title, sought to prove that she owned certain land from which she derived sufficient revenue to enable her to make certain loans to her husband, in part satisfaction of which loans the bill of sale was given. Her testimony tended to show that she furnished the money with which the lands were bought; that title was taken in the husband's name, she supposing it should be so taken; and that afterwards, on her learning she could hold title in her own name, he conveyed, with warranty, to her. Held, that the jury should have been instructed that if the husband's deed was given without any intent to defraud his creditors, and did not in fact defraud them when it was executed, it conveyed to her his entire right and title in and to the land whether the land was originally bought with her money or not; that if the land was bought with her money and title placed in her husband's name, and he, recognizing her right, deeded to her at her request, such deed would convey his entire right and title in and to the land acquired by such original conveyance to him, and subsequent creditors of his could not attack the validity of such deed; and that the title acquired by the husband, subsequently to his warranty deed to his wife, by virtue of a deed to cure certain defects in the title to part of the land inured to her benefit because of his warranty.—Jansen v. McQueen, 105 Mich. 199.

¶ 332. Where the good faith of a debtor's transfer of goods is in question the relationship of the parties to the transfer is a fact for the jury, even though the transferee is a creditor.—Hough v. Dickinson, 58 Mich. 89.

¶ 333. Where the defendant in a pending action, in order to prevent the collection of any judgment that might be rendered, had conveyed certain land and personalty to his wife and children, taking in payment their notes which he afterwards destroyed, and where after judgment against him the deed has been recorded and the bill of sale filed, it is a question for the jury whether the papers were intended to pass title to the grantees.—Cole v. Call, 79 Mich. 159.

¶ 334. A man began business on money borrowed from his father shortly before, and although neither had reason to suppose he had made money, the father sold him at par a quantity of worthless railroad stock, took a mortgage on his stock in trade for an

amount that would have nearly exhausted it, and left him in possession to sell the goods in the course of business. The goods were seized on attachment by the son's creditors and the father brought replevin for them. Held, that on those facts the case should have gone to the jury on the question of the good faith of the mortgage.—King v. Hubbell, 42 Mich. 597.

¶ 335. In replevin to recover five cows seized upon execution against plaintiff's husband and his father, where plaintiff testified that the 90 acre farm valued at $3,000 from which the cattle were taken, together with four cattle, was conveyed to her to pay for $300 advanced by her and for services, and in consideration of an agreement to support the father-in-law for life; the question of fraudulent transfer was for the jury.—Kastl v. Arthur, 135 Mich. 278.

¶ 336. Under How. St., § 6206, the question of fraudulent intent in the transfer of property by a husband to his wife is a question of fact and not of law.—Norris v. McCanna, 29 Fed. 757.

E. TRANSFERS TO CREDITORS OR CLAIMANTS.

§ 67. In general.

Right to prefer creditors, see post §§ 68-71.
Applicability of general assignment law, see post § 72.
Preference by retransfer to seller, see post § 73.
Preference by waiving or withholding defense, see post § 74.
Transfers to pay specific claims of creditors, see post § 75.
Transfers or mortgages in trust for specified creditors, see post § 76.
Application of assets to pay secured debts, see post § 77.
Presumptions, burden of proof and evidence, see post §§ 78, 79.
Jury questions and instructions, see post § 80.
Persons against whom fraudulent transfers invalid, see post, II.
Effect between parties and as to third parties not creditors, see post, III.
Rights and liabilities of grantee towards defrauded creditors, see post, IV.
Validity and legality of assignments for creditors, see Assignments for Creditors, §§ 1, 9-16.
Rights of grantee from trustee in bankruptcy as against bankrupt's prior grantee, see Bankruptcy § 7.
Decedent's transfers to defraud creditors, see Estates of Decedents §§ 97-101.

¶ 337. The mere fact that a transfer or series of transfers by a debtor to his creditor will necessarily hinder or delay other creditors, or prevent the collection of their claims, does not render the same fraudulent as a matter of law.—McMorran v. Moore, 113 Mich. 101.

¶ 338. A conveyance made as a preference to a specified creditor is not void for fraud merely because its effect is to hinder, delay and obstruct other creditors; to render it so it must be made with that intent.—Hollister v. Loud, 2 Mich. 309.

§ 68. Right to prefer creditors.

See also ante ¶¶ 98-100.
By mortgage or security, see post § 69.
Inclusion in mortgage of unmatured or contingent obligations, see post § 70.
Right of mortgage creditor to take possession or foreclose, see post § 71.
Applicability of general assignment law, see post § 72.
Right to prefer family or relatives as creditors, see ante §§ 52, 53.
Sufficiency of past consideration, see ante § 39.
Sufficiency of evidence to show right to prefer creditors, see post ¶ 396.
Preferences as making assignments invalid, see Assignments for Creditors § 9.
Preferences within Bankruptcy Act, see Bankruptcy § 8.

¶ 339. A debtor may secure or prefer any debt he pleases.—Gay v. Bidwell, 7 Mich. 519; Voorhies v. Frisbie, 25 Mich. 476; Hill v. Bowman, 35 Mich. 191; Bay City State Bank v. Chapelle, 40 Mich. 447.

¶ 340. A debtor has the right to pay one creditor in preference to another.—Thompson v. Newland, 144 Mich. 595.

¶ 341. Debtors may lawfully prefer any honest creditor by mortgage, or may sell out to him an entire stock of goods to pay the debt.—Whitfield v. Stiles, 57 Mich. 410.

¶ 342. A debtor may always prefer any of his creditors, so long as it is not done with some unlawful or forbidden purpose.—Johnson v. Stellwagen, 67 Mich. 10.

¶ 343. Debtors being permitted to prefer one creditor to another, and to use any of their property in the payment or security of their honest debts in such order as they may select, nothing but a distinct lien upon property can prevail against such disposition.—People v. Bristol, 35 Mich. 28.

¶ 344. A debtor may prefer one creditor to another, and may use any of his property for the purpose of paying or securing debts, in such order as he may select, and nothing but a distinct lien upon the property by a creditor can prevail against such disposition.—Belding Sav. Bank v. Moore, 118 Mich. 150.

¶ 345. A merchant when ill gave a bill of sale of his stock and accounts to B., his indorser and brother-in-law. It was absolute

in form, but the merchant claimed was only to secure him against loss on indorsements, with the understanding that B. should conduct the business until sufficient should be realized to satisfy the indebtedness upon which he was liable, and should then turn the stock back to the merchant, or to the one then entitled thereto. B. having died, his administrator continued the business in the usual way for a time, and then gave a bill of sale of all his right, title, and interest in the stock to W., another creditor of the merchant, in consideration of the payment by W. of the obligations upon which B. was liable and of the debts incurred in the conduct of the business. Held, that if the transfer to W. was intended to pass an absolute title, and the consideration paid was a fair one, other creditors of the merchant could maintain no right to the property, as such a sale was authorized under the bill of sale to B.—Globe Casket Mfg. Co. v. Wolcott, 106 Mich. 151.

¶ 346. Where no assignment for the benefit of creditors, or no transaction amounting to such assignment, exists, a debtor, though insolvent, may pay or secure particular credits.—Sheldon v. Mann, 85 Mich. 265.

§ 69. ——By mortgage or security.

See also ante ¶ 339, post ¶ 401.
Voluntary mortgages, see ante §§ 32, 33.
Effect of notice or knowledge of mortgagee, see ante § 25.
Notice or knowledge of transferee as affecting transfers in payment of debts, see ante § 24.

¶ 347. An insolvent debtor may prefer one or more of his creditors by mortgage security, and if security is the object it is immaterial whether the effect of giving it is to prevent other creditors from realizing on their claims.—Wood v. Eldredge, 147 Mich. 554.

¶ 348. A debtor, although insolvent, may secure a creditor for the payment of a preexisting debt by a mortgage upon all of his property, although he may have numerous creditors who are unsecured.—Warner v. Littlefield, 89 Mich. 329.

¶ 349. Neither the fact of the debtor's insolvency nor the knowledge on the part of the mortgagee of such fact will defeat or impair a mortgage security taken for an honest debt.—Warner v. Littlefield, 89 Mich. 329.

¶ 350. A creditor who obtains in good faith a security for an honest debt can hold it against any subsequent claim to attack it.—Root v. Potter, 59 Mich. 498.

¶ 351. A debtor has a right to mortgage all his property to secure previous bona fide debts and future advances.—Armstrong v. Cook, 95 Mich. 257.

¶ 352. Parties who take security from persons indebted to others must act in good faith, and so as not unnecessarily to hinder, delay or deceive other creditors.—Showman v. Lee, 86 Mich. 556.

¶ 353. A mortgage is not fraudulent that is taken, without fraudulent intent, to secure no more than the mortgagor's actual debt.—Adams v. Niemann, 46 Mich. 135.

¶ 354. A mortgage given to secure a bona fide indebtedness upon which the mortgagor was liable as surety is not rendered fraudulent by the fact that it was within the contemplation of the parties that a preference might be gained over other creditors of the mortgagor in the enforcement of their demands if an insolvency should ensue.—Webber v. Webber, 109 Mich. 147.

¶ 355. A chattel mortgage in fraud of an execution creditor is nevertheless valid if given to secure an honest debt and taken in good faith, unless the mortgagee shares the fraudulent intent.—Andrews v. Fillmore, 46 Mich. 315.

¶ 356. A chattel mortgage by a corporation contemplating assignment, made to secure a bona fide indebtedness to a creditor who did not know an assignment was intended, is valid.—Dwight v. Scranton & Watson Lumber Co., 67 Mich. 507.

¶ 357. A mortgage executed by a debtor to secure his creditor for his debt, and also to secure a debt due another creditor, which the mortgagee agrees to pay, is not in fraud of other creditors.—Harrington v. Upton, 78 Mich. 28.

¶ 358. One may extend credit to a person who is largely indebted to him and to others, and may secure his debt by taking a mortgage in preference to other creditors; and it is not a badge of fraud to do so.—Ferris v. McQueen, 94 Mich. 367.

¶ 359. A debtor has a right to give security upon property to be by him afterwards acquired in the course of business.—Preston National Bank v. Smith Middlings Purifier Co., 84 Mich. 364.

¶ 360. By surrendering a note given for the purchase-price of sheep, and taking in its stead a mortgage which contains an express promise of payment, one does not cease to be a bona fide creditor.—Wright v. Starks, 77 Mich. 221.

§ 70. ——Inclusion in mortgage of unmatured or contingent obligations.

¶ 361. Where a chattel mortgage given to secure existing indebtedness, the larger part of which is not due, provides for the payment of the indebtedness at maturity, and there is nothing on the face of the mortgage conferring any power of sale before that

time, a parol arrangement, existing at the time the mortgage is given, conferring such power, will be merged in the mortgage; and while such an arrangement, if afterwards made, may tend to show collusion, it will not, as matter of law, become a part of the mortgage, and destroy its validity.—Oshkosh Nat. Bank v. First Nat. Bank, 100 Mich. 485.

¶ 362. Where A. was indebted to plaintiff in $15,000 for cash advanced, and plaintiff was liable, also, as indorser and accommodation acceptor for A. in $22,000, and for a firm composed of A. and another in $104,000; and A., being in failing circumstances, sold to plaintiff certain personal property in satisfaction of the $15,000, and, at the same time, conveyed to him certain real estate by deed for the consideration of $45,000, and took back a mortgage, conditioned for the payment of $45,000 by plaintiff, by the extinguishment of that amount of the liabilities for which plaintiff was so holden, and, in case such liabilities should be taken up by A. or by said firm, then for the payment of that amount to A. within five years; and there was nothing in the evidence to show that the sums mentioned as the consideration for such transfers were less than the value of the property, and no evidence of actual fraud in making them, held, that these transfers were not void, as tending to hinder, delay or defraud the other creditors of A.—Hubbard v. Taylor, 5 Mich. 155.

§ 71. ——Right of mortgage creditor to take possession or foreclose.

¶ 363. Foreclosing for a very small sum a mortgage that has been almost wholly paid is not, of itself, a badge of fraud.—Hyde v. Shank, 93 Mich. 535.

¶ 364. The fact that chattel mortgagees took possession within a few days after the execution of the mortgage is not of itself a badge of fraud, as diligent and honest creditors may take this course to secure their debts.—Pierce v. Johnson, 93 Mich. 125.

¶ 365. The failure of a mortgagee of a stock of liquors to foreclose the mortgage by advertisement, and his permitting the mortgagor to sell the liquors at private sale, and account to him for the proceeds, will not render the mortgage void as against an attaching creditor, but the mortgagee will be held liable to account for the surplus, if any, arising from such sales to those holding subsequent liens on the property.—Anderson v. Cook, 100 Mich. 621.

§ 72. ——Applicability of general assignment law.

See also post ¶ 383.

Transfer back to grantor or seller as badge of fraud, see ante § 13.

Transfers regarded as common law assignments, see Assignments for Creditors §§ 11, 12.

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Invalidity of preferential assignments and operation of such as common law assignments, see Assignments for Creditors § 9 et seq.

¶ 366. How. St. § 8739, forbidding preferences in general assignments for creditors, does not avoid honest transfers or securities that are not in themselves general assignments.—Rollins v. Van Baalen, 56 Mich. 610; Neumann v. Calumet & Hecla Mining Co., 57 Mich. 97; Funke v. Cone, 65 Mich. 581.

¶ 367. An instrument securing a single creditor out of several, on property which by its terms can be disposed of only to pay the secured debt, is an equitable mortgage, and not an assignment for the benefit of creditors, and can be avoided only for actual fraud.—Parsell v. Thayer, 39 Mich. 467.

§ 73. Preference by retransfer to seller of property not paid for.

¶ 368. A stock of goods was sold under a contract giving the purchaser possession but providing that the vendor should retain title to the stock and additions until paid for, which contract was not recorded. Upon default the stock was turned over to the vendor. In a suit to subject the stock to claims of creditors of the vendee, held that if the goods were turned over to the vendor in good faith in satisfaction of the contract and their value did not so greatly exceed the amount of his claim as to show fraud, the creditors of the vendee could not complain.—Greene v. Williams, 131 Mich. 46.

¶ 369. Creditors of the vendee cannot complain of a reconveyance of the property to satisfy a vendor's lien thereon for the full amount of the purchase price.—Lyon v. Clark, 132 Mich. 521.

§ 74. Preference by waiving or withholding defense.

¶ 370. A debtor may waive the statute of limitations as to a particular creditor, and other creditors cannot complain.—Brigham v. Fawcett, 42 Mich. 542.

§ 75. Transfers to pay specific claims of creditors.

Sufficiency of past consideration, see ante § 39.

Transfers or mortgages in trust for benefit of specified creditors, see post § 76.

¶ 371. Where a corporation, being financially embarrassed, executed a deed to its real estate for a fair consideration in order to obtain money to pay the claims of specified creditors, such conveyance was not in fraud of other existing creditors.—Haight v. Smith, 178 Mich. 392.

¶ 372. Where property goes to pay an honest debt, that use of it is lawful, although it may cut off the redress of all others, and although intended to do so.—Nichols v. Bancroft, 74 Mich. 191.

¶ 373. The use of property for the payment of a debt is lawful, even though intended to cut off the redress of all other creditors.—Jordan v. White, 38 Mich. 253.

¶ 374. A sale by a debtor to a creditor in payment of a debt is to be considered as a whole; and if there is a balance due the debtor for which the purchaser gives his notes, it is not for that reason alone to be set aside to that extent in favor of other creditors.—Beurmann v. Van Buren, 44 Mich. 496.

¶ 375. A purchase of goods from a debtor, with the sole purpose of obtaining payment of an honest debt, does not make the sale void as to other creditors, even though the debtor intended thereby to hinder or defraud them, if the purchaser did not share his fraudulent intent.—Beurmann v. Van Buren, 44 Mich. 496.

¶ 376. A sale by a debtor of attached property subject to the attachment, in payment of a debt due the vendee, is valid—if made in good faith and with intent that it take immediate effect—as against a subsequent attachment made before the delivery of the property.—Hauser v. Beaty, 93 Mich. 499.

¶ 377. In replevin of property taken upon an execution levy, where plaintiff claimed that the property was turned over to her in payment of a loan made by her to the judgment debtor, and that a bill of sale was given to her, and where the court found that plaintiff had no knowledge of any debts other than her own, it was error to refuse to pass upon the question of the loan, the surrender of the property, and the execution and delivery of the bill of sale.—Morse v. Velzy, 123 Mich. 532.

¶ 378. A judgment for the defendant in replevin of property taken under an execution levy will not be sustained, where it appears that the judgment debtor who was indebted to plaintiff upon his note and unable to pay at maturity, turned over the replevied property to her in payment and executed and delivered a bill of sale, upon a surrender of the note.—Morse v. Velzy, 123 Mich. 532.

¶ 379. A sale of cordwood wherein the consideration was to be paid to certain creditors of the seller is not one made with the intent to hinder, delay, and defraud creditors, and void under Comp. L. 1897, § 9533, even though the arrangement did not provide for the payment of all the creditors, when there was no evidence to show fraud, nor that the price was not a fair one, nor that the debts secured were not bona fide debts.—Thompson v. Newland, 144 Mich. 595.

§ 76. Transfers or mortgages in trust for benefit of specified creditors.

Transfers on trust for debtor, see post I, F.

Presumptions relative to transfers in trust for benefit of specified creditors, see post ¶ 392.

Transfers in trust for benefit of secured creditors, see post ¶ 390.

Right of voluntary assignee for creditors to question acts of debtor, see post § 109.

Nature, purposes and validity of trusts in general, see Trusts, I.

Validity of transfer in trust to sell for specified creditors where trustee authorized to rent property, see Trusts, I.

¶ 380. A conveyance in trust to sell for the benefit of specified creditors is authorized by Comp. L. 1897, § 8839, and it is not sufficient reason to set it aside that its effect is to hinder and delay other creditors.—Geer v. Traders' Bank of Canada, 132 Mich. 215.

¶ 381. A trustee for the benefit of a single creditor can sell on credit with the assignor's consent, so long as no creditor has obtained a lien on the property.—State Bank of Bay City v. Chapelle, 40 Mich. 447.

¶ 382. A transfer to a trustee for creditors absolute in terms and empowering him to carry on a lumbering business, and not amounting to a mortgage though expressed to be for security, is a fraud on creditors, within the rule of Kendall v. Bishop, 76 Mich. 634; and is therefore subject to attachment.—Pettibone v. Byrne, 97 Mich. 85.

¶ 383. A debtor conveyed a specific portion of his real estate to trustees to pay certain debts. A transferee of some of the creditors protected thereby attached the property, and the trustees filed a bill to quiet their title as against his levy. Held, that the conveyance was not a general assignment, and as such subject to the rules which determine that a general assignment is fraudulent in not conveying all the debtor's property or securing all his creditors or in withholding a part of it for his own benefit.—Palmer v. Mason, 42 Mich. 146.

¶ 384. An instrument which, as between the parties does not convey an absolute title, but merely a transfer in trust to secure certain debts does not do so as against other creditors, and the latter may reach the equity of redemption.—Austin v. First Nat. Bank, 100 Mich. 613.

¶ 385. Where without intent to defraud one has taken from an insolvent debtor an assignment in trust for purpose of paying certain creditors, which operates to delay creditors, but where he has acted in good faith and with the acquiescence of complainants, he should only be charged on the accounting with what he has received from the assigned property, although any specific article which by any gross neglect of duty on his part he may have lost, should be charged to him.—Cutcheon v. Corbitt, 99 Mich. 578.

¶ 386. A brother's transfer to another of all his property, the sole consideration being that the grantee should pay the grantor's

debts to certain persons, making no provision for paying a note held against him by their mother, is fraudulent and void.—Nugent v. Goldsmith, 59 Mich. 593.

¶ 387. That a chattel mortgage is given to a trustee to secure demands in favor of several creditors, instead of being given to the creditors themselves, and that it contains a provision that the trustee shall be liable in the premises for his own neglect or default only, are matters to be taken into account in determining the question of fraud, but they do not render the instrument fraudulent in law.—Bagg v. Jerome, 7 Mich. 145.

¶ 388. Execution sale against the assignor for benefit of creditors passes no title, where at the time the deed of assignment had been accepted and the legal title vested in the assignees although they disclaimed any interest in the lands and never executed the trust devolved on them; and accordingly the purchaser has no standing to assail as a cloud on title conveyances by the assignees and the trust deed to them.—Wolf v. O'Connor, 83 Mich. 301, reversed on rehearing, 88 Mich. 124, on the ground that fraudulent preference appeared on the face of the assignment by reason of which the execution sale passed a good title to the purchaser and which title he conveyed to others, and thence to complainant.

¶ 389. A chattel mortgage on personal property of a manufacturer given to a trustee, conveying substantially all the mortgagor's property, and reciting that it was given for the benefit only of those creditors but not less than 50% who accepted the security within sixty days, and extended the time of the payment of their several debts, and if the maker paid the creditors within the time it was to be void, and in default thereof the trustee was authorized to foreclose and sell the property to satisfy the creditors who accepted and pay the surplus to the mortgagor, is fraudulent in that it hindered and delayed creditors where the object of the scheme was to give the maker a year in which to operate its business without annoyance from its creditors and it retained absolute control of all its receipts without any obligation to pay any creditor during the time of the extension, and where there were insufficient funds to pay those creditors who had accepted.—Wood v. Eldredge, 147 Mich. 554.

§ 77. Application of assets to payment of secured debts.

See also post ¶ 397.

¶ 390. An unsecured creditor cannot complain that moneys in the hands of a trustee for creditors secured by a mortgage were applied to the payment of a fraudulent claim, where the total amount coming to the possession of the trustee was insufficient to pay the valid claims so secured.—Krementz v. Howard, 109 Mich. 466.

¶ 391. Unsecured creditors of an insolvent are not hindered by application of assets of the debtor by the secured creditors to the payment of an invalid claim, where the total assets were insufficient in any event to satisfy the valid secured claims.—Burrows v. Leech, 116 Mich. 32.

§ 78. Presumptions and burden of proof.

Presumptions and burden of proof as to matters not related to specific elements and indicia of fraud, see post § 132.

¶ 392. A conveyance in trust to sell for the benefit of specified creditors as authorized by Comp. L. 1897, § 8839, is presumed to be valid and courts will ascribe to parties thereto, an honest rather than an unlawful purpose.—Geer v. Traders' Bank of Canada, 132 Mich. 215.

¶ 393. In order to destroy the validity of a deed claimed to have been executed to pay an honest debt, the court must not only be satisfied that the deed was made with intent to hinder, delay or to defraud creditors, but that the deed was not actually made to pay a debt justly due; and the burden of proof is on one who seeks to avoid the deed.—Nichols v. Bancroft, 74 Mich. 191.

§ 79. Admissibility and sufficiency of evidence.

Admissibility of evidence relative to matters other than specific elements and indicia of fraud, see post § 133.

Weight and sufficiency of evidence as to matters not related to specific elements and indicia of fraud, see post § 134.

¶ 394. Evidence is admissible of the motives of the officers of an insolvent corporation in making an assignment for creditors.—Covert v. Rogers, 38 Mich. 363.

¶ 395. On a review of the testimony an assignment of certain mortgages by an insolvent debtor was held not fraudulent, being designed to secure the assignee as an indorser, attendant acts otherwise suspicious being satisfactorily explained.—Bostwick v. Benjamin, 63 Mich. 289.

¶ 396. Testimony in a creditor's bill upon a judgment does not show collusion but merely the exercise of a debtor's privilege to prefer creditors; where the debtor obtained repeated continuances of the law case upon promises to make payment, and where a day previous to the entry of judgment, a corporation was formed into which the assets of the debtor went, in consideration of stock, and where he immediately turned over such stock to a creditor other than the plaintiff, as collateral security, and otherwise disposed of the remainder.—Scripps v. Crawford, 123 Mich. 173.

¶ 397. Evidence of the invalidity of a single claim sought to be secured with other valid claims by a mortgage executed by an insolvent is insufficient to show an intent to defraud unsecured creditors, where the

amount of the invalid claim is trifling in proportion to the whole amount secured, and where the valid secured claims will exhaust the security.—Burrows v. Leech, 116 Mich. 32.

¶ 398. It is not necessarily an evidence of fraud that the parties to a chattel mortgage consent to the mortgagee's selling the property before the debt is due.—Oshkosh Nat. Bank v. First Nat. Bank, 100 Mich. 485.

¶ 399. Preconceived fraud on a seller of goods to a firm consisting in a purpose of buying them and then absorbing them in payment for an old debt, does not appear on testimony that a mortgage claimed to have been fraudulent was to secure in part a loan of funds which went into the stock in the form of goods, that the firm was then solvent and borrowed more money from the mortgagee, that a new partner failed to make his agreed contribution and was bought out, that a further loan was made by the mortgagee to provide funds for so doing and to return to the outgoing partner what he had put in, and to purchase more stock, and that thereafter when the business did not prosper the lender demanded security and was given the mortgage, the sale having been made after the second loan.—Ross v. Miner, 101 Mich. 1.

¶ 400. Where, in garnishment proceedings against a trustee, to whom a firm with which he had formerly been connected had mortgaged its entire stock of goods, books of account, credits, etc., to secure certain specified creditors, the testimony tends to show that the mortgagee had, after severing his connection with the mortgagors, kept some track of their business; that when he took the mortgage he went through the form of taking possession, but continued the mortgagors in actual charge of the business; that he subsequently sold the mortgaged property and bid it in in form, but that the mortgagors continued in possession; and that in taking the mortgage he assumed to act as trustee for certain creditors, who did not appear to have been present—the jury may well find that the trustee would, as a reasonably prudent man, before assuming to act as trustee, inform himself as to the state of said creditors' claims by reference to the books of the mortgagors, especially in view of his previous knowledge of their business, and, if the books tend to show that no such indebtedness as that claimed to exist in favor of a portion of said creditors was ever created, they are competent evidence as showing a fraudulent intent on the part of the mortgagors in executing the mortgage, and some evidence of mala fides on the part of the mortgagee.—Cluett v. Rosenthal, 100 Mich. 193.

§ 80. Questions for jury and instructions.

Questions of law and fact as to matters not related to specific elements and indicia of fraud, see post § 135.

Instructions not involving specific elements and indicia of fraud, see post § 136.

¶ 401. It is error to charge that a mortgage given for a precedent debt is not a bona fide incumbrance as against other creditors; since a debtor may always give a bona fide security for existing debts.—Wright v. Towle, 67 Mich. 255.

¶ 402. A debtor executed a chattel mortgage, absolute on its face, to a party to whom he was not indebted, for the aggregate amount actually due several of his creditors, and received from the mortgagee an agreement containing a list of said creditors, with the amount due each, and conditioned for the payment of said creditors on the payment to the mortgagee of the amount of the mortgage, or, if only paid in part, then for their pro rata payment. Held, that the two papers should be taken together as showing the entire transaction, which was not fraudulent as to other creditors, if entered into with a bona fide intent to pay the creditors named; and that question was for the jury.—Gore v. Ray, 73 Mich. 385.

¶ 403. In a case involving the validity of the sale of goods to a mortgagee thereof in payment of a debt, the questions whether the mortgage debt had been discharged and whether the note had been given up and canceled, should have been properly submitted to the jury.—Heaton v. Nelson, 74 Mich. 199.

¶ 404. In trover by a vendee against an officer who levied upon the goods under an attachment by the vendor's creditors, plaintiff's request for an instruction that he is entitled to a verdict if the jury finds the vendor's purpose in making the sale was to raise money to pay his creditors and not to defraud them, should be granted where there is evidence to support that theory.—Bendetson v. Moody, 100 Mich. 553.

F. TRANSFERS ON TRUST FOR DEBTOR OR RESERVING BENEFITS OR POSSESSION.

§ 81. Transfers on trust to protect debtor.

Effect of reserved benefits, see post § 82.
Chattel mortgages reserving to debtor right of disposal, see post § 83.
Necessity for delivery and change of possession, see post §§ 84, 85.
Presumptions, burden of proof and evidence, see post §§ 86, 87.
Jury questions and instructions, see post § 88.
Transfers or mortgages in trust for benefit of specified creditors, see ante § 76.
Persons against whom fraudulent transfers invalid, see post II.
Effect between parties and as to third parties not creditors, see post III.
Rights and liabilities of grantee towards defrauded creditors, see post IV.
Invalidity as to creditors of transfers of personalty made in trust for use of person making same, see Comp. L. 1915, § 11980.

¶ 405. All transfers made in trust for the use of the grantor are void as against creditors, under How. St. § 6184, one reason being that the property is thus put beyond the reach of process; and a mortgage or conveyance in trust, which authorizes the trustee to take possession of the property and to continue the business, which gives him power to manage and dispose of the surplus, and which puts the property beyond the reach of creditors, is void as to those creditors who do not accept the benefits of the trust.—Kendall v. Bishop, 76 Mich. 634; Pettibone v. Byrne, 97 Mich. 85.

¶ 406. A deed to a third person for the purpose of protecting the property against a creditor of the real purchaser is void as a fraudulent conveyance under Comp. L. 1871, § 146, which is merely declaratory of the common law.—Baker v. Humphrey, 101 U. S. 494, 25 L. ed. 1065.

§ 82. Effect of reserved benefits.

Chattel mortgages reserving to debtor right of disposal, see post § 83.
Necessity for delivery and change of possession, see post §§ 84, 85.
Conveyances reserving power of revocation, see Comp. L. 1915, §§ 11972-11974.

¶ 407. Judgment creditors may, on bill in aid of execution, have a decree avoiding a deed from their debtor to a third person by which his property is withdrawn to provide for himself and his family.—Pursel v. Armstrong, 37 Mich. 326.

¶ 408. A quitclaim deed from husband to wife executed during the grantor's illness, and reserving the use of the land during his life, was apparently intended to operate as a will, was not clearly proved to have been delivered, and by a mutual understanding was kept from record for nearly ten years, and until the grantor's insolvency. Held, that it should be set aside in favor of the creditor whose dealings with the grantor antedated the deed.—Fetters v. Duvernois, 73 Mich. 481.

§ 83. Chattel mortgages reserving to debtor right of disposal.

See also post ¶ 450.
Validity of mortgage between parties, see also post ¶ 493.
Effect of unfiled chattel mortgages or mortgages without notice or change of possession or fraudulent mortgages, see Chattel Mortgages, I, D.

¶ 409. A mortgage of a stock of goods is not void as against the mortgagor's creditors because it covers after-acquired goods, and permits the mortgagor to sell in the usual course of trade and apply the proceeds to his own use.—Louden v. Vinton, 108 Mich. 313; Huellmantel v. Vinton, 116 Mich. 621.

¶ 410. Where it was shown that the mortgagee of a stock of goods left the same in the hands of the mortgagor, with power to sell and dispose of the same in the usual course of business, for cash or upon credit, and the mortgagor applied the proceeds of sales in the purchase of other goods to keep up the stock, in the support of himself, and in paying other debts than that secured by the mortgage—the mortgagee not asserting a right to the possession of the property, or the specific proceeds of the sale thereof, or preventing or prohibiting such sales—these facts do not render the mortgage absolutely void in law as against the creditors of the mortgagor.—Oliver v. Eaton, 7 Mich. 108.

¶ 411. Being good between the parties, a chattel mortgage which leaves the mortgagor in possession and by inference authorizes him to sell in the usual course of business could not be fraudulent on its face as against creditors, since it would not show that there are any creditors, or, if it did, it would not appear but that they had assented to it, or were themselves sufficiently secured.—Gay v. Bidwell, 7 Mich. 519.

§ 84. Necessity for delivery and change of possession.

Goods not in possession of debtor, see post § 85.
Effect of collection of rents by the grantor with later accounting to grantee therefor, see also ante ¶ 202.
Debtor in control and possession after transfer to members of family, see also ante ¶ 195.
Presumption as to nature of transfer where no change of possession, see also ante ¶ 109.
Burden of proof as to good faith on sale not accompanied by change of possession, see also post ¶¶ 418, 420-424.
Sufficiency of evidence as to change of possession, see post ¶ 428.
Evidence admissible to show change of delivery, see post ¶ 429.
Instructions as to necessity for delivery and change of possession, see post ¶¶ 431, 432.
Fraud arising from want of delivery as question for jury, see post ¶¶ 433, 434.
Retaining possession as evidence of fraud, see also ante ¶ 318.
Sufficiency of change of possession from husband as owner to husband as agent of wife as transferee, see also ante ¶¶ 280, 288.
Possession as notice of title or claim of possessor of land, see Notice and Record of Title, I.
Necessity and sufficiency of change of possession under unfiled chattel mortgage as against other creditors and subsequent purchasers, see Chattel Mortgages, I, D.
Sales presumed fraudulent for want of immediate delivery and change of possession, see Comp. L. 1915, § 11985.

¶ 412. Comp. L. 1897, § 9520, making every sale of goods unaccompanied by delivery and change of possession, fraudulent as against the vendor's creditors, applies to all creditors

whether they became such before or after the sale.—Williams v. Brown, 137 Mich. 569.

¶ 413. In a sale of personalty, where there is no immediate delivery followed by actual and continued change of possession, a fraudulent intent on the vendor's part, though not participated in by the vendee, avoids the sale as to creditors of the vendor.—Kipp v. Lamoreaux, 81 Mich. 299.

¶ 414. The fact that an engagement of marriage exists between vendor and vendee of personalty does not take the case out of the general rule that a sale of personalty, where there is no immediate delivery followed by actual and continued change of possession, is avoided by the vendor's fraudulent intent though not participated in by the vendee.—Kipp v. Lamoreaux, 81 Mich. 299.

¶ 415. A tenant on shares under an oral lease gave a chattel mortgage upon his half of the stock to his landlord, who owned the other half. Being heavily indebted to others he afterwards conveyed the whole to his landlord for the amount of his mortgage and gave up the lease. The landlord then leased the farm to the tenant's wife on the same terms, sold her the half interest in the stock for the amount of the old mortgage, and took her own mortgage, payable in a year, for the same amount. There was no change of possession and the property was worth more than the mortgage. Held, that the transaction was capable of a fraudulent meaning, and that if the landlord entered into it with any complicity, or any reason to suppose it so designed, he could not cut off any rights of creditors by the shifting of tenants. And if the wife obtained property by fraudulent contrivance with her husband, it could not be protected if the husband continued to be the real tenant and manager, even though the landlord had no complicity in the transaction. —Richardson v. Coddington, 49 Mich. 1.

§ 85. ——Goods not in possession of debtor.

¶ 416. A sale of chattels by a debtor cannot be impeached for want of delivery if they are already under the purchaser's control, as, e. g., where the debtor is the purchaser's son-in-law and is indebted to him, and the chattels are in a building belonging to the purchaser's wife and to which he has the key.—Edwards v. Edwards, 54 Mich. 347.

¶ 417. Where, pursuant to an agreement of sale made on Sunday, delivery is made on Monday of the goods, which are then wrongfully attached by the vendor's creditors, a bill of sale to the vendee executed by the vendor while the goods are in the officer's possession is not fraudulent as to creditors because not followed by delivery.—Aspell v. Hosbein, 98 Mich. 117.

§ 86. Presumptions and burden of proof.

See also post ¶¶ 587, 592.

Presumptions and burden of proof as to matters not related to specific elements and indicia of fraud, see post § 132.

Presumption as to nature of transfer where no change of possession, see also ante ¶ 109.

¶ 418. That a sale is not accompanied by an actual and immediate change of possession merely has the effect of casting upon vendee the burden of showing the good faith of the transfer (How. St. § 6190).—Hopkins v. Bishop, 91 Mich. 328; Hauser v. Beaty, 93 Mich. 499.

¶ 419. How. St. § 6190, casting upon the purchaser of personal property, who permits the same to remain in the possession of the seller, the burden of showing, as against creditors, not only his own good faith, but the good faith of the seller, does not apply to a transfer of property as security.—Canfield v. W. J. Gould & Co., 115 Mich. 461.

¶ 420. Where the vendor of personalty retains possession, the vendee has the burden of showing that the sale was in good faith and without any intent to defraud the vendor's creditors; and refusal so to instruct the jury is error.—Clark v. Lee, 78 Mich. 221; Kipp v. Lamoreaux, 81 Mich. 299; Hopkins v. Bishop, 91 Mich. 328.

¶ 421. A sale of a buggy on credit, to be settled on balancing accounts, the buyer knowing an execution to be out against the seller, there being no memorandum or change of possession, held to be presumably fraudulent.—Webster v. Bailey, 40 Mich. 641.

¶ 422. A sale may be good as between the parties but not as against creditors, either upon proof of an actual intent to hinder, delay or defraud them, or upon the statutory presumption of such intent, where the requisite delivery and change of the possession are wanting.—Hatch v. Fowler, 28 Mich. 205.

¶ 423. From the burden of showing, where possession is retained, that the sale of personal property was made in good faith and without intent to defraud creditors, the wife or husband who is a purchaser from the other is not exempt.—Kipp v. Lamoreaux, 81 Mich. 299.

¶ 424. Where a sale of personal property, followed by an actual change of possession, is attacked as fraudulent as to creditors, the burden of proof is upon the attacking party to establish such fact.—Kipp v. Lamoreaux, 81 Mich. 299.

¶ 425. Creditors seeking to levy on property cannot be required to call hostile witnesses to show the nature of a possession under which it is held, when the case prima facie requires explanation from the other party.—Haynes v. Leppig, 40 Mich. 602.

¶ 426. A son selling a stock of goods to his father, giving him the store door key, and instructing the clerk that the older man

was thenceforth proprietor, and, following this, the father, being no merchant, hiring the son to run the business for him and returning the key to him a few days after receiving it, so that, to all appearances, the business is that of the son just as before, are facts which, if proved, notwithstanding these appearances, make out a sufficient immediate delivery to satisfy the law; but, in case the goods are attached by the sheriff for the son's debt and they are replevied by the father, the latter has the burden of proving that the sale was an honest one, provided his possession was not actual and continuous throughout from the time of his receiving the key.—Hopkins v. Bishop, 91 Mich. 328.

¶ 427. A sale made by a debtor and not accompanied by immediate delivery is only prima facie fraudulent as against his creditors, and not conclusively so.—Molitor v. Robinson, 40 Mich. 200.

§ 87. Admissibility and sufficiency of evidence.

Admissibility of evidence relative to matters other than specific elements and indicia of fraud, see post § 133.

Weight and sufficiency of evidence as to matters not related to specific elements and indicia of fraud, see post § 134.

¶ 428. Whether there was a change of possession must be determined from the circumstances upon a fair preponderance, where a gift of a driving horse by a husband to his wife is attacked as fictitious.—Davis v. Zimmerman, 40 Mich. 24.

¶ 429. Writings by which a chattel mortgagee and mortgagor agreed that the mortgagee might take immediate possession of all the property covered, are admissible for the mortgagee suing an execution creditor for conversion by levying on them as fraudulently conveyed.—Ganong v. Green, 71 Mich. 1.

¶ 430. The plaintiff brewing company was a creditor of one Carrel, a hotel and saloonkeeper, to the extent of $1,500. Plaintiff took from Carrel a bill of sale of the stock of liquor and cigars and the furnishings in his hotel, and made an agreement by which Carrel might buy back the same at the rate of thirty dollars a month. The bill of sale was not recorded, and the goods were left in Carrel's possession. For many years plaintiff and Carrel had occupied intimate relations. Judgment creditors of Carrel levied on the goods in question, and plaintiff sued the defendant sheriff in replevin. Held, the jury was justified in finding the said sale was in fraud of creditors, under Comp. Laws 1897, §§ 9520, 9521, making such a transaction presumptively fraudulent.—Grand Rapids Brewing Co. v. Pettis, 159 Mich. 679.

§ 88. Jury questions and instructions.

See also ante ¶ 420.

Questions of law and fact as to matters not related to specific elements and indicia of fraud, see post § 135.

Instructions not involving specific elements and indicia of fraud, see post § 136.

¶ 431. In a replevin suit turning on the question whether an alleged sale from an attachment debtor to the plaintiffs had been completed, it was error to refuse to charge that if the sale was made but the property left with the debtor, who acted with and treated it as his own, the sale would be deemed fraudulent and void as against his creditors; this rule is established by Comp. L. 1871, § 4703, How. St., § 6190.—Hatch v. Fowler, 28 Mich. 205.

¶ 432. An instruction in an action of trover brought by a wife for property attached by her husband's creditors five days after he had executed to her a bill of sale of the property, that if there was no immediate delivery of the property, and no actual and continued change of possession, the burden of proof was upon plaintiff to show that the sale was made in good faith and without intent to defraud creditors, is not open to the objection that the jury must have understood that what was meant by the expression "immediate delivery" was "instantaneous delivery"; the testimony tending to show that, for two days after the execution of the bill of sale, the husband continued to care for the property, and on the third day left for another state, leaving his son in charge of the property, and that on the third day, while the son was using the property for his father in his business, a portion of the indebtedness for which the property was attached was contracted, under circumstances tending strongly to show that the husband could not reasonably have expected to pay for the goods thus obtained.—Jansen v. McQueen, 105 Mich. 199.

¶ 433. The question of fraud arising from a want of delivery and a continued change of possession of goods sold or assigned by way of security was, under R. S. 1838, p. 382, § 4, a question of fact.—Jackson v. Dean, 1 D. 519.

¶ 434. A contract by which A. is to work for B. in the sale of merchandise in the store formerly occupied by A., taking charge of the business, being accountable for all bad debts, to have all the profits over and above ten per cent, and to give up the store and goods whenever required, is not necessarily fraudulent on its face as against creditors, but the question of fraud is for the jury, and would depend on the evidence outside the instrument itself.—Snook v. Davis, 6 Mich. 156.

II. AGAINST WHOM INVALID.

A. EXISTING AND SUBSEQUENT CREDITORS.

§ 89. In general.

Voidable character of fraudulent transfers, see post § 90.

Validity as to existing creditors, see post §§ 91, 92.
Validity as to junior incumbrancers, see post § 93.
Validity as to subsequent creditors, see post §§ 94-96.
Claimants regarded as creditors, see post § 97.
Diligence and laches and reduction of debt to judgment, see post II, B.
Effect between parties and as to third persons not creditors, see post III.
Rights and liabilities of grantee towards defrauded creditors, see post IV.
Remedies of creditors, see post V.
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Priority of rights of creditors over assignee in bankruptcy, see also post ¶ 524.
Public policy as to contracts contemplating fraud or imposition on third persons, see Contracts §§ 70-72.
Persons entitled to complain of preference or hindrance or fraud in assignment, see Assignments for Creditors § 34.
Invalidity of conveyances made to hinder, delay, or defraud creditors, see Comp. L. 1915, § 11998.
Statutory definition of "creditors," see Comp. L. 1915, § 11985.

¶ 435. A voluntary mortgage is fraudulent only as to those who are or may be defrauded by it.—Brigham v. Brown, 44 Mich. 59.

¶ 436. A transfer of property in fraud of creditors is not open to attack by any other creditors than those whom the debtor meant to avoid.—Hall v. Moriarty, 57 Mich. 345.

¶ 437. While conveyances made in fraud of creditors are valid as between the parties themselves, they are absolutely void as to creditors, and as to them it is immaterial whether the grantee paid any consideration or not.—Morley Bros. v. Stringer, 133 Mich. 690.

¶ 438. Transfers made to defendant by a person since deceased with the purpose of defeating his creditors and of saving his estate to himself are void as to the creditors. —Howd v. Breckenridge, 97 Mich. 65.

¶ 439. The obligee in an appeal bond by which the surety becomes liable to pay a judgment if the appeal is lost, is a creditor within the meaning of the Bulk Sales Act, No. 223, Pub. Acts 1905, and the surety cannot, prior to the decision of the appeal, fraudulently convey his goods to escape paying the judgment.—Hanna v. Hurley, 162 Mich. 601.

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See also post ¶ 490.

¶ 440. A deed in anticipation of insolvency is not void but only voidable.—Jenison v. Rankin, 57 Mich. 49.

¶ 441. Fraudulent conveyances are, as against the creditors of the grantor, not void, but only voidable at their option on taking proper proceedings.—McMaster v. Campbell, 41 Mich. 513.

§ 91. Validity as to existing creditors.

See also ante ¶ 408.
Junior incumbrancer as existing creditor, see post § 93.
Validity as to existing creditors of transfer to spouse, see also ante ¶¶ 211, 233.
Extension of credit on property transferred, see post § 92.
Right of general creditors before obtaining judgment, see also post ¶¶ 474-476, 478.

¶ 442. An actually fraudulent design is not necessary to defeat a voluntary conveyance as against existing creditors.—Fellows v. Smith, 40 Mich. 689.

¶ 443. In replevin a defense of a levy on the goods as fraudulently transferred to the replevin plaintiff, who took them in satisfaction of a debt of the seller, is not sustained, unless it be shown that the execution creditor had a claim when the sale was made, and that the sale was fraudulent as against that claim.—Bodine v. Simmons, 38 Mich. 682.

§ 92. ——Extension of credit on property transferred.

Effect of notice and want of reliance on apparent ownership as to subsequent creditors, see post § 96.

¶ 444. The doctrine that transfers of property are presumed to be fraudulent as to existing creditors rests on the idea that property is the basis of credit, and that credit is extended in reliance on the property which the debtor possesses.—Lovell v. Denison, 171 Mich. 599.

¶ 445. The question whether a transfer of property is void as to creditors cannot be affected by the fact that at the time the debts were incurred the creditors did not know that the debtor owned the specific property transferred.—Ionia County Savings Bank v. McLean, 84 Mich. 625.

¶ 446. Where a creditor levies upon property as that of his debtor, and a brother claiming ownership, replevies, and the testimony tends to show that although the debtor purchased and paid for the property, the receipted bill was rendered in the name of the brother, and an order for the delivery to the latter was given to the party in whose possession the property was, but that the debtor used the property most of the time, it is error to instruct the jury that it was a question for them to say whether there was any evidence to show that credit was extended to the debtor upon the strength of the property, or to show that the creditor knew of the property when his claim arose

and that if he did not, and did not rely upon it, he could not complain of the transfer.—French v. Newberry, 124 Mich. 147.

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¶ 447. The mortgagee of a second mortgage on real estate can complain only as a general creditor of an insolvent mortgagor, who, for the purpose of defrauding his creditors, while insolvent furnished his daughter the money with which she secured the assignment to herself of a first mortgage on such property.—Hatch v. Daugherty, 145 Mich. 569.

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Necessity of fraudulent intent, see post § 95.
Effect of notice and want of reliance on apparent ownership, see post § 96.
Validity as to subsequent creditor of transfer to spouse, see also ante ¶ 211.
Whether creditors are subsequent or existing as question for jury, see post ¶ 622.

¶ 448. As a general rule a conveyance which is void as to existing creditors is void as to subsequent creditors also.—Beach v. White, W. 495; Herschfeldt v. George, 6 Mich. 456.

¶ 449. A sale of land cannot be attacked as fraudulent by a creditor whose claim against the vendor arose subsequently thereto.—Sorenson v. Sorenson, 69 Mich. 351.

¶ 450. A creditor who does not show that he was such at the time of the giving of a mortgage is not in a position to attack it as fraudulent, on the ground that it allows the mortgagor to remain in possession and dispose of the mortgaged property.—Gay v. Bidwell, 7 Mich. 519.

¶ 451. The rights of the complainant in a bill in aid of execution are not to be determined upon the basis that he is a subsequent creditor merely because certain items of the indebtedness upon which he had judgment were incurred subsequent to the conveyance attacked, but, if such conveyance is shown to have been voluntary, it may be held valid as to such subsequent indebtedness, and void as to the balance of the judgment.—Cole v. Brown, 114 Mich. 396.

¶ 452. Purchasers at an execution sale of the defendant's interests have no equity to file a bill to set aside a conveyance in fraud of creditors made by him before the date of the judgment.—Cranson v. Smith, 47 Mich. 189.

§ 95. ——As dependent on fraudulent intent.

Intent to defraud or hinder, see ante § 2.

¶ 453. While no fraudulent intent is necessary to set aside a voluntary conveyance as to existing creditors, it must be established in order to set it aside as to subsequent creditors.—Cole v. Brown, 114 Mich. 396.

¶ 454. Actual fraud and specific intent to defraud, either creditors generally or an individual creditor, must be shown in order to set aside a voluntary conveyance by a debtor as to a subsequent creditor.—Barkworth v. Palmer, 118 Mich. 50.

¶ 455. Whether an actual intent to defraud existing creditors entitles a subsequent creditor to have a conveyance by the debtor set aside—quære.—Cole v. Brown, 114 Mich. 396.

¶ 456. The doctrine of presumptive fraud cannot be applied in case of debts contracted after a secret transfer of property by the debtor, though the transaction may be convincing evidence of the intent to defraud.—Lowell v. Denison, 171 Mich. 599.

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Extension of credit on property transferred as to existing creditors, see ante § 92.

¶ 457. A voluntary mortgage would not defraud a mere subsequent mortgagee actually or constructively notified.—Brigham v. Brown, 44 Mich. 59.

¶ 458. After an alleged fraudulent conveyance persons extending credit to the grantor without relying on his apparent ownership, are not entitled to relief from such conveyance.—Cowan v. Anderson, 184 Mich. 649.

¶ 459. A judgment creditor cannot levy on property that his debtor had transferred before the existence of his claim, and without contemplating any future indebtedness, and where the claim was not incurred on any faith that the property belonged to the debtor, and the creditor does not show himself in any position to attack the rectitude of the transfer.—Keeler v. Ullrich, 32 Mich. 88.

§ 97. Claimants regarded as creditors.

Rights of third persons other than creditors, see post §§ 108-112.

¶ 460. A disputed claim for damages sounding in tort is not a debt before it has been prosecuted to judgment, and does not constitute the claimant a creditor, nor invest him with the right given by law to creditors to question voluntary transfers of their debtor's property.—Hill v. Bowman, 35 Mich. 191. [Criticized as overlooking the words "other persons" in How. St. § 6203 and as giving too narrow construction to the word "creditors."—Schaible v. Ardner, 98 Mich. 70.]

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¶ 437. While conveyances made in fraud of creditors are valid as between the parties themselves, they are absolutely void as to creditors, and as to them it is immaterial whether the grantee paid any consideration or not.—Morley Bros. v. Stringer, 133 Mich. 690.

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See also post ¶ 490.

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¶ 443. In replevin a defense of a levy on the goods as fraudulently transferred to the replevin plaintiff, who took them in satisfaction of a debt of the seller, is not sustained, unless it be shown that the execution creditor had a claim when the sale was made, and that the sale was fraudulent as against that claim.—Bodine v. Simmons, 38 Mich. 682.

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as being fraudulent as to creditors under Comp. Laws 1897, § 9520, How. 2nd Ed., § 11404.—Parnell v. Pungs, 190 Mich. 638.

B. DILIGENCE AND LACHES; REDUCTION OF DEBT TO JUDGMENT.

§ 98. Delay and laches.

In securing relief from sale contrary to Bulk Sales Law, see post § 99.
Estoppel to assert rights, see post § 100.
Necessity for judgment or lien, see post §§ 101-103.
Effect between parties and as to third parties not creditors, see post III.
Rights and liabilities of grantee towards defrauded creditors, see post IV.
Remedies of creditors, see post V.
Priorities between creditors, see post VI.
Time for filing bill by execution purchaser, see also Executions ¶ 257.

¶ 462. Delay for more than a year to institute proceedings to determine judgment debtor's rights and equities is laches on the part of one who has levied execution to reach an equitable interest in land.—Edsell v. Nevins, 80 Mich. 146.

¶ 463. Where a judgment creditor has waited four years before enforcing his claim, and the grantee of the land attached by him was an active party to a fraud on such creditor, the delay does not constitute laches which will bar the action.—Yates v. McGahen, 174 Mich. 211.

¶ 464. A delay of twenty-eight years in enforcing the claims of creditors to the proceeds of land conveyed by a debtor to his wife, during which time the creditors, the debtor, and his wife have died, is such laches as to bar relief in a bill for an accounting alleging fraud, especially where the facts were ascertainable from the records.—Sheldon v. Miller, 151 Mich. 283.

¶ 465. A bill to set aside certain conveyances as fraudulent, and for an accounting, is barred by laches, when the complainant has neglected to bring her action for nearly thirty years, there being no reasonable excuse for the delay, and it appearing that witnesses and persons charged with fraud, were all dead, and that third persons had acquired interests in the property involved, so that the allowance of the proceeding would prevent safety in acting upon conveyances and records of the court.—Eames v. Manley, 121 Mich. 300.

¶ 466. A conveyance of land in consideration of the agreement of the grantee to pay a mortgage thereon, the amount of which, with interest, exceeded the value of the premises, and to provide a home for the grantor, will not be declared fraudulent as to a creditor of the latter, who, for two years thereafter, although he himself had knowledge of the transaction, left the grantee in ignorance of his claim.—Delavan v. Wright, 110 Mich. 143.

¶ 467. Where an alleged fraudulent conveyance made upwards of ten years before the grantor's death, is not attacked by creditors during the former's lifetime, the laches bars relief against a subsequent grantee for value.—Cowan v. Anderson, 184 Mich. 649.

§ 99. ——In securing relief from sale contrary to Bulk Sales Law.

Estoppel or waiver of rights under Bulk Sales Act, see post § 124.
Necessity for judgment or lien to entitle to relief from violation of Bulk Sales Law, see post § 102.
Equitable and legal remedies of creditors under Bulk Sales Law, see post § 127.

¶ 468. If the status of the purchaser of a stock in violation of the Bulk Sales Act (Act No. 223, Pub. Acts 1905, How. Ann. St., 2nd Ed., §§ 2612-2614) has not been altered in the meantime, delay of a creditor in seeking relief in equity from the sale does not amount to laches.—Humiston, Keeling & Co. v. Yore, 181 Mich. 629.

¶ 468a. A purchaser cannot assert the doctrine either of waiver or estoppel against a creditor who seeks to enforce the provisions of the Bulk Sales Law by garnishment on the ground that the creditor has delayed for two years after having been informed by the debtor of the sale, where it is not shown that the purchaser did anything to change his position in reliance upon the conduct of the creditor.—Marquette County Sav. Bank v. Koivisto, 162 Mich. 554.

§ 100. Estoppel to assert rights.

Estoppel or waiver of rights under Bulk Sales Law, see post § 124.
Receipt of dividend as estoppel to attack assignee's mortgage as fraudulent, see Assignments for Creditors ¶ 184.

¶ 469. An unsecured creditor is not estopped to attack as in fraud of creditors a bill of sale absolute in form but upon a secret trust to pay certain creditors by the fact that the property including a saw-mill was conveyed to a purchaser who carried on the business in his own name, making advances to pay off pressing claims, and that the attacking creditor was informed of the terms of the alleged sale soon after and had sawing done at the mill and paid for it, the grantee having refused to allow it on his debt, and that the creditor for several years took no steps to set aside the sale.—Corbitt v. Cutcheon, 79 Mich. 41.

¶ 470. Where a creditor was advised by his debtor and a third party that the two were in treaty for a transfer to such third party of the debtor's property, but was not informed that by such transfer the debtor was to deprive himself of the means of pay-

ing his debts; and he was called upon by them to declare whether he had any claim against the debtor, or the property in question, and declined to answer, it was held that he was not, by his silence, estopped from seeking relief against the transfer as a voluntary one.—Cicotte v. Gagnier, 2 Mich. 381.

¶ 471. One who takes from an administrator a note and mortgage given to the intestate, upon which the latter had made an indorsement with a view to discharging to that extent the debt, cannot attack such indorsement as fraudulent against creditors, though he himself be a creditor and the estate insolvent.—Morris v. Morris, 5 Mich. 171.

¶ 472. A wife does not lose her rights as a creditor of her husband by failing to make her claim known, even as against a third party who lends money to the husband in ignorance of such claim.—Hyde v. Powell, 47 Mich. 156; Dull v. Merrill, 69 Mich. 49.

¶ 473. A wife will not lose her rights as a creditor of her husband by failing to make her claim known, even as against a party who trusted the husband in ignorance of such claim.—Buhl v. Peck, 70 Mich. 44; Wooden v. Wooden, 72 Mich. 347.

§ 101. Necessity for judgment or lien.

For equitable relief from violation of Bulk Sales Law, see post § 102.

Rights under void judgment, see post § 103.

Necessity for judgment lien before assailing fraudulent transfer made to defeat collection of tax, see Taxes, X.

¶ 474. General creditors having no judgment or lien on the debtor's property cannot attack conveyances or other dealings for fraud.—McKibben v. Barton, 1 Mich. 213; Maynard v. Hoskins, 9 Mich. 485; Tyler v. Peatt, 30 Mich. 63; Griswold v. Fuller, 33 Mich. 268; Stoddard v. McLane, 56 Mich. 11; Root v. Potter, 59 Mich. 498; Scott v. Chambers, 62 Mich. 532; Krolik v. Root, 63 Mich. 562; Nugent v. Nugent, 70 Mich. 52; People's Sav. Bank v. Bates, 120 U. S. 556, 30 L. ed. 754, 7 Sup. Ct. Rep. 679.

¶ 475. A general creditor must obtain a judgment before he can complain that his debtor has fraudulently disposed of his property.—Hatch v. Daugherty, 145 Mich. 569.

¶ 476. It has always been held in this state that general creditors, having no judgment or lien on the debtor's property, cannot attack conveyances or other dealings for fraud.—Root v. Potter, 59 Mich. 498.

¶ 477. A fraudulent conveyance cannot be set aside unless the person bringing suit is a judgment creditor, and in addition the judgment procured must be followed by the issue of an execution and a levy of it upon the property said to have been fraudulently conveyed.—Eames v. Manley, 121 Mich. 300.

¶ 478. General creditors who have not obtained a judgment or who have not any lien on the debtor's property cannot attack conveyances or other dealings for fraud.—Trowbridge v. Bullard, 81 Mich. 451.

¶ 479. A creditor who has not prosecuted his claims has no legal concern with his debtor's dealings with property, and where partly secured cannot complain of the transfer of his debtor's remaining interest as a fraud against him, unless he has obtained a lien upon such remaining interest by due legal process.—Glynn v. Phetteplace, 26 Mich. 383; Eslow v. Mitchell, 26 Mich. 500.

¶ 480. No creditor who has not obtained a lien or judgment, and who has not, in seeking to enforce that lien or judgment in the ordinary way, found it necessary to assail the conveyance of his debtor's property as fraudulent, can complain of it.—Voorhies v. Frisbie, 25 Mich. 476.

¶ 481. A judgment creditor only can inquire into the transmutation of his debtor's assets; and in that capacity he can only reach assets equitably belonging to his debtor.—Tawas & B. C. R. Co. v. Iosco Circuit Judge, 44 Mich. 479.

¶ 482. A conveyance fraudulent as to creditors can only be avoided by a judgment creditor, or one claiming under him, who has taken out execution and levied on the property fraudulently conveyed.—Fox v. Willis, 1 Mich. 321, reversing Fox v. Clark, W. 535.

¶ 483. A chattel mortgage cannot be questioned by a creditor at large except by some proceeding against the property, as by garnishee process.—Fearey v. Cummings, 41 Mich. 376.

§ 102. ——For equitable relief from violation of Bulk Sales Law.

See also post ¶ 567.

Liability of transferee under Bulk Sales Law, see post § 123.

Effect between parties and as to persons not creditors of sales under Bulk Sales Law, see post § 113.

As form of fraudulent transfer in general, see ante § 10.

Delay or laches in securing relief from sale contrary to Bulk Sales Law, see ante § 99.

¶ 484. One need not be a judgment creditor in order to obtain relief in equity from a sale in violation of the Bulk Sales Act (Act No. 223, Pub. Acts 1905, How. Ann. St., 2nd Ed., §§ 9612-9614).—Humiston, Keeling & Co. v. Yore, 181 Mich. 629; Coffey v. McGahey, 181 Mich. 225. (Ostrander, J., dissenting.)

¶ 485. A creditor seeking relief in equity under the provisions of Pub. Acts 1905, No. 223, avoiding the sale by debtors of stocks of merchandise in bulk, must first secure a

judgment at law against the debtor. (By divided court, per Blair, C. J., Ostrander, Grant and Hooker, JJ., concurring; Moore and Brooke, JJ., dissenting; Montgomery and McAlvay, JJ., concurring independently in the decision.)—Bixler v. Fry, 157 Mich. 314.

¶ 486. Where the seller of a stock of goods has absconded a creditor is entitled to equitable relief under the Bulk Sales Act, without first reducing his claim to judgment.—Coffey v. McGahey, 181 Mich. 225. (Ostrander, J., dissenting.)

§ 103. ——Rights under void judgment.

¶ 487. Void judgment in attachment cannot be basis of creditor's bill to set aside conveyance as fraudulent.—Nugent v. Nugent, 70 Mich. 52.

¶ 488. Only judgment creditors can assail a conveyance on the ground that it is fraudulent as to creditors; and one who only has a judgment that is void for want of jurisdiction is not in condition to question such a conveyance.—Millar v. Babcock, 29 Mich. 526.

III. EFFECT BETWEEN PARTIES AND AS TO THIRD PERSONS NOT CREDITORS.

§ 104. Effect between parties.

Right of parties to relief or defense, see post §§ 105, 106.
On sales in violation of Bulk Sales Law, see post § 113.
Effect of fraud of one of several transferees or mortgagees, see ante § 27.
Validity of fraudulent conveyances between parties, see also ante ¶ 437.
Rights and liabilities of grantee towards defrauded creditors, see post IV.
Remedies of creditors, see post V.
Priorities between creditors, see post VI.
Application of clean hands maxim to person claiming under illegal bulk sale, see also Equity ¶ 24.
Validity of voluntary deeds between parties in general, see Deeds § 3.

¶ 489. A voluntary deed, intentionally and deliberately made, is good against the grantor and his heirs and successors and can only be avoided by creditors or others having superior equities to the grantee.—Jackson v. Cleveland, 15 Mich. 94; Ryan v. Brown, 18 Mich. 196; Gale v. Gould, 40 Mich. 515; Barber v. Milner, 43 Mich. 248.

¶ 490. Conveyances to defraud creditors are not utterly void. They convey the property effectually as between the parties and their representatives, and may be maintained against all persons except those intended to be defrauded.—Fox v. Willis, 1 Mich. 321; Cleland v. Taylor, 3 Mich. 201; Millar v. Babcock, 29 Mich. 526; Hess v. Final, 32 Mich. 515; McMaster v. Campbell, 41 Mich. 513; Messmore v. Huggard, 46 Mich. 558; Wheeler v. Wallace, 53 Mich. 364.

¶ 491. A mortgage fraudulent as to creditors may be, and usually is, good as between the parties, if there is a consideration to support it.—Hess v. Final, 32 Mich. 515.

¶ 492. Existence and adequacy of a valuable consideration is not important as between the parties and privies to a deed, where no creditors are involved.—Wallace v. Harris, 32 Mich. 380.

¶ 493. A chattel mortgage of a stock of goods, which leaves the mortgagor in possession, and by inference authorizes him to sell in the usual course of business, is good between the parties.—Gay v. Bidwell, 7 Mich. 519.

¶ 493a. There was a gift by a husband to his wife which he could not avoid, where he deposited money in the bank in her name, and delivered to her the bank book, and where she signed all the checks by which the money was withdrawn, although the purpose of such deposit was to put the money beyond the reach of his creditors.—Wipfler v. Detroit Pattern Works, 140 Mich. 677.

§ 105. Right of parties to relief or defense.

On transfers of homesteads or exempt property, see post § 106.
Disability of party placing money with another in fraud of creditors to sue holder for converting check in obtaining money, see also Conversion ¶ 72.

¶ 494. The rule in relation to a conveyance given to defraud creditors, and without consideration as between the parties, is that the law will not aid either of the parties committing or attempting to commit the fraud, but will leave them where they have placed themselves, without relief.—Williams v. Clink, 90 Mich. 297.

¶ 495. A party who executed a deed for the illegal purpose of delaying his creditor in the collection of his debt must bear the consequences, if the party he trusts, in his unlawful attempt, defrauds him. Courts cannot occupy themselves with adjusting equities between wrongdoers.—Gage v. Gage, 36 Mich. 229.

¶ 496. A deed which, though intended merely as security, is absolute in form, will not, if executed for the purpose of delaying creditors, be adjudged an equitable mortgage at the solicitation of the debtor.—Patnode v. Darveau, 112 Mich. 127.

¶ 497. Where one conveys away to his wife his property for the purpose of avoiding anticipated claims against him, though he regards them as a conspiracy, he is not in position to invoke the aid of a court of equity to obtain a reconveyance.—Poppe v. Poppe, 114 Mich. 649.

¶ 498. That the grantee, wife, in her answer to a bill to compel a reconveyance, ad-

mits a parol promise to reconvey, will not avail the complainant, where the conveyance was made for the avowed purpose of placing the property beyond the reach of prospective creditors.—Poppe v. Poppe, 114 Mich. 649.

¶ 499. A mortgagor in a suit brought by the mortgagee may dispute the validity of the mortgage by showing that it was given without consideration, and for the purpose of defrauding his creditors.—Williams v. Clink, 90 Mich. 297.

¶ 500. A grantor cannot seek to have his deed set aside as invalid on the ground that it is fraudulent as to creditors.—Nichols v. Nichols, 94 Mich. 569.

¶ 501. One who deeds land to another for the purpose of enabling the grantor to effect a fraudulent and collusive settlement with his creditors in bankruptcy proceedings, having fraudulently placed the property out of his hands, is in no position to seek the aid of a court of equity to have the deed declared to be a mortgage.—Frolich v. Aikman, 194 Mich. 569. (Bird and Person, JJ., dissenting.)

¶ 502. A. held his brother B.'s note and transferred it to C. in a trade, signing himself as joint maker. He afterwards bargained with B. for eighty acres of land on which B. with his wife lived, and offered him three hundred and twenty acres of other land and a reduction of $500 on the note to C. B.'s wife consented to the sale on condition that part of the three hundred and twenty acres be conveyed to her, and supposing it was done she exchanged her share for fifty-three acres bought of a third party. C. obtained a judgment on the note against B., and filed a creditor's bill to reach these fifty-three acres, it appearing that A. was the real party in interest. Held, that the bill should be dismissed, as A. could not assail the title of B.'s wife, he being a party to the transaction.—Bunce v. Bailey, 39 Mich. 192.

¶ 503. Where an assignment of a debt is made to defraud creditors, they only can take advantage of the fraud to set it aside, and it is good against all others, and the debtor cannot set it up as a defense to a suit by the assignee.—Morey v. Forsyth, W. 465.

§ 106. ——On transfers of homesteads or exempt property.

Transfer of homestead, see ante § 16.
Transfers of exempt or nonleviable property, see ante § 15.

¶ 504. Since a debtor's homestead is not subject to the claims of creditors, a conveyance of it for the purpose of placing it beyond their reach does not preclude him from having the deed declared a mortgage, if the circumstances justify such relief.—Patnode v. Darveau, 112 Mich. 127.

§ 107. Right of transferee to surplus after satisfying creditors.

Rights of transferee with respect to debtor, see ante §§ 104-106.
Rights, liens and allowances to grantee on transfer being set aside, see post § 122.
Title of grantees in general, see post § 114.
Rights and liabilities of transferees towards defrauded creditors, see post IV.

¶ 505. When the creditor is satisfied by a sale of converted property on execution, any surplus belongs to the vendee.—Wheeler v. Wallace, 53 Mich. 364.

§ 108. Rights of third persons other than creditors.

Personal representatives and assignees for creditors, see post § 109.
Bona fide purchasers, see post § 110.
Purchasers on foreclosure or execution, see post § 111.
Right of officer levying under prior law, see post § 112.
Claimants regarded as creditors, see ante § 97.
Holder of disputed claim for tort damages as creditor, see also ante § 97, ¶ 460.
Remedies of creditors, see post V.
Invalidity of conveyances to defraud nonresident dowress, see Dower § 5.
Fraudulent conveyances to defeat dower, see Dower §§ 19, 20.
Conveyance in fraud of alimony, see Divorce ¶ 685.

¶ 506. Only the creditors of a vendor, or their proper representatives, can attack a sale by him as fraudulent against them.—McAuliffe v. Farmer, 27 Mich. 76; Richardson v. Welch, 47 Mich. 309.

¶ 507. Where mortgaged chattels are levied upon and sold under a claim that the mortgage is fraudulent as to creditors, and the mortgagor's wife purchases part of the property, which is replevied by the mortgagee, she can attack the mortgage for fraud, to the extent of the property purchased by her, on the trial of the replevin suit.—Watson v. Mead, 98 Mich. 330.

¶ 508. Where, through vendee's failure to remove within the stipulated time logs cut under a timber contract, they revert to the vendor, the vendee, in replevin for the logs by the vendor's assignee, cannot attack the good faith of the transfer.—Gamble v. Gates, 97 Mich. 465.

¶ 509. Fraud of the plaintiff in procuring title to the stock is immaterial and is therefore properly excluded in trover against a bank cashier, who was also treasurer of a corporation, for converting stock by refusal to issue a new certificate to plaintiff and thus gaining time for attachment by the bank against the stock standing in the name of plaintiff's assignor.—Hine v. Commercial Bank of Bay City, 119 Mich. 448.

¶ 510. Against a bill filed by the holder of the legal title in possession to quiet title as against void tax titles, the holder of such titles cannot raise the defense that complainant's title is void because originating in fraud of creditors.—Loose v. Navarre, 95 Mich. 603.

¶ 511. The rule announced in Hill v. Bowman, 35 Mich. 191, that a claimant for tort damages is not invested with the right given by law to creditors to question voluntary transfers of their debtor's property was criticized as overlooking the words "other persons" in How. St., § 6203, which makes fraudulent transfers void as to "other persons" hindered, delayed or defrauded and as giving a narrow construction to the word "creditors."—Schaible v. Ardner, 98 Mich. 70.

§ 109. ——Personal representatives and assignees for creditors.

See also post ¶ 573.

Assignees of original parties as necessary and proper parties, see post § 129.

Suits by assignees for creditors to avoid levies and transfers of property, see also Assignments for Creditors § 40.

Right of executor or administrator to recover fraudulently transferred assets for satisfaction of creditors of estate of the debtor, see Estates of Decedents § 97 et seq.

Suits to annul decedent's fraudulent conveyances, see Estates of Decedents §§ 97-101.

Invalidity of fraudulent conveyances as to heirs, successors, personal representative, or assigns of creditors, see Comp. L. 1915, § 12000.

Suits to set aside by personal representative, see Jud. Act, chap. LIV, §§ 15-17; Comp. L. 1915, §§ 13859-13861.

¶ 512. The voluntary assignee of the mortgagor who takes property subject to the mortgage has no right or title superior to his assignor and does not represent the creditors in such a manner as to entitle him to attack the mortgage and the creditors can question the mortgage only in proceedings brought to enforce their claim.—Wakeman v. Barrows, 41 Mich. 363.

§ 110. Bona fide purchasers.

Liabilities of bona fide purchasers and transferees, see post § 115.

General doctrine of bona fide purchaser, see Notice and Record of Title, I.

Title of purchaser for valuable consideration without notice of fraud, see Comp. L. 1915, § 12002.

¶ 513. Where a plaintiff buys property under a bill of sale and takes possession, but later the original owners regain possession, the plaintiff's title is good except as against subsequent purchasers in good faith.—O'Neill v. Thompson, 152 Mich. 396.

¶ 514. One purchasing incumbered property without notice, from the fraudulent grantee, is entitled to reimbursement for an amount paid by him for the discharge of the incumbrances in case the conveyance is set aside as fraudulent as to creditors of the original grantor, although he had agreed to pay incumbrances as a part of the purchase price.—Weatherwax v. Gorman, 150 Mich. 316.

¶ 515. Where a person has conveyed property in fraud of creditors, and subsequently been adjudicated a bankrupt, the filing of the certified copy of the bond of the trustee in bankruptcy in the office of the register of deeds will not deprive an innocent purchaser from the fraudulent grantee of the right to be reimbursed for the amount paid by him for the land, and for sums paid by him to discharge the incumbrances, in case the deeds to him are set aside at the instance of the trustee in bankruptcy.—Weatherwax v. Gorman, 150 Mich. 316.

§ 111. Purchasers on foreclosure or execution.

See also post ¶ 563.

Effect of notice on rights of purchasers on foreclosure, see ante § 26.

Right of purchasers at execution sale to set aside transfer made before their purchase, see also ante ¶ 452.

¶ 516. A mortgagor is estopped from questioning, as against an innocent purchaser, the validity of a mortgage he has given to defraud creditors.—Sessions v. Sherwood, 78 Mich. 284.

§ 112. Right of officer levying under prior judgment.

Right of sheriff to plead fraudulent conveyance in justification, see Sheriffs, VI.

Rights and liabilities of sheriffs under levy on property which has been fraudulently conveyed, see Sheriffs, IV, G.

Nonliability of officer levying on mass where transferee intermingled fraudulent gift with own goods and refused to identify them, see Executions ¶ 320.

Priority of lien of levy and transfers by debtor, see also Executions § 32.

¶ 517. A sheriff, who levied on goods under a judgment prior in time to an agreement whereby the judgment debtor was to work land for the benefit of another, the claimant, who was to have the crops and apply the proceeds on the indebtedness due from such debtor, may show in justifying under the judgment that the agreement was intended to be a shield and was fraudulent as against the pre-existing creditors.—Haynes v. Ledyard, 33 Mich. 319.

¶ 518. An attaching officer unable when sued in trover to justify under his writ because of having disposed of the attached property contrary to law cannot attack as

fraudulent a sale of the attached goods to plaintiff by the attachment debtor prior to his levy.—Terry v. Metevier, 104 Mich. 50.

§ 113. Sales in violation of Bulk Sales Law.

Bulk sales of merchandise as form of transfer to hinder or delay creditors, see ante §§ 10-12.

Who are creditors within meaning of Bulk Sales Act, see ante ¶ 439.

Delay and laches in securing relief from sale contrary to Bulk Sales Law, see ante § 99.

Necessity for judgment or lien for relief from violation of Bulk Sales Law, see ante § 102.

Bulk Sales Law, see Comp. L. 1915, §§ 6346-6348.

¶ 519. A sale by a merchant of practically his entire stock in trade in bulk in violation of Pub. Acts 1905, Act No. 223, known as the "sales-in-bulk act" is void, not only as to the creditors, but as between the parties, and the bill of sale cannot be given the effect of a chattel mortgage on the goods for the purchase money.—Farrar v. Lonsby Lumber & Coal Co., 149 Mich. 118.

IV. LIABILITIES AND RIGHTS OF GRANTEE TOWARDS DEFRAUDED CREDITORS.

§ 114. Title of grantees in general.

Bona fide purchasers and transferees, see post § 115.

Rights in growing crops on conveyed lands, see post § 116.

Effect of fraud of one of several transferees or mortgagees, see ante § 27.

Liability of transferee under Bulk Sales Law, see post § 123.

Rights of bona fide purchaser from debtor as against his fraudulent transferee, see ante § 110.

Rights of grantee or transferee towards defrauded creditors, see also ante ¶ 330.

Rights of transferee to surplus after satisfying creditors, see ante § 107.

Notice or participation of transferee or grantee in fraud, see ante, I, B.

Effect between parties and as to third parties not creditors, see ante, III.

Remedies of creditors, see post, V.

Priorities between creditors, see post, VI.

Operation and effect of the Recording Acts and doctrine of bona fide taker, see Notice and Record of Title.

Rights under conveyance in general, see Vendor and Purchaser, X.

Liability of garnishee who disposes of property held by conveyance or title fraudulent as to creditors, see Garnishment, IX.

Grantees as parties to creditors' bill, see Creditors' Suits § 24.

Invalidity of conveyances made to hinder, delay or defraud creditor, see Comp. L. 1915, § 11998.

¶ 520. Land conveyed by a person for the purpose of defrauding his creditors remains subject to execution in the grantee's hands.—Cleland v. Taylor, 3 Mich. 201.

¶ 521. One who has bought property under an arrangement which would be fraudulent as against the creditors of the vendor, or by an unratified sale in which the vendor's agent has exceeded his authority, obtains no title which he can protect from attachments sued out by the vendor's creditors.—Newburn v. Woods, 52 Mich. 610.

¶ 522. One who takes title from an insolvent debtor, merely for the purpose of defrauding creditors, and disposes of it to an innocent purchaser on credit, is liable to them for its value, whether he succeeds or not in collecting the purchase money.—Robinson v. Boyd, 17 Mich. 128.

¶ 523. A fraudulent grantee to whom a judgment debtor has transferred his property subject to a levy cannot put himself in any better position by a tortious interference with that levy, and the property in his hands or in the hands of any mala fide holder under him would continue to be held under the character of a disposition in fraud of the judgment creditor.—Nelson v. Ferris, 30 Mich. 497.

¶ 524. Where the debtor makes a voluntary conveyance in fraud of his creditors, and his grantee becomes bankrupt, the creditors are entitled to the property in preference to the assignee in bankruptcy.—Manning v. Drake, 1 Mich. 34.

¶ 525. A grantee who voluntarily becomes a party to a deed which is fraudulent in part forfeits his right to claim benefit from another part which would have been good.—Kirby v. Ingersoll, H. 172.

¶ 526. A conveyance of land by a husband to his wife without consideration and for the purpose of merely making the wife eligible as a surety upon a liquor dealer's bond for the husband, which conveyance failed by reason of misdescription, is subject to a subsequent levy upon a judgment against the husband; and a bill by the wife for injunction and reformation of the deed was dismissed.—Balch v. Jaycox, 122 Mich. 624.

§ 115. ——Bona fide purchasers and transferees.

See also ante ¶¶ 94, 95.

Right of bona fide purchaser or transferee to reimbursement for expenditures, see ante ¶¶ 514, 515.

General doctrine of bona fide purchaser, see Notice and Record of Title, I.

¶ 527. The actual secret intent of the grantor, however bad, cannot affect a bona fide purchaser without notice.—Hollister v. Loud, 2 Mich. 309.

¶ 528. A sale to a bona fide purchaser is not invalidated by the fact that the vendor made it with intent to hinder and defraud creditors.—Spring Lake Iron Co. v. Waters, 50 Mich. 13.

¶ 529. Where one in good faith buys a mortgage on goods without notice of prior levies thereon, his rights under it cannot be affected by the fraud of or notice to his assignor.—Henry v. Ferguson, 55 Mich. 399.

¶ 530. The disposal of property by a debtor, although made by him with the intention of avoiding payment of indebtedness to a particular creditor, must be deemed to have been made in good faith as far as the purchaser is concerned, so as not to be subject to attack by such creditor, where such purchaser paid full value for the property, and the abstract of title submitted to him did not disclose any interest of the creditor, and he had no knowledge of the creditor's claim, and no judgment or decree had been entered against the debtor at the time of the purchase.—Downing v. Brooks, 194 Mich. 490.

§ 116. Rights in growing crops on conveyed lands.

¶ 531. A debtor cannot, by a fraudulent sale of the land, deprive a creditor of the right to levy upon the growing crops.—Pierce v. Hill, 35 Mich. 194.

¶ 532. A sheriff who has levied on a growing crop after the land had been conveyed by the execution debtor, and has afterwards taken possession of the harvested crops, can show, when sued in replevin by the grantee, that the conveyance was fraudulent and void as against the creditor in his execution; and he is not bound first to have the conveyance set aside in a direct proceeding for that purpose.—Pierce v. Hill, 35 Mich. 194.

¶ 533. A judgment creditor is entitled to crops grown upon the land of his debtor after it has been transferred in fraud of his rights, so far at least as the fraudulent grantor retains an interest in them by an understanding with the grantee; and where there is reason to suppose there is such collusion, all doubts are solved in the creditor's favor.—Fury v. Strohecker, 44 Mich. 337.

§ 117. Exhaustion of debtor's other assets as condition precedent.

Following one of several transfers, see post § 118.

¶ 534. It seems that a conveyance fraudulent as to creditors will not be set aside if it be made to appear that the debtor has other property liable to execution, sufficient for the payment of his debts, which creditors have not yet exhausted.—Fox v. Willis, 1 Mich. 321.

¶ 535. Where the personal property of a judgment debtor, liable to execution, is amply sufficient to satisfy the judgment and all costs, and the creditor's remedy by a resort thereto is neither uncertain nor insufficient, there is nothing to justify a resort to the debtor's real estate, even though fraudulently conveyed. So held where a judgment debtor caused his real estate to be conveyed to his wife, and also conveyed to her his personal property (a stock of goods), all in fraud of his creditors, and at the time of a levy on the real estate she was in possession of the goods, and carrying on the business her husband had been engaged in on the premises thus conveyed in her name by her husband as manager, and where no reason was apparent why said stock of goods should not have been levied upon to satisfy the judgment; the alleged fraud in the sale being attackable in an action at law, and there being no occasion for a resort to a bill in equity.—Brock v. Rich, 76 Mich. 644; Pierce v. Rich, 76 Mich. 648.

§ 118. Following one of several transfers.

¶ 536. A judgment creditor is not obliged to follow all the fraudulent conveyances made by several execution defendants, but may allow some to stand while he seeks to set aside others.—First Nat. Bank of Marshall v. Hosmer, 48 Mich. 200.

§ 119. Extent of liability; property liable.

Growing crops on conveyed lands, see ante § 116.

Exhaustion of debtor's other assets as condition precedent, see ante § 117.

Following one of several transfers, see ante § 118.

Following property in converted form, see post § 120.

Liability of partially valid transfer or mortgage, see post § 121.

Liability of transferee who disposes of property on credit, see also ante ¶ 522.

Leviability of mortgagor's or mortgagee's or conditional seller's or buyer's interest, see Executions §§ 16, 17.

Right to levy on property in purchaser's hands when taken before levy but on promise to pay attaching creditor, see Executions ¶ 31.

¶ 537. Creditors levying on live-stock fraudulently transferred cannot take from the transferee the increase therefrom if they have long allowed it to accumulate under his management.—Wheeler v. Wallace, 53 Mich. 355.

¶ 537a. The fact that the tangible assets of a newspaper corporation, whose transfer of all of its assets to another paper the garnishee corporation, in payment of a debt, is attacked as fraudulent by a judgment creditor, did not exceed in value the amount of the indebtedness, will not necessarily relieve the assignee from liability in garnishment, where no account was taken of intangible assets consisting of good will and a press franchise.—Long v. Evening News Ass'n, 113 Mich. 261.

§ 120. Following property in converted form.

¶ 538. Property purchased by a wife with the proceeds of an insurance policy on other property conveyed to her by the husband in fraud of creditors may be subjected in equity to the claims of such creditors.—Syllabus 2 of Palmer v. Smith, 126 Mich. 352.

§ 121. Partially valid transfer or mortgage.

See also ante ¶ 525, post ¶ 586.

¶ 539. That one of the debts secured by a chattel mortgage is fraudulent does not invalidate the mortgage as to the other creditors named therein.—Krementz v. Howard, 109 Mich. 466.

§ 122. Rights, liens and allowances to grantee on transfer being set aside.

Right of transferee to surplus after satisfying creditors, see ante § 107.

¶ 540. Where a deed, given in consideration of expenses incurred and services rendered by grantee and future support, is set aside in favor of creditors, the grantee is entitled to recover for the services rendered and expenses incurred up to the time the deed was made.—Michigan Trust Co. v. Comstock, 130 Mich. 572.

¶ 541. A conveyance by a debtor upon consideration of an agreement to pay him an annuity is void as to creditors who are thereby deprived of the means of enforcing their claims, though no actual fraud was intended; but the grantee will be protected to the extent of the payments made in good faith.—Walker v. Cady, 106 Mich. 21.

¶ 542. A judgment creditor attacking a conveyance of land by his debtor to another creditor, and claiming that the land was conveyed merely as security for a debt between the parties, must, in order to be entitled to relief, offer to reimburse the other creditor for the amount he has been compelled to pay as indorser of a note made by the debtor and delivered before the execution of the conveyance attacked.—Rathbone v. Maltz, 155 Mich. 306.

¶ 543. A conveyance being actually and not only constructively fraudulent, it was held, on bill filed by the creditors to set it aside, that the grantee should be credited with taxes paid and improvements made by him, but not for advances made to the fraudulent grantor, unless the money was used by the latter, before complainants filed their bill, to pay debts due at the time of the conveyance.—How v. Camp, W. 427.

¶ 544. In a case involving the question of the validity of a deed as to creditors, a decree declaring the deed as security for the amount found due the grantee should be affirmed, if there is nothing in the record to satisfy the reviewing court that the amount so secured has been paid.—Smith v. Lee, 79 Mich. 465.

¶ 545. Where, without intent to defraud, one has taken from an insolvent debtor an assignment of a contract, and has subsequently paid the balance due on the contract, taking title in his own name, he should as against his assignor's creditors who with full knowledge of the facts have waited several years before obtaining judgment, levying execution, and filing a bill in aid of such execution, be allowed the amount expended by him on the land, and should be required to turn over to the creditors nothing but the debtor's interest.—Cutcheon v. Buchanan, 88 Mich. 594.

¶ 546. On a bill to subject assets to an assignment for the benefit of creditors, filed against the debtor and his wife, by whom, as averred, these assets are held for him in fraud of creditors, a decree charging the wife with the difference between her husband's indebtedness to her and the value of the property exchanged for land deeded to her, and which was to be her property, may, on an apt showing in the record on appeal, be modified by adding thereto the amount charged to the wife on the husband's books for money paid to her in the same account in which she is credited with the loans making up the husband's indebtedness to her.—Joslin v. Goebel, 90 Mich. 71.

¶ 547. In a bill in aid of execution, one of the defendants who entered into possession of the land in question under quitclaim deed and occupied in good faith and made improvements, was entitled, ahead of the lien established by the levy and attachment, to allowance for such improvements to their value at the time such defendant was notified by complainant not to make improvements.—Cleland v. Clark, 123 Mich. 179.

¶ 548. "He that committeth iniquity, shall not have equity" applies in favor of a creditor filing a bill in aid of execution, as against the debtor's cotenant to whom the debtor had conveyed his interest, and who voluntarily paid off the proportionate part of the mortgage on the half conveyed to him by the debtor and seeks protection as to payments made by him.—Morley Bros. v. Stringer, 133 Mich. 690.

¶ 549. On cancelling a transfer in fraud of creditors made in the form of a deed to one creditor, which was treated as a mortgage, the amount due on such mortgage was decreed to be paid to the holder, it having had no part in the fraud.—Desbecker v. Mendelson, 117 Mich. 293.

§ 123. Liability of transferee under Bulk Sales Law.

Estoppel or waiver of rights under act, see post § 124.

Inventories, affidavits and notices under Bulk Sales Law, see post § 125.

Necessity for judgment or lien to entitle to relief from violation of Bulk Sales Law, see ante § 102.
Bulk sales of merchandise stocks as transfers to hinder or delay creditors, see ante §§ 10-12.
Who are creditors within meaning of Bulk Sales Law, see ante ¶ 439.
Right of purchaser buying in violation of Bulk Sales Statute to exemption of his seller, see Exemptions ¶ 11a.
Liability of transferee under Bulk Sales Law, see Comp. L. 1915, § 6348.
Statutory provisions regulating sales, transfers and assignments of goods, merchandise and fixtures in bulk, see Comp. L. 1915, §§ 6346-6348.

¶ 550. A purchaser cannot assert ignorance of the Bulk Sales Act in defense to a proceeding against him thereunder by a creditor.—Marquette County Sav. Bank v. Koivisto, 162 Mich. 554.

¶ 551. Where the buyer and seller of a stock of goods fail to observe the provisions of Act 223, P. A. 1905, known as the Bulk Sales Law, creditors of the seller, may recover from the buyer to the extent of the reasonable value of the goods.—J. L. Hudson Co. v. No-Name Hat Co., 174 Mich. 109.

¶ 552. A verdict should be directed for the plaintiff in an action of garnishment by a creditor of one who sold a stock of merchandise without complying with the Bulk Sales Act (Act No. 223, Pub. Acts 1905, §§ 2612-2614, How. St., 2nd Ed.), where the stock had been resold by the purchaser to the garnishee.—Youghiogheny & Ohio Coal Co. v. Anderson, 186 Mich. 349.

¶ 553. The fact that a bank holding the note of a debtor fails to set off the debtor's deposit against such note will not prevent it from pursuing the transferee of the debtor's stock of goods under the Bulk Sales Act, and particularly where the deposit account did not equal the amount of the note indebtedness at maturity at any time.—Marquette County Sav. Bank v. Koivisto, 162 Mich. 554.

¶ 553a. A garnishee defendant purchased for $1,251.30 a stock of general merchandise from a principal defendant, without complying with the provisions of the Bulk Sales Statute (Act No. 223, Pub. Acts 1905). Plaintiff secured a judgment for $217.28 against the principal defendant, whose indebtedness to all creditors was $1,437.88. Held, plaintiff was entitled to recover against the garnishee defendant the entire amount of his judgment and was not limited to recover a sum based upon the proportion between $1,437.88 and $1,251.30.—National Grocer Co. v. Plotler, 167 Mich. 626.

¶ 553b. A garnishee defendant purchased from a principal defendant a stock of general merchandise in bulk, without complying with the provisions of the Bulk Sales Act (Act 223, Pub. Acts 1905). Garnishee defendant called up plaintiff, the creditor of the principal defendant, and asked for and secured his permission to pay the purchase money to a certain bank for the benefit of creditors of the principal defendant. Garnishee defendant in fact deposited said money in said bank subject to check by the principal defendant. Held, plaintiff was entitled to recover against the garnishee defendant the amount of his judgment for failure to comply with said statute.—National Grocer Co. v. Plotler, 167 Mich. 626.

§ 124. ——Estoppel or waiver of rights under act.

Effect of delay or laches in securing relief from sale in violation of Bulk Sales Law, see ante § 99.
Estoppel of creditors to assert rights in general, see ante § 100.

¶ 554. No waiver of a creditor's rights under the Bulk Sales Act (Act No. 223, Pub. Acts 1905, How. Ann. St., 2nd Ed., §§ 9612-9614) can be predicated on an agreement between him and the purchaser, where, if made, the creditor was not aware that the sale was in violation of the act, nor based on any consideration.—Coffey v. McGahey, 181 Mich. 225. (Ostrander, J., dissenting.)

¶ 555. Plaintiff bought a stock of saloon goods of one Vohlers and left them in the saloon. Upon paying the vendor for them he saw one McGann a creditor of the vendor, showed him the money, and McGann saw him hand it to the vendor. McGann asked Vohlers for the money, and the latter promised to pay him the same day. McGann attached the goods. Plaintiff sued the sheriff in replevin. Held, McGann was not estopped from employing his remedy under the Bulk Sales Act, Act No. 223, Pub. Acts 1905.—Porter v. Goudzwaard, 162 Mich. 158.

§ 125. Inventories, affidavits and notices under Bulk Sales Law.

Remedies under Bulk Sales Law, see post § 127.
Bulk sales of merchandise stocks as transfers to hinder or delay creditors, see ante §§ 10-12.
Who are creditors within meaning of Bulk Sales Law, see ante ¶ 439.
Bulk Sales Law, see Comp. L. 1915, §§ 6346-6348.

¶ 556. Under the Bulk Sales Law, Act No. 223, Pub. Acts 1905, if the vendor has no creditors and cannot therefore furnish a list of them, the vendee must take an affidavit of him to that effect.—Interstate Shirt & Collar Co. v. Windham, 165 Mich. 648.

¶ 557. A statement in a vendor's affidavit to a vendee that the stock of goods sold in bulk is entirely free from debt is not a suf-

ficient compliance with that provision of the Bulk Sales Law, Act No. 223, Pub. Acts 1905, which requires the vendor to make an affidavit that he has no creditors, and a vendee who makes a bulk purchase under such an affidavit is liable in garnishment to the vendor's creditors.—Interstate Shirt & Collar Co. v. Windham, 165 Mich. 648.

¶ 558. Under Act No. 223, Pub. Acts 1905 (the Bulk Sales Law), notice of sale must be given to all creditors, and it is not enough that it is given merely to merchandise creditors.—People's Sav. Bank v. Van Allsburg, 165 Mich. 524.

V. REMEDIES OF CREDITORS.

A. IN GENERAL.

§ 126. Equitable or legal remedies.

Under Bulk Sales Law, see post § 127.
Necessary and proper parties, see post §§ 128, 129.
Form, scope and sufficiency of bill, see post § 130.
Issues and scope of hearing, see post § 131.
Right of parties to relief, see ante §§ 105, 106.
Evidence and presumptions, see post, V, B.
Judgment and relief, see post, V, C.
Right of creditor to follow one of several transfers, see ante § 118.
Right to follow property in converted form, see ante § 120.
Necessity for judgment or lien to entitle creditor to relief, see ante §§ 101-103.
Diligence and laches in securing relief, see ante §§ 98, 99.
Right of creditor to growing crops on conveyed lands, see ante § 116.
Effect between parties and as to third parties not creditors, see ante, III.
Rights and liabilities of grantee towards defrauded creditors, see ante, IV.
Priorities between creditors, see post, VI.
Charging garnishee as fraudulent grantee of principal debtor, and raising issue in garnishment proceedings, see Garnishment, V, IX.
Right of creditors to sue under assignment to annul fraudulent conveyances in aid of assignment, see Assignments for Creditors § 89.
Right to garnishment proceedings as remedy of creditor against fraudulent transfer or conveyance, see Garnishment, II.
Criminal frauds and cheats, see Crimes, II, Indictment.
Necessity of proof of fraudulent conveyance on creditors' bill, see also Creditors' Suits § 28.
Sufficiency of answer to creditors' bill in aid to admit of adjudicating rights of defendant, see Creditors' Suits § 26.
Arrest of fraudulent debtors, see Civil Arrest, I, II.
Suits to set aside conveyances in fraud of alimony decree, see Divorce § 190.
Constitutional power to vest law courts with jurisdiction to annul conveyances, see Constitutional Law § 57, ¶ 282.
Right of assignee to avoid transfers and suits under assignment to avoid them, see Assignments for Creditors §§ 20, 21, 40.
Accounting for fraudulently diverted property of wife on bill for divorce, see also Divorce ¶ 195.
Right of trustee in bankruptcy to sue to annul, see Bankruptcy § 18.
Jurisdiction over suits by trustee in bankruptcy, see Bankruptcy § 16.
Remedy and procedure to annul fraudulent transfer or diversion of corporate property by officers, see Corporations §§ 177, 200, 222, 345.
Statutory creditors' suits to reach fraudulently alienated corporate assets, see Corporations § 200.
Relative state and Federal jurisdiction over suits by or against bankrupt or his trustee, see Courts § 97.
Suits to annul decedent's fraudulent conveyances, see Estates of Decedents §§ 97-101.
Levy and sale followed by bill to declare equities of defendant in land, as distinguished from bill to annul fraudulent transfer in favor of execution purchaser, see Executions § 100.
Plea and notice in trover to assail transfer for fraud, see also Conversion § 28.
Bills in aid of execution on fraudulently transferred property, see Creditors' Suits.
Pleadings and proof in actions against sheriffs for levy on property fraudulently conveyed or transferred, see Sheriffs, VI.
Setting aside fraudulent transfers to collect taxes, see Taxes, X.
Bills in aid of execution when brought to uncover concealed assets, see Creditors' Suits.
Bills in aid of execution when brought to subject interests that are not leviable, see Creditors' Suits.
Remedies and rights of persons injured by fraud in general, see Fraud, III.

¶ 559. Equity recognizes the right of a judgment creditor to attack any fraudulent conveyance, subterfuge or device resorted to by the debtor for the purpose of hindering, delaying or defeating the creditor from realizing upon his judgment.—Barber v. McMicking, 189 Mich. 266.

¶ 560. Liens obtained on personalty by levy of execution do not in general require the aid of equity to enforce them, and transactions alleged to be fraudulent as against them are properly investigated in courts of law.—Stoddard v. McLane, 56 Mich. 11.

¶ 561. The rule that execution must be returned unsatisfied before equity can be resorted to, to reach property fraudulently conveyed, applies to defeat a suit based upon

the fact that within four months the new bankruptcy law will take effect and seeking to preserve the property of the debtor until such time.—Ideal Clothing Co. v. Hazle, 126 Mich. 262.

¶ 562. Where a judgment debtor has elected to treat as fraudulent a conveyance made by his debtor before the judgment, and notwithstanding the transfer of title has proceeded to sell the property on execution, he cannot afterwards maintain a bill to set aside the conveyance.—Cranson v. Smith, 47 Mich. 647.

¶ 563. An execution purchaser of land fraudulently transferred to a third person by the execution debtor may bring ejectment therefor; the fraud may be shown as well at law as in equity.—Cleland v. Taylor, 3 Mich. 201.

¶ 564. Where a deed of real estate was taken in the name of a minor son to keep it from his father's creditors, and it was afterwards sold by the sheriff on the execution against the father, the son was decreed to release to the purchasers at the sheriff's sale. —Cutter v. Griswold, W. 437.

¶ 564a. A delay of eight or nine years after gaining knowledge of facts upon which complainant bases a charge of fraud in transactions between husband and wife is too great to justify relief.—Buhl v. Peck, 70 Mich. 44.

§ 127. ——Under Bulk Sales Law.

Pleading in action under Bulk Sales Law, see also post ¶ 583.
Necessary and proper parties in proceedings under Bulk Sales Law, see post ¶ 571.
Inventories, affidavits and notices under Bulk Sales Law, see ante § 125.
Necessity for receivership in proceedings under Bulk Sales Law, see also post ¶¶ 635, 636.
Necessity for judgment or lien to entitle to relief from violation of Bulk Sales Law, see ante § 102.
Delay and laches in securing relief from sale contrary to Bulk Sales Law, see ante § 99.
Bulk Sales Law, see Comp. L. 1915, §§ 6346-6348.

¶ 565. The plain terms of the Bulk Sales Act (Act No. 223, Pub. Acts 1905, How. Ann. St., 2nd Ed., §§ 9612-9614) show that it was not the intention of the legislature to deprive creditors of an equitable remedy.—Coffey v. McGahey, 181 Mich. 225; Humiston, Keeling & Co. v. Yore, 181 Mich. 629.

¶ 566. The legal remedy by garnishment given creditors of the seller of a stock in violation of the Bulk Sales Act (Act No. 223, Pub. Acts 1905, How. Ann. St., 2nd Ed., §§ 9612-9614), are not so complete and adequate as to deprive a court of equity of jurisdiction.—Coffey v. McGahey, 181 Mich. 225.

¶ 567. An objection that a court of equity is without jurisdiction of a proceeding by a creditor against a purchaser of a stock of goods sold without compliance with the terms of the Bulk Sales Act (Act No. 223, Pub. Acts 1905, How. Ann. St., 2nd. Ed., §§ 9612-9614), because the complainant was not a judgment creditor, and that he has an adequate remedy at law, when not raised by demurrer, cannot be taken advantage of after answer and on the taking of proofs at the hearing.—Coffey v. McGahey, 181 Mich. 225. (Ostrander, J., dissenting.)

§ 128. Necessary and proper parties.

Assignees of original parties, see post § 129.
Multifariousness of bill joining all parties, see also Equity § 74.
Assignee or creditors as proper plaintiff to sue to set aside transfers in aid of assignment, see Assignments for Creditors §§ 39, 40.
Necessity of making grantee who has reconveyed party defendant in suit to annul fraudulent conveyance, see Estates of Decedents ¶¶ 312, 313.

¶ 568. Where the intent of a deed is so far carried out, by operative provisions, as to secure to beneficiaries the interests designed for them, the grantors need not be made parties to a creditor's bill to set aside subsequent conveyances.—Paton v. Langley, 50 Mich. 428.

¶ 569. An attorney for a mortgagee, who is charged with actively participating with his client in the fraudulent foreclosure of the mortgage, whereby all of the mortgagor's property was absorbed to the injury of creditors, is a proper, though not a necessary, party to a bill filed by a judgment creditor for an accounting and the payment of his judgment.—Sweet v. Converse, 88 Mich. 1.

¶ 570. A wife has no interest in the case so as to necessitate making her a party defendant to a suit to set aside a fraudulent deed to land executed by her and her husband.—Fowler v. Hanniford, How. N. P. 145.

¶ 571. On a creditor's bill against the purchaser of a stock of merchandise bought without complying with Pub. Acts 1905, No. 223, the complainant's debtor is a necessary party defendant.—Bixler v. Fry, 157 Mich. 314. (Moore and Brooke, JJ., dissenting.)

§ 129. ——Assignees of original parties.

Rights of assignees of creditors, see ante § 109.

¶ 572. The right to sue in equity to have a conveyance or other act set aside for fraud is not assignable.—Morris v. Morris, 5 Mich. 171; Brush v. Sweet, 38 Mich. 574.

¶ 573. An assignee of unpaid claims may attack fraudulent conveyances made by the debtor prior to his assignment.—Noble v. McKeith, 127 Mich. 163.

¶ 574. The assignee of a claim against a fraudulent grantor may sue to set aside the transfer on the same grounds of fraud open to his assignor.—Sweet v. Converse, 88 Mich. 1; Howd v. Breckenridge, 97 Mich. 65.

§ 130. Form, scope and sufficiency of bill.

Extent of grantee's liability and property liable, see ante § 119.
Issues and scope of hearing, see post § 131.
Propriety of joining all causes in one bill, see also Equity § 75.
Treating bill as common law creditors' bill to avoid shorter limitation, see Limitations, II.

¶ 575. A bill to set aside a conveyance made in fraud of creditors is aimed at defendant's legal title to the premises as against his creditors, and not merely at his equitable interest therein.—Cranson v. Smith, 47 Mich. 189.

¶ 576. A bill by another judgment creditor impleading a judgment creditor of an estate and the administrator thereof to set aside the judgment on the ground that it was procured by fraud and collusion between defendants, but alleging no facts or circumstances from which fraud could be inferred, is rightly dismissed for the want of equity.—McMahon v. Rooney, 93 Mich. 390.

¶ 577. A bill to reach land alleged to have been fraudulently conveyed by a judgment debtor is bad on general demurrer if it contain no direct averment that at the time of the alleged fraudulent conveyance the debtor had, or pretended to have, an interest in the lands.—Manning v. Drake, 1 Mich. 34.

¶ 578. Where a creditor seeks in chancery to reach property alleged to have been purchased with the money of his debtor, and conveyed to the debtor's wife to keep the same beyond the reach of creditors, he must show either that his debt existed at the time, or that the debtor was indebted to others, and that the purchase money was paid by him and the deed taken to his wife with actual intent to defraud existing creditors; or that the purchase money was paid by the debtor and the conveyance taken to the wife for the purpose of defrauding future creditors.—Hopson v. Payne, 7 Mich. 334.

¶ 579. The insolvency of a corporation one of defendants alleged to hold a bankrupt's assets in hindrance of creditors is sufficiently set forth in a bill which alleges that an organizer of the same stated that it owed more than it could pay, and which also alleges that judgments are entered or about to be entered for amounts beyond the ability of the company to meet.—Kimmerle v. Dowagiac Gas Co., 159 Mich. 34.

¶ 580. A bill in aid of execution to set aside a deed as fraudulent as against the complainant should show how it is so, and is too general if it merely alleges the fraud. But if the defendant does not object on the hearing the defect is not open on an appeal.—Rhead v. Hounson, 46 Mich. 243.

¶ 581. Where a judgment creditor's bill alleges that the mortgagor and a receiver appointed in foreclosure fraudulently conspired to enable the mortgagee to get possession of all of the mortgagor's assets for a nominal consideration, and that the conspiracy was successful, it is not necessary to aver that as a consequence there were no assets with which to pay complainant's judgment, or that defendants' contract operated as a fraud upon other creditors, or that the intent was to defraud them.—Sweet v. Converse, 88 Mich. 1.

¶ 582. Where the bill was inconsistent, averring in one part that the purchase price was paid by the wife, and in another that the husband paid the money, or furnished the money wherewith it was purchased by the wife, it was held that, as the law presumes honesty rather than fraud, it was to be inferred that the wife paid for the land with her own money rather than the contrary.—Hopson v. Payne, 7 Mich. 334.

¶ 583. A demurrer should not be sustained to a bill of complaint alleging that a stock of merchandise was voluntarily turned over by a debtor to a chattel mortgagee without foreclosure proceedings, in violation of the Bulk Sales Act (Act No. 223, Pub. Acts 1905, §§ 2612-2614, How. St., 2nd Ed.), where the value of the incumbered chattels is not disclosed by the bill.—Symons Bros. & Co. v. Brink, 187 Mich. 43.

¶ 584. If there is no special prayer to have the fraudulent conveyance set aside, the complainant is entitled to have it set aside under the general prayer for other and further relief.—Williams v. Hubbard, W. 28.

§ 131. Issues and scope of hearing.

¶ 585. Whenever a disposition of property has been made which is alleged to be fraudulent as to creditors the actual indebtedness is not only in issue, but it is the primary fact in logical order for the party attacking the conveyance to establish. It is also important in its bearing upon the probable intent of the parties to the transfer; and the bona fides of the transaction cannot be properly tried without going into this subject.—Cook v. Hopper, 23 Mich. 511; Manning v. Bresnahan, 63 Mich. 584.

¶ 586. On a bill to discharge of record certain mortgages alleged to be invalid as against complainants' judgment and levy because they have been paid and satisfied, it is immaterial that the mortgages may be valid as to some of the defendants though

void as to complainants, where all parties are joined and before the court.—Eaton v. Eaton, 68 Mich. 158.

B. EVIDENCE AND PRESUMPTIONS.

§ 132. Presumptions and burden of proof.

Presumptions and burden of proof as to notice or participation of transferee in fraud, see ante § 28.

Presumptions and evidence of intent or effect of transfer to hinder or defraud, see ante §§ 18-20.

Presumptions and burden of proof as to transfers to family relatives or business associates, see ante § 59.

Presumptions and burden of proof as to voluntariness and inadequacy of consideration as badge of fraud, see ante § 42.

Presumption of fraud as to existing creditors, see also ante ¶ 444.

Presumption on the pleadings as to fraudulency of conveyance, see also Equity ¶ 638.

Presumptions and evidence as to intended fraud in assignment, see Assignments for Creditors §§ 15, 16.

Prima facie case on bill in aid of execution to shift burden of showing good faith, see Creditors' Suits, II.

Presumption against party failing to produce full evidence, see Evidence §§ 63-65.

Presumptions and evidence as to fraudulent conveyance on motion to dissolve attachment, see Attachment §§ 122-124.

Burden of proof, presumptions and evidence in garnishment trials, see also Garnishment §§ 78-81.

Statutory rule as to requisites of prima facie case in bills in aid of execution and as to shifting of burden of proof to show good faith in transfers, see Pub. Acts 1917, No. 215, amending Jud. Act, chap. XXIII, § 82; Comp. L. 1915, § 12897.

¶ 587. Fraud is not presumed from a sale on credit merely, though such presumption may arise from failure to change possession and from some express deviation from the ordinary course of business.—Lewis v. Rice, 61 Mich. 97.

¶ 588. Fraud against creditors in a transfer of securities is not inferable from certain suspicious circumstances, in spite of uncontradicted testimony to the contrary.—Miller v. Beadle, 65 Mich. 643.

¶ 589. Provisions in a chattel mortgage giving power to sell at public or private sale, and to remove the mortgaged property to other places for sale in case of default, are not unusual, and are not per se fraudulent.—Armstrong v. Cook, 95 Mich. 257.

¶ 590. When there is no evidence as to the time when an indebtedness of a husband accrued upon which a judgment was rendered whether before or after a transfer to a wife it must be regarded as having accrued at the date of the judgment.—Glover v. Alcott, 11 Mich. 470.

¶ 591. Complainant in a bill in aid of execution, filed to set aside a conveyance which defendant is alleged to have delivered after verdict had been rendered against him, has the burden of proving that delivery was not made until after verdict.—McCullough v. Day, 45 Mich. 554.

¶ 592. In replevin for property attached by an officer, which had been sold and was in the possession of a third person, the burden of proof is upon the officer to show that the sale of the property by the debtor to the person in possession was fraudulent as against creditors. If the property had not been delivered to the buyer the burden of proof is upon the latter to show the good faith of the transaction.—Angell v. Pickard, 61 Mich. 561.

¶ 593. Under Pub. Acts 1897, No. 99, the burden of proof is on the defendant to show a conveyance attacked by a bill in aid of execution to have been made bona fide.—Ullman v. Thomas, 126 Mich. 61.

¶ 594. Pub. Acts 1897, Act No. 99, shifting to the defendant the burden of proof of fraud in suits in aid of execution applies only in cases where a judgment has been obtained against the principal defendant, and execution issued, and a levy made upon the property which it is claimed was fraudulently conveyed; and had no application to an action against a wife upon a note claimed by her to have been signed for a debt of her husband.—Whelpley v. Stoughton, 119 Mich. 314.

¶ 595. By § 10203, C. L. 1897, § 12864, How. St., 2nd Ed., after the complainant in a bill in aid of execution has established a prima facie case, the burden is shifted to the defendant to show the bona fides of the questioned transaction.—L. Starks Co. v. Eppink, 185 Mich. 233.

§ 133. Admissibility of evidence.

Admissibility of evidence as to form and manner of transfer and intent or effect to hinder and defraud, see also ante §§ 19, 20.

Admissibility of evidence as to notice or participation of transferee in fraud, see ante § 29.

Admissibility of evidence as to voluntariness and inadequacy of consideration as badge of fraud, see ante § 43.

Admissibility of evidence as to transfers to family, relatives or business associates, see ante §§ 60, 61.

Pleadings and files in other suits as evidence, see Evidence § 548.

Acts and declarations of parties as admissions of fraud binding successors, see Evidence §§ 414-416.

Opinions as to insolvency at time of transfer, see Evidence § 211, ¶ 1247.

Settlements with other creditors as admission, see Evidence § 396.
Cross-examination of witnesses as to financial conditions and resources, see Examination of Witnesses § 48.

¶ 596. Where a transfer of goods is attacked by the creditors of the party transferring as fraudulent, liberal rules govern the admissibility of evidence tending to prove fraud. All material facts and circumstances bearing on the transaction and on the relationship of the parties are properly considered.—Carew v. Mathews, 49 Mich. 302.

¶ 597. Where creditors attack a sale as fraudulent, evidence of all that was said and done between the parties at and before the agreement is competent, not only to show fraud but to rebut it. The seller may testify whether the sale was absolute, and the buyer may testify as to his intent.—Angell v. Pickard, 61 Mich. 561.

¶ 598. On an issue whether a stock of goods levied on as A.'s property really belonged to him or to B., as whose ostensible agent A. had been carrying on business, previous dealings between A. and B., whereby the former, to defraud his creditors, transferred to the latter a stock of goods which the jury were justified in treating as the basis of the stock levied on, were admissible in evidence.—Wolfe v. Frederick, 59 Mich. 246.

¶ 599. In an action involving the good faith of a firm in buying goods just before they failed, a written answer to an inquiry by the vendor as to their credit, which though true in fact was false in spirit and tended to mislead, was admissible in evidence.—Shipman v. Seymour, 40 Mich. 274.

¶ 600. Where a vendor's execution creditors sued for conversion by the vendee defend on the ground that the sale defrauded creditors, evidence that two months afterwards vendor made a general assignment, shown to have been contemplated at the time of the sale, is admissible.—Wessels v. Beeman, 87 Mich. 481.

¶ 601. Where an attaching officer sued in trover by a chattel mortgagee attacked the mortgage as fraudulent as to creditors, the court exercised a fair discretion in excluding, upon the cross-examination of plaintiff's witness, testimony which tended to prove that the mortgagor had entered into a fraudulent arrangement with certain other creditors in respect to property not covered by the mortgage.—Keating v. Retan, 80 Mich. 324.

¶ 602. In an action by an assignee in bankruptcy to recover assets fraudulently received from a bankrupt and used by defendants in the investment in a zinc mine, where the actual dividends and value of the stock in the mine had been shown, evidence of the reputation or standing of this or other mines was wholly immaterial.—Arnold v. Harris, 142 Mich. 275.

¶ 603. In an action by an assignee in bankruptcy to recover assets fraudulently received from a bankrupt and used by defendants, among whom was a son of the bankrupt, evidence that this son was a first class business man was inadmissible as having no bearing on the issue.—Arnold v. Harris, 142 Mich. 275.

¶ 604. Where in a suit involving the bona fides of a chattel mortgage given by a druggist to a firm of liquor dealers, with whom he had dealt for several years, to secure an existing indebtedness and the price of a bill of liquors which the mortgagees claim had been ordered by the mortgagor, the mortgagor denies ever ordering the liquors, and testifies that the mortgage was given for the larger amount in fraud of other creditors, it is competent for the assailants of the mortgage to show, as bearing upon the probabilities, in what quantities the mortgagor had usually ordered liquors of the mortgagees, and that the alleged order was an unusual one, and out of all proportion to the business then being carried on by the mortgagor.—Rosenthal v. Bishop, 98 Mich. 527.

¶ 605. The purchaser of goods being dissatisfied negotiated for a resale to the vendor, but notes which he had given fell due and he became embarrassed and made an assignment. In the course of the settlement of his affairs the vendor took back the goods and received a deed of them and gave a mortgage on them to a stranger. In later proceedings to set these aside as having been obtained by fraud, testimony to the original transfer was irrelevant except for the purpose of showing how complainant became indebted and how defendant became interested in the settlement of his debts.—Collins v. Jackson, 43 Mich. 558.

¶ 606. Where the seller of cord wood had agreed that the price therefor should be paid to certain creditors by the purchaser, evidence that a debt not included by the seller was contracted through fraud has no tendency to prove that his sale was fraudulent, neither is such evidence admissible.—Thompson v. Newland, 144 Mich. 595.

¶ 607. Where a mortgagee seeks to recover the value of mortgaged property sold on execution, and the mortgage is charged to have been fraudulent, he may be cross-examined as to his disposition of other property covered by the mortgage but not involved in the suit.—Ganong v. Green, 71 Mich. 1.

¶ 607a. The entire antecedents of the dealings between a principal defendant and a garnishee and their agents, and all transactions regarding the property and its disposal, are admissible in evidence where fraudulent

dealings of the garnishee as against the principal defendant's creditors are in question.—Cummings v. Fearey, 44 Mich. 39.

¶ 608. It is competent, upon the question whether all of the goods transferred by a debtor to another were entered upon the former's books, to show a removal of goods during the noon hour, in the absence of the bookkeeper, in connection with his evidence that he does not remember of any instance when goods that had been ordered in the forenoon were not sent until after he came back from dinner, nor of any instance of finding a memorandum of goods to be entered up when he came back from dinner.—Gumberg v. Treusch, 110 Mich. 451.

¶ 608a. The principal defendant and certain garnishees were engaged in the same kind of business, the former having at one time been an employee of the latter, and subsequently a partner with them, and having later still purchased from them the stock owned by the firm and a broken stock belonging to a branch store which the garnishees had for a time operated at a loss. Plaintiffs' theory was that the principal defendant had transferred a large amount of goods to the garnishees in payment of an indebtedness that was not bona fide, and that the goods were procured for that purpose pursuant to a fraudulent scheme entered into by the principal and garnishee defendants. Held, that plaintiffs could show whether orders for goods given by the garnishees were filled in the usual course of business or not, and that immediately after the garnishees sold the stocks of goods to the principal defendant he sent letters to different dealers asking for quotations and samples, it appearing that he was without capital, and that, according to the garnishees' claim, his indebtedness equaled, if it did not exceed, his assets.—Gumberg v. Treusch, 103 Mich. 543.

§ 134. Weight and sufficiency.

Weight and sufficiency of evidence as to form and manner of transfer and intent or effect to hinder and defraud, see also ante §§ 19, 20.

Weight and sufficiency of evidence as to notice and participation of transferee in fraud, see also ante § 29.

Weight and sufficiency of evidence as to voluntariness and inadequacy of consideration as badge of fraud, see ante § 44.

Weight and sufficiency of evidence as to transfers to family, relatives or business associates, see ante §§ 62-65.

Evidences of fraud in general as between the parties, see Fraud, I, B.

Sufficiency of evidence of fraudulent conveyance in actions against sheriffs for wrongful levy, see Sheriffs, VI.

Evidence of fraudulent conveyance as ground for attachment, see Attachment §§ 8, 122-124.

Evidence as to fairness or fraudulency of corporate assignment for creditors, see Corporations § 230.

Insufficiency of recital of consideration as proof of payment of value as against third person, see also Contracts ¶ 626.

¶ 609. One who impugns a transaction as fraudulent which may or may not be so is not sustained by his own assertion alone in case he is disputed, but must make his allegation good by independent evidence.—Hutchinson v. Poyer, 78 Mich. 337.

¶ 610. A grantee held as against the grantor's creditors, to have sustained the burden imposed on him by § 10203, Comp. Laws 1897, § 12864, How. St., 2nd Ed., of showing the bona fides of his conveyance.—Hummell v. Smale, 186 Mich. 199.

¶ 611. A decedent's conveyance will be set aside in favor of his creditors where equities of the complaining creditor are strong and the evidence pertaining to its delivery to a third person for delivery to the grantee on the grantor's death, as well as the question whether the grantor intended to part with all control over the instrument, is weak and not convincing.—Brown v. Keiser, 182 Mich. 432.

¶ 612. A bill in aid of execution and praying for the setting aside of various mortgages, was properly dismissed where the testimony proved that such mortgages were given for a bona fide indebtedness and that they were delivered.—Wilcox v. Wilcox, 135 Mich. 240.

¶ 613. On suit in aid of an execution issued on a deficiency decree, evidence of the suit to foreclose in August, 1896, a transfer of the property made on December 18th without consideration, a deficiency decree in April, 1897, exceeding the value of the remaining property, makes out a prima facie case for the complainant under Act No. 99, Public Acts of 1897 and testimony by two witnesses for the defendant tending to show the existence of sufficient property to cover the indebtedness at the time of the transfer, is offset by further testimony of an execution issued shortly thereafter and returned unsatisfied and the debtor's testimony that he is not sure whether his personal property was mortgaged at that time or not.—Gruner v. Brooks, 126 Mich. 465.

¶ 614. A contention that there is no evidence of fraud cannot be sustained where judgment creditors seeking to set aside conveyances show that a husband represented himself as being worth $20,000 at the time that the indebtedness was incurred, that he had nothing shortly afterwards and that some of the conveyances were kept off the record for a long time, and where the husband and the grantees and vendees in the conveyances refuse to take the stand and show the bona

fides of the transactions.—Manhard Hardware Co. v. Rothschild, 121 Mich. 657.

¶ 615. On a bill to quiet title to real estate which one of defendants claimed was originally deeded him by his father with the understanding that he should furnish his two brothers money whenever they wanted it, evidence held insufficient to establish fraud in inducing the execution of a deed by one of the plaintiffs, wife of one of the brothers, to whom such defendant had conveyed the property, to her husband.—Prentis v. Prentis, 189 Mich. 1.

¶ 616. On a bill to set aside an attachment levy, and a cross-bill asking to have a deed to complainant set aside as fraudulent as to creditors of grantor, evidence held sufficient to sustain a finding that the conveyance was not bona fide and was void as to creditors of grantor under Comp. Laws 1897, § 9533, How. St., 2nd Ed., § 11417.—McRae v. Sleeper, 188 Mich. 168.

¶ 617. A defendant in a justice's court suit filed for record January 7, 1908, a mortgage on his real estate running to his brother. The mortgage was dated January 4, 1908. Judgment was had against defendant in the suit January 6, 1908. The certificate of deposit which represented the loan made to defendant by his brother was canceled January 7, 1908. Defendant and his brother were heard to say that they had fixed things so that the judgment could not be collected. In a bill by complainant in aid of the execution, held, the mortgage should be set aside as fraudulent.—Shepard v. Schrutt, 163 Mich. 485.

¶ 618. On a bill in aid of execution by the seller of land against the purchaser and her husband, where a judgment at law had been obtained against the purchaser for fraudulent representations as to the value of exchanged property, evidence held sufficient to show that the conveyance was made to the purchaser and her husband at the request of the purchaser.—Lipp v. Jacobs, 198 Mich. 357.

§ 135. Questions of law and fact.

Jury questions as to form and manner of transfer and intent or effect to hinder and defraud, see also ante § 21.

Questions of law and fact as to notice and participation of transferee in fraud, see also ante § 30.

Jury questions as to transfers to family, relatives or business associates, see ante § 66.

Excessive mortgages as question for jury, see ante ¶¶ 151, 153.

Extension of credit on property transferred as question for jury, see also ante ¶ 446.

Fraudulent intent as question of fact, see Comp. L. 1915, § 12001.

¶ 619. Fraud against creditors in a sale of goods by a debtor is a question of fact and not of law, except in the very few cases where a transaction is intrinsically incapable of a legal and honest effect; and except in those cases it should be submitted to the jury, under proper instructions.—Lewis v. Rice, 61 Mich. 97; Bedford v. Penney, 65 Mich. 667; Wessels v. Beeman, 66 Mich. 343.

¶ 620. Suspicious circumstances attending an alleged sale of goods to plaintiff in replevin, which sale is claimed to be fraudulent, are matters for the jury.—Morse v. Denton, 77 Mich. 693.

¶ 621. The weight of evidence is for the jury where the plaintiff insists that the sale in question was made in good faith and the defendant avers that it was fraudulent, and each gives testimony tending to support his claim.—Gordon v. Alexander, 122 Mich. 107.

¶ 622. The questions whether the mortgage was filed before the persons complaining of it became creditors of the mortgagor are for the jury; so, also, are the questions whether a garnishee has possession of assets belonging to the principal defendant, and whether he holds by a title fraudulent as against the plaintiff in the character of a creditor.—Fearey v. Cummings, 41 Mich. 376.

¶ 623. It is necessary to submit a proper jury question whether a sale of goods was fraudulent as to creditors although the sale attacked embraced some cigars as to which it was void as made in violation of the United States revenue laws.—Wessels v. Beeman, 66 Mich. 343.

§ 136. Instructions and direction of verdict.

Instructions as to form and manner of transfer and intent or effect to hinder and defraud, see also ante § 21.

Instructions as to notice and participation of transferee in fraud, see also ante § 30.

Instructions as to transfers to family, relatives or business associates, see ante § 66.

¶ 624. Where the question was as to the validity, against creditors other than the mortgagee, of two chattel mortgages, the second of which was given and received to secure a compromise based in part at least upon the supposed validity of the first, an instruction directing the jury's attention entirely to the first mortgage on the ground that if it was fraudulent and void so also would the second be, while if it was valid the mortgagee would prevail even though the second were fraudulent and void, was sustained.—Anderson v. Cook, 100 Mich. 621.

¶ 625. It is error to instruct the jury, in a suit by a vendee to recover the value of goods from the attaching creditors of his vendor, that plaintiff has made out a prima facie case by proving the sale to him of the goods, other facts being shown by plaintiff's testimony which might also have weight with the jury in determining the bona fides of the

purchase.—Hutchinson v. Poyer, 78 Mich. 337.

¶ 626. In replevin by mortgagees against an attaching officer who raises the defense that the mortgage was fraudulent as to creditors, it is proper, where the defendant produces no evidence of fraud, to instruct the jury that the evidence does not warrant a finding that the mortgage was fraudulent, the burden being on defendant.—Hyde v. Shank, 93 Mich. 535.

¶ 627. On an issue of fraud upon creditors in a chattel mortgage after the evidence is received tending to show fraud on the debtor's part, the court will direct a verdict accordingly; if no evidence indicates fraud and if the mortgagee is not shown to be chargeable with it the jury will be so instructed; but it cannot be excluded when offered because there is no evidence to connect the mortgagee with it.—Heath v. Koon, 130 Mich. 54.

¶ 628. Where, in a case involving the bona fides of a chattel mortgage the mortgagees introduce evidence to show that at the request of the mortgagor, made subsequently to the execution of the mortgage, they did not ship the goods ordered, but credited the price of the same upon the mortgage, and the mortgagor claims that the writing containing such request was made by him at the instance of the mortgagees, and that the goods mentioned had never been ordered, it is error for the court to refuse to instruct the jury, at the request of the attaching creditors of the mortgagor, that any arrangement between the parties, by which the amount of the mortgage was reduced to the sum actually due, would not save the security, if the mortgage was fraudulent in its inception.—Rosenthal v. Bishop, 98 Mich. 527.

¶ 629. Where the question was whether a transfer of goods was fraudulent as to creditors, an instruction that in the absence of direct or positive proof of fraudulent acts the proof must be clear and convincing, of the kind and amount to create in the mind a hearty conviction that the charge of fraud is true, was misleading; proof of facts and circumstances is sufficiently clear if it creates a belief that a fraud has been perpetrated.—Gumbert v. Treusch, 103 Mich. 543.

¶ 630. An instruction on the validity of two mortgages was sustained, which charged that if the first mortgage was valid when plaintiff, the mortgagee, demanded the property from attaching officer, neither the latter nor the plaintiff in attachment could have been injured by coupling the second mortgage, even if fraudulent, with the first, it appearing that the first mortgage alone exceeded the appraised value of the property.—Anderson v. Cook, 100 Mich. 621.

¶ 631. On a conflict in evidence tending to show that plaintiff falsely claimed to have bought the horses in suit of the debtor, thereby intending to assist him in defrauding his creditors, and that the defendant officer had delivered them to the debtor at plaintiff's instance, an instruction assuming a valid purchase by plaintiff and an unauthorized delivery of the property to the debtor, as claimed by plaintiff, should be refused.—Mears v. Cornwall, 73 Mich. 78.

C. JUDGMENT AND RELIEF.

§ 137. In general.

Receivership or other ancillary relief, see post § 138.

Necessity for judgment or lien to entitle creditor to relief, see ante §§ 101-103.

Diligence and laches in securing relief, see ante, II, B.

Requisites of decree setting aside fraudulent transfer in bankruptcy, see Bankruptcy ¶ 64.

Parties entitled to appeal from decree, see Appeal § 61.

Finality of decision under the Bulk Sales Act, to operate as res adjudicata, see Former Adjudication ¶ 97.

Sufficiency of decree that fraudulent grantee satisfy all creditors on suit by representative to annul transfer, see Estates of Decedents ¶ 323.

Necessity for saving questions for review, see Saving Questions.

¶ 632. A bill of a judgment creditor and in aid of execution set out that the judgment debtor had caused certain land to be conveyed to himself and wife in fraud of creditors, and that the consideration therefor, or at least one-half the consideration, was paid by the judgment debtor. Held, the bill would not support a decree of sale of all the land, but only of the debtor's undivided half.—St. Louis Hoop & Stave Co. v. Danforth, 160 Mich. 226.

¶ 633. A bill in aid of execution was filed against land which had been sold in contemplation of the issue of the execution. The land included a homestead, and the purchaser redeemed it from a mortgage against the judgment debtor. Held, that the redemption raised an equity in the purchaser's favor, but as it benefited the homestead as well as the rest, the amount of land subject to sale on execution was what was left after setting apart the homestead parcel and so much besides as was found on appraisal of the whole to be worth that proportion of the redemption money which was paid to release the homestead. Interest on the mortgage was not allowed where it did not clearly appear that the purchaser had not paid it, and it was shown that he had the use of the land long enough to counterbalance his claim therefor.—Rhead v. Hounson, 46 Mich. 243.

¶ 634. A decree for complainant in a bill in aid of execution was not disturbed where it appeared that the debtor regarded the

claim as inequitable, and that the conveyance in question was to the debtor's brother, and that no money passed as an outstanding mortgage was assumed and another was given back for the balance of the purchase price, and that the latter was never recorded, and that the papers were drawn by a brother-in-law, and the grantor soon left the county. —Noble v. Laidlaw, 136 Mich. 680.

§ 138. Receivership or other ancillary relief.

General grounds for receivership, see Receivers, I.

Procedure for appointment of ancillary or pendente lite receivers and sufficiency of main pleadings to support appointment, see Receivers, II, A.

¶ 635. Where a sale of a stock of goods has been made by a debtor without complying with the Bulk Sales Law, Act No. 223, Pub. Acts, 1905, his creditor may proceed against him in accordance with sections 10601 and 10632, Comp. Laws 1897, without the intervention of a court of equity, and no receiver need be appointed.—Musselman Grocer Co. v. Kidd, Dater & Price Co., 151 Mich. 478, affirmed in 217 U. S. 461, 54 L. ed. 839, 30 Sup. Ct. Rep. 606.

¶ 636. Equity has jurisdiction on petition of a creditor of a vendor to appoint a receiver to take possession of a stock sold in violation of the Bulk Sales Act (Act No. 223, Pub. Acts 1905, How. Ann. St., 2nd Ed., §§ 2612-2614), and to permit all other creditors, although their claims have not been reduced to judgment, to intervene.—Humiston, Keeling & Co. v. Yore, 181 Mich. 629; Coffey v. McGahey, 181 Mich. 225. (Ostrander, J., dissenting.)

VI. PRIORITIES BETWEEN CREDITORS.

§ 139. In general.

See also ante ¶ 246.

Rights and liabilities of grantee towards defrauded creditors, see ante, IV.

Remedies of creditors, see ante, V.

Priorities of the various liens and incumbrances with respect to each other, see specific topics treating of such liens, e. g., Chattel Mortgages, III; Mortgages, V; Attachment, VIII; Executions, V; Liens; Vendors and Purchasers, XI.

Notice or record under recording acts as affecting priority, see Notice and Record of Title.

Marshalling and subrogation, see Marshalling Assets; Subrogation.

¶ 637. A man fraudulently transferred his property to his son to anticipate the judgment in a suit pending against him. The son agreed, in the instrument of transfer, to pay his father's debts to certain bona fide creditors, and, while the action was still pending, executed mortgages to them therefor. After the verdict, but before the judgment, he executed other mortgages to brothers of defendant. Held, on a bill filed by the judgment creditor in aid of execution, that the property, relieved of the later mortgages, should be sold on execution and that if the proceeds were not sufficient to pay the judgment and the bona fide claims they should be applied ratably thereon.—Beam v. Bennett, 51 Mich. 148.

¶ 638. Prior liens paid in pursuance of fraudulent agreements stand upon the same basis as actual payments of the purchase price, in proceedings in aid of execution.—Morley Bros. v. Stringer, 133 Mich. 690.

¶ 639. Parties dealing so as to defraud creditors of a principal defendant, and having no preference by legal proceedings, cannot go behind judgments recovered against the principal defendant to inquire into the dates at which debts matured.—Cummings v. Fearey, 44 Mich. 39.

FRAUDULENT DEBTOR PROCEEDINGS to GAMBLING.

Cross-References.

Fraudulent Debtor Proceedings—
See Civil Arrest, II.

Free Delivery—
By express company, see Carriers § 32.

Freeholds; Freeholders —
Freehold interests in land, see Real Property.
Freeholder qualification for office or public function, see specific topic treating of the office of act to be done, e. g. Drains, II; Eminent Domain, V; Highways, II, B; Arrest, IX (bail); Stay, II.

Freemasons—
See Associations; Corporations.

Free Schools—
See Schools.

Free Speech and Free Press—
Constitutional rights, see Constitutional Law, VII.

Freezing—
Liability of building contractor for, see Building Contracts § 16.
Carrier's liability, see Carriers § 45.

"Freeze Out"—
Fraud on minority stockholders, see Corporations, XXIV, D.

Freight—
See Carriers, II, I.
Public regulation of carriers, see Public Service; Carriers, I.

Frenzy—
As condition affecting criminal responsibility, see Crimes § 13.

Friendly Suits—
Doctrine as to jurisdiction by consent, see Courts, V.
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Voluntary appearances, see Appearance.

Fright—
As element of damages, see Damages §§ 24-27.

Frightening Animals—
Liability for injury ensuing from fright, see Highways, XII, XIII; Railroads, VIII.
Frivolous Appeal or Error—
Dismissal or other disposal, see Appeal, X.
Costs for damage and delay, see Costs §§ 124-127.
Frivolous Examination of Witnesses—
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Frivolous Pleading—
See Pleading, III, IV; Equity, VII.
Frontage—
Basis for assessment for local improvements, see Local Improvements, VI.
Frost—
Duty of carrier to protect from frost, see Carriers § 45.
Liability of building contractor for frost damage, see Building Contracts § 16.
Liability of warehouseman, see Warehousing.
Fruit—
Right to fruit as crop, see Agriculture; Landlord and Tenant, IV, E; Life Estates, II.
Fruit Trees—
Measure of damages for breach of warranty of variety, see Damages § 62.
Sales and warranties, see Sales.
Fuel—
Exemptions of sustenance for family, see Exemptions.
Precautions against throwing sparks in use of wood burning engines, see Fires; Railroads, VIII, G.
Fugitives from Justice—
See Extradition.
Full Administration—
As defense to claim on debt of estate, see Estates of Decedents, VI, C, 2, IX.
Full Faith and Credit—
To foreign judgments, see Foreign Judgments, II.
Full Liability on Stock—
See Corporations, XXIV, E.
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See Payment.
Tender and acceptance of payment in full as accord and satisfaction, see Accord § 6 et seq.
For stock, see Corporations, XXIV, E.
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Trust funds—
See Trusts.
Corporate trust fund doctrine, see Corporations § 219.
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See generally Corpses and Burial; Cemeteries.
Expense as charge against estate, see Estates of Decedents § 150.
Liability of husband or wife for other's burial, see Husband and Wife, III, IV.
Benefits payable under fraternal certificate, see Fraternal Associations.
Expenses as element of damages for death by wrongful act, see Death by Wrongful Act § 33 et seq.
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Furnished on Request—
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Furniture—
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Further Accountings—
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Covenants for better assurances of title, see Covenants for Title.
Further Evidence or Findings—
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Declination of abstract or futile questions, see Appeal § 259 et seq.; Certiorari § 40.
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Mortgaging after acquired titles and properties, see Mortgages, III; Chattel Mortgages, I, B.
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Future Property—
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Future Support—
Agreements for, see Contracts §§ 111, 206; Parent and Child, IV; Adoption.
Fraud affecting agreements, see Fraud; Parent and Child, IV.
Future Values—
Estimation of prospective value, see Values.
Futures—
Dealings in, see Gambling Contracts; and see Contracts IV.
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Gambling—
As crime, see Crimes, II; Indictment.

GAMBLING CONTRACTS.

TREATS of contracts wagering in nature and object, and especially of dealings in futures.

Analysis.

§ 1. In general; what constitute.
§ 2. Dealings in futures.
§ 3. Liabilities of parties to the contract.
§ 4. ——Action for recovery of stake or money.
§ 5. Effect of invalidity on collateral or substituted obligations.
§ 6. Presumptions and evidence.
§ 7. Questions for jury and instructions.

§ 1. In general; what constitute.

Dealings in futures, see post § 2.
Use of slot machine, see post ¶ 17.
"Guessing" contests, see post ¶ 13.
Presumptions and evidence and jury questions, see post §§ 6, 7.
Averments in affidavit for capias as showing gambling contracts, see Civil Arrest § 7.
Designating as beneficiary one having no insurable interest, see Fraternal Associations ¶ 88.
Statutes for "suppression of gaming," see Comp. L. 1915, chap. 148, § 7795 et seq.

¶ 1. A contract cannot be a gambling contract unless both parties concur in the illegal intent.—Gregory v. Wendell, 40 Mich. 432.

¶ 2. Comp. L. 1857, chap. 189, being How. St., § 9387, punishing as a common nuisance the running of horses for bets or rewards, excepting such as are "by special laws for that purpose expressly allowed," it was held that Comp. L. 1857, chap. 54; How. St., § 2306, authorizing agricultural societies to hold fairs and "distribute premiums for the most meritorious animals," did not operate to validate

racing for premiums at a horse-fair and accordingly an agreement to pay a purse was invalid.—Bronson Agricultural & Breeders' Ass'n v. Ramsdell, 24 Mich. 441.

¶ 3. Furnishing money to another for betting purposes is a gambling transaction, and suit cannot be maintained for the winnings.—Helber v. Schantz, 109 Mich. 669.

¶ 4. A contract by which a corporation in consideration of $80 paid in weekly instalments of $1.25 each, agrees to give the payor a diamond within three months after the last payment and if desired repurchase the diamond for $125, all payments made to be forfeited in case of default, is not void as a gambling contract.—Barney v. Tontine Surety Co., 131 Mich. 192.

¶ 5. A contract providing for weekly payments of $1.25 until $80 has been paid in, the payments made to be forfeited in case of default, and providing that the other party three months after the last payment is made shall deliver to the first party a diamond which if he so desires can be sold back to the second party for $120, is not within the definition of a gambling contract.—Rehberg v. Tontine Surety Co., 131 Mich. 135.

¶ 6. An agreement with the purchaser of goods by the seller whereby such goods might be secured by the purchaser by a drawing at less than the purchase price, held to be a gambling contract under Comp. Laws 1897, § 9931, How. 2nd Ed., § 14856.—La France v. Cullen, 196 Mich. 726.

§ 2. Dealings in futures.

Nature of dealings as jury question, see post § 7.

Brokerage agreements, see Brokerage.

¶ 7. An agreement for a sale for future delivery is a gambling contract, and as such not enforceable where the intention is that there shall be no actual sale, but only that at the time fixed for delivery the parties shall settle, and the purchaser pay or receive the difference between the agreed price and the market price at that time according as the market price is less or greater.—Gregory v. Wendell, 39 Mich. 337.

¶ 8. If one of the parties to a bargain of sale contemplates an actual sale, the transaction may be perfectly valid irrespective of any illegal purpose entertained by the other.—Gregory v. Wendell, 40 Mich. 432.

¶ 9. Under Comp. Laws 1897, §§ 11373, 11374, relating to brokers' contracts, the intention of the parties entering into the contracts is the controlling factor in determining their lawfulness, and contracts are only made void by said statute where there is no intention of receiving and paying for the property bought, or of delivering the property sold; and the absence of a bona fide intention of one side only will not serve to make void the contract with respect to the rights of the other party.—E. B. Cadwell & Co. v. Lean's Estate, 169 Mich. 117.

¶ 10. It is lawful to buy merchandise for future delivery even if at the time of purchase the seller has none to deliver.—Gregory v. Wendell, 39 Mich. 337; Gregory v. Wendell, 40 Mich. 432.

¶ 11. Defendant made an arrangement with plaintiff brokers at Detroit under which the latter were to buy and sell grain for him on the Board of Trade at Chicago. Plaintiffs made such purchases and sales through brokers at Chicago. The Chicago brokers charged a certain percentage for making the purchases and sales and assessed the charge irrespective of whether defendant lost or won by the transaction. Plaintiffs in turn assessed said charge against defendant and sued to recover for charges so accumulated. Under the contracts made in defendant's behalf by said brokers, defendant was entitled to call for the actual delivery of the grain, and all the evidence indicated that it was the intention of the parties to make sales of said character. Held, under Comp. Laws 1897, §§ 11374, 11375, relating to the duties of brokers, plaintiffs were entitled to recover.—E. B. Cadwell & Co. v. Lean's Estate, 169 Mich. 117.

§ 3. Liabilities of parties to the contract.

Illegality as affecting other and collateral agreements and rights, see post § 5.

Public policy as to contracts and defenses based on public policy, see Contracts, IV.

Right of person acting in good faith to enforce contract, see also Contracts § 90.

Right of person not participating in gambling intent to enforce contract, see also Contracts § 91.

Criminality of gaming, see Crimes, II; Indictment.

Statutory penalties and forfeitures for gaming, see Comp. L. 1915, §§ 7796, 7798.

¶ 12. Where a commercial "operation" is a purely gambling transaction, and understood to be so by both parties, neither can sue the other on it.—Gregory v. Wendell, 40 Mich. 432.

¶ 13. A guessing contest prior to a presidential election, under the terms of which the publisher of a periodical agrees to pay a certain sum to the one guessing nearest to the number of votes cast for the office of President of the United States and a certain other sum to the one giving the next nearest correct estimate, provided a certain sum was paid at the time of the making of the estimate for a subscription to the periodical, constituted a "lottery" within the prohibition of Comp. L. 1897, § 11344, How. St., 2nd Ed., § 14856, providing that every "person who

shall set up or promote, within this state, any lottery or gift enterprise for money, or shall dispose of any property, real or personal, goods, chattels or merchandise, or valuable thing, by the way of lottery or gift enterprise" shall be subject to a certain punishment; and the winner of a prize cannot enforce payment.—Waite v. Press Pub. Ass'n, 155 Fed. 58.

§ 4. ——Action for recovery of stake or money.

Presumptions and evidence, see post § 6.
Jury questions, see post § 7.
Implied contract for money or property wagered, see Contracts § 96.
Statutory right of action for recovery from winner of stakes paid over, see Comp. L. 1915, § 7795.
Oath of defendant to discharge himself, see Comp. L. 1915, § 7797.

¶ 14. If the loser of money, deposited upon an unlawful wager, claim his money before it has been actually paid over by the holder, even though it be after the wager has been decided, the stakeholder is bound to return it to him, and is liable to an action therefor if he refuses.—Whitwell v. Carter, 4 Mich. 329.

¶ 15. Recovery of money lost by gambling, How. St. § 2023, which provides for the recovery of money lost "by playing or betting on cards or by any other device in the nature of such playing or betting," does not cover betting on the result of an election.—Lassen v. Karrer, 117 Mich. 512.

¶ 16. A slot machine, by the operation of which, if the dial stops in a certain position the player will win, and, if it does not, the owner will win, and by which, if the player wins, the money is delivered to him automatically by the machine, and, if he loses, the machine retains the coin deposited by him, constitutes a gambling device within Comp. Laws 1897, § 5929, How. 2nd Ed., § 5272, providing that any person that shall lose any sum of money or any goods or articles of value by the playing or betting on cards "or by any other device, in the nature of such playing or betting" and shall pay or deliver the same or any part thereof to the winner, the person so paying or delivering the same may sue for and recover such money.—Raymond v. Green, 194 Mich. 639.

¶ 17. A deposit of a coin in a slot machine for the purpose of playing the same constitutes a delivery to the owner where the machine retains the coin upon the player losing.—Raymond v. Green, 194 Mich. 639.

¶ 18. The fact that an agent of a railroad company has embezzled funds which are used by him in gambling with a slot machine does not deprive him of the right to recover the sum lost under the provisions of Comp. Laws 1897, § 5929, How. 2nd Ed., § 5272.—Raymond v. Green, 194 Mich. 639.

§ 5. Effect of invalidity on collateral or substituted obligations.

Furnishing money for another to bet, see also ante ¶ 3.
Effect of illegality of contract, see Contracts, IV, D.
Right to recover money lent to make "corner," see Contracts ¶ 388.

¶ 19. "Margin" cannot be recovered back in case of a decrease in the price of the goods, where both vendor and purchaser contemplated a merely gambling contract; it cannot be recovered to the extent of the loss where both intended an actual sale; if the purchaser alone acted in good faith he can recover back whatever he has advanced.—Gregory v. Wendell, 39 Mich. 337.

¶ 20. "Dealing in options," though contrary to public policy to such an extent as to render negotiable paper based upon it invalid for want of consideration, is not "gaming" or "betting" as those terms are commonly understood, or within the meaning of Comp. L. 1871, § 1996, How. St., § 2027, which is of a penal nature and declares all notes, etc., in which any part of the consideration shall be for goods won by any betting or gaming, or for reimbursing moneys knowingly advanced for betting or gaming, shall be void as between the parties and all persons except bona fide holders without notice.—Shaw v. Clark, 49 Mich. 384.

¶ 21. One who lends or advances money to be used for the purpose of making a corner in wheat cannot recover it back by any legal measures.—Raymond v. Leavitt, 46 Mich. 447.

¶ 22. Act No. 336, Pub. Acts 1907, prohibiting gambling contracts, does not prevent a plaintiff who contracted in good faith with a defendant broker for the purchase of stocks, from recovering for the latter's failure to deliver same.—Goodspeed v. Smith, 162 Mich. 641.

¶ 23. Where money is loaned to a customer by the operator of a "hand-book business" for the purpose of betting at races and is repaid by the customer to an agent of the lender, the latter can be required to account for the money received, since the contract of agency, created upon receipt of the money, is not vitiated by the illegal contract between the principal and his customer.—Sheahan v. McClure, 199 Mich. 63.

¶ 24. The parties to an arrangement for speculating in options have the right as between themselves to settle their mutual dealings as they please; and a loan from one to the other, agreed upon by them in making such settlement, would not be affected by the nature of their previous operations.—Stanley v. Nye, 51 Mich. 232.

¶ 25. A defense to an action for failure to deliver a telegram, for the reason that such

message was in furtherance of a gambling contract, and invalid under the statute (How. St., § 9354f) is not conclusive where the evidence is in dispute as to whether the plaintiff intended to actually buy the grain ordered, it being the rule that every contract for a future delivery of grain is not a gambling contract.—Carland v. Western Union Tel. Co., 118 Mich. 369.

§ 6. Presumptions and evidence.

General law of evidence, see Evidence.

Cross-examination to show that sale was a gambling contract, see Examination of Witnesses § 50, ¶ 291.

¶ 26. Suit under Comp. L. 1857, § 1582, How. St., § 2023, which autnorizes the loser of money by betting, "who shall pay and deliver the same" "to the winner," to "sue for and recover such money, in an action for money had and received." The parties had made a wager upon the result of an election, depositing their negotiable notes for the amount instead of money. When the result was determined the stakeholder delivered the notes to the winner—the defendant—who afterwards sold plaintiff's note at a discount. Plaintiff then brought assumpsit against defendant for money had and received, and on the trial produced his note as evidence that he had paid it. Held, that the production of the note was not sufficient evidence of its payment by plaintiff to authorize him to maintain the statutory action.—Buckley v. Saxe, 10 Mich. 328.

¶ 27. In an action to recover embezzled funds, which had been used in gambling, in a slot machine, from the proprietor where it appeared that the plaintiff, who was an agent of a railroad company, took a certain sum from the company during the period in question, and that during that time his salary was a specified sum, and he showed various expenditures for living and other purposes during the same period, and the amount deposited in the machine was arrived at by deducting the expenditures from the total sum, held that the evidence was sufficient to sustain the finding of the jury in favor of plaintiff.—Raymond v. Green, 194 Mich. 639.

§ 7. Questions for jury and instructions.

Gambling nature as jury question, see also Contracts ¶ 1430.

¶ 28. In an action by a broker to recover for loss on a sale of wheat for future delivery, where there is a conflict of testimony as to whether the contract was a lawful contract, or unlawful under Comp. L. 1897, § 11373, making it unlawful to buy or sell stocks, etc., without the intention of receiving and paying for the property sold or delivering the property bought, the question becomes one for the jury and the appellate court will not disturb their judgment.—Donovan v. Daiber, 124 Mich. 49.

¶ 29. Whether a purchase of wheat for future delivery and on margins was a bona fide purchase or a mere gambling contract and prohibited by Comp. L. 1897, § 11373, was properly for the jury though it appeared that the purchaser had no use for the wheat and that none was delivered to him and that the brokers during the many years they had done business had never actually delivered any wheat to the customers who had dealt with them.—DeMary v. Burtenshaw's Estate, 131 Mich. 326.

¶ 30. Whether a plaintiff who contracts for the purchase of stocks and puts up the margins intends to make a binding contract or is merely gambling, contrary to Act No. 336, Pub. Acts 1907, is a question of fact for the jury.—Goodspeed v. Smith, 162 Mich. 641.

GAME to GARBAGE.

Cross-references.

Game—
- Game laws and regulations, see Fish and Game.

Games of Chance—
- See Crimes, II; Indictment; Gambling Contracts.

Garages—
- Motor vehicle laws and regulations, see Highways, XIV.
- Storage, keeping and bailments of automobiles for work, see Bailments; Warehousing.
- Building regulations, see Buildings.
- Liens for charges, see Liens.
- Nuisances in general, see Nuisances.

Garbage—
- Sanitary regulations, see Health.
- Municipal regulation for disposition and removal as a "taking," see Eminent Domain ¶¶ 84, 85.
- Municipal police power, see Municipal Corporations, IX.
- Nuisances in general, see Nuisances.

GARNISHMENT.

TREATS of the process by which a debtor or bailee of the principal defendant in an action is warned that the debt or the property supposed to be in his hands is attached for the satisfaction of the judgment recovered or sought against such principal defendant, and of the proceedings upon garnishment and the trial of issues raised by the garnishee. The equitable remedy in aid of execution or by ordinary creditors' suit is distinct and is treated in Creditors' Suits or in Fraudulent Conveyances. Garnishment before justices of the peace is treated in Justices of the Peace.

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I. NATURE AND GROUNDS OF REMEDY; KINDS OR STATUS OF ACTIONS.

§ 1. In general.

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Strictness of construction of garnishment laws, see post § 3.

Grounds and jurisdiction, see post §§ 4-6.

Actions and judgments sufficient as basis, see post § 7.

Jurisdictional amount and subjects, see post § 8.
Proper county or venue, see post § 9.
Persons entitled to sue out writ, see post §§ 10, 11.
Garnishment as adequate remedy at law precluding creditors' suit, see Creditors' Suits § 9.

¶ 1. Garnishment proceedings are not in the ordinary course of law, as they involve consequences that could not otherwise arise at law or in equity.—Blake v. Hubbard, 45 Mich. 1.

¶ 2. Garnishment process is in the nature of an equitable attachment of assets belonging to a defendant but held by a third person, the purpose of the attachment being to apply such assets in discharge of defendant's debt.—Bethel v. Superior Court Judge, 57 Mich. 379.

¶ 3. The object of the garnishee law is to furnish reasonable facilities for reaching property of the debtor due him, or held for him by third persons.—Karp v. Citizens' Nat. Bank, 76 Mich. 679.

¶ 4. Garnishment proceedings do not contemplate the enforcement of a lien upon the property and moneys garnisheed, but simply the application of the plaintiff's demand when that is established, and alternatively and contingently the personal liability of the garnishee.—Childs v. N. B. Carlstein Co., 76 Fed. 86.

¶ 5. A garnishment proceeding is a proceeding by which a third party is involuntarily drawn into litigation for which he is not responsible and in which he has no interest, the ultimate object being to compel him to pay a contractual indebtedness to another than a creditor to whom he owes the debt. It is a proceeding substantially in rem by which the garnishee defendant's indebtedness is impounded or taken into custody of court for the benefit of his creditor and he made an involuntary stakeholder, receiver, agent, or trustee of the court to hold the fund or res until it is determined in the litigation who is entitled to it, or he is otherwise relieved of his trust.—Katt v. Swartz, 199 Mich. 51.

§ 2. Ancillary nature of the proceeding.

When garnishment becomes adversary in character, see post ¶ 213.
Discontinuance of garnishment on failure of main case or for delay therein, see post §§ 97, 98.
Garnishment as remedy to reach shares for benefit of creditors of distributees, see Estates of Decedents § 382.

¶ 6. The service of a writ of garnishment is not the commencement of an action. Garnishment is ancillary to the action.—Milwaukee Bridge & Iron Works v. Wayne Circuit Judge, 73 Mich. 155.

¶ 7. Garnishment proceedings are special and ancillary, and jurisdiction to render judgment against the garnishee depends upon an observance of the statutory prerequisites.—Heritage v. Armstrong, 101 Mich. 85.

¶ 8. Garnishment is a special auxiliary remedy for the more effectual recovery of debts. The primary object of it is to reach the res in the hands of third persons against whom there is no foundation for a personal claim when the summons issues.—Newland v. Wayne Circuit Judge, 85 Mich. 151.

§ 3. Strictness of remedy; construction of statutes.

Statutory grounds as exclusive of others, see post § 4.

¶ 9. The act authorizing proceedings against garnishees being in derogation of the common law must be strictly construed.—Maynards v. Cornwell, 3 Mich. 309; Hanselman v. Kegel, 60 Mich. 540.

¶ 10. The remedy is purely statutory and artificial, and the mode of conducting it is regulated and defined by enactment.—People ex rel. Townsend v. Cass Circuit Judge, 39 Mich. 407; Smith v. Holland, 81 Mich. 471.

¶ 11. The proceedings under the garnishee statute are in derogation of the common law, and there is no authority for any action or prohibition of action outside of the statute.—Hanselman v. Kegel, 60 Mich. 540.

¶ 12. Garnishment proceedings are purely statutory, and for every step taken until jurisdiction is acquired authority must be found in the garnishment law.—Milwaukee Bridge & Iron Works v. Wayne Circuit Judge, 73 Mich. 155.

¶ 13. Garnishee proceedings must follow the statutes strictly, and cannot be extended beyond the plain letter thereof.—Kennedy v. McLellan, 76 Mich. 598.

¶ 14. Garnishee proceedings are harsh, and the statutes authorizing them must be strictly followed.—King v. Harrigan, 145 Mich. 436.

¶ 15. Garnishment proceedings are statutory and in derogation of the common-law, and the statute must be strictly followed to bind the principal defendant.—Crisp v. Fort Wayne & E. R. Co., 98 Mich. 648; Foster v. Kent Circuit Judge, 116 Mich. 285.

¶ 16. Garnishment proceedings are statutory, subject to strict construction, and not entitled to special favor, and no presumption can be raised in support of plaintiff's claim; and this is especially so where the object

sought is within the scope of equity jurisdiction.—Folkerts v. Standish, 55 Mich. 463.

§ 4. Grounds, jurisdiction and conditions.

Jurisdictional requisites, see also ante ¶ 7.
Strict construction of the statutes, see ante § 3.
Necessity that there be an existing debt or obligation to the principal defendant, see post § 5.
Necessity of exhaustion of other remedies, see post § 6.
On what actions, suits and judgments garnishment will lie, see post § 7.
Default judgment on published service as basis for garnishment, see post § 7.
Garnishment of foreign debts, see post § 22.
Nonresidence of defendant as ground, see also post ¶ 66.
Jurisdiction to garnishee nonresident, see also post ¶ 67.
Jurisdictional amount and subject, see post § 8.
Proper county for the proceeding, see post § 9.
Actions and judgments which will sustain garnishment, see post § 7.
Persons entitled to garnish, see post §§ 10, 11.
Fraudulent transfer as ground for garnishment of transferee, see post § 16.
Necessity of service of garnishee or appearance by him to sustain judgment, see post § 86.
Sufficiency of return to writ, see post § 56.
Other pending suits and proceedings affecting garnishment, see post § 101.
Jurisdiction of garnishment by justices, see Justices of the Peace, IV, C.
Jurisdiction of courts in general, see Courts, V.

¶ 17. The proceedings cannot be extended to cases not provided for by statute.—Sievers v. Woodburn Sarven Wheel Co., 43 Mich. 275; Ford v. Detroit Dry Dock Co., 50 Mich. 358.

¶ 18. Garnishment is a harsh and peculiar remedy and should not be resorted to without sufficient reason or when redress can be had at common law.—Weimeister v. Manville, 44 Mich. 408; Iron Cliffs Co. v. Labais, 52 Mich. 394.

¶ 19. The remedy is a harsh one and is supported by no such equitable considerations as appeal to the court to give it effect in doubtful cases.—Farwell v. Chambers, 62 Mich. 316.

§ 5. ——Existence or admission of indebtedness to principal defendant.

Contingent and immature claims and demands as subject of garnishment, see post § 24.
Debts not due wholly to principal debtor, see post §§ 28-30.
Necessity and sufficiency of averments in affidavit, see post §§ 39-42.
Sufficiency of evidence of existence of the debt and of ownership of it, see post § 80.
Liability to plaintiff as depending on state of claim when served, see post § 103.

¶ 20. No jurisdiction in garnishment attaches where the real parties interested, before either of the principal defendants had been notified of the proceedings, and before they themselves have been notified, have paid over the full amount due.—Hamilton v. Rogers, 67 Mich. 135.

¶ 21. Where a garnishee had delivered to a defendant a non-negotiable draft before a writ of garnishment had been served upon him, and the defendant had already transferred the draft to a bank for full value, there was no indebtedness on the part of the garnishee.—Patek v. Chicago & N. W. R. Co., 147 Mich. 377.

¶ 22. In order to find for the plaintiff in a garnishment proceeding it is essential that the fund garnished be owing to the principal defendant.—Robbins v. Vandermeiden, 182 Mich. 674.

¶ 23. Where by a tripartite agreement a stockholder who owes the corporation a $500 note is released and agrees to pay a $300 note the corporation owes a bank there is a novation, the stockholder is no longer a debtor of the corporation and cannot be garnisheed for its debts.—Clay Lumber Co. v. Harts Branch Coal Co., 174 Mich. 613.

¶ 24. Where a stockholder of a corporation is to be released from payment of a $500 note upon payment of $300 note given by the corporation to a bank and indorsed by the stockholder, the agreement is executory until the $300 note is paid, and the stockholder is liable in a garnishment suit to a creditor of the corporation on the $500 note in the same manner as he is to the corporation.—Clay Lumber Co. v. Harts Branch Coal Co., 174 Mich. 613.

¶ 25. One is not liable to garnishment where he is not individually indebted to the principal defendant, but is indebted to him merely as a member of a partnership.—Wellover v. Soule, 30 Mich. 481.

§ 6. ——Resort to or exhaustion of other remedies.

See also post ¶ 84.

¶ 26. No previous proceedings need be taken to exhaust other remedies before proceeding to garnish assets that are covered by an unrecorded mortgage made before the debt was incurred for which the mortgagee was garnished.—Crippen v. Jacobson, 56 Mich. 386.

§ 7. Actions, suits and judgments sustaining garnishment.

Debts and properties subject to garnishment, see post § 20 et seq.

Necessity that main action be commenced by service or otherwise, see also post § 38.
Necessity of judgment in main case before trial of garnishment issues, see post § 73.
Objections going to main case, process or judgment, see post § 91.
Discontinuance of garnishment on failure of main case, see post §§ 97-99.
Statutory enumeration of actions and judgments on which garnishment lies, see Jud. Act, chap. XXVIII, § 1; Comp. L. 1915, § 13122.

¶ 27. To give jurisdiction for proceedings in garnishment, there must be service within the county upon either the person, property or credits of the principal defendant; taking out a summons without serving it is not enough. —People ex rel. McCloskey v. Wayne Circuit Judge, 26 Mich. 100.

¶ 28. Laws 1879, Act No. 256, did not authorize garnishment in suits begun by declarations (Act 1 of 1881, How. St., § 8058, permits it).—Weimeister v. Manville, 44 Mich. 408.

¶ 29. Laws 1879, Act No. 256 (How. St., § 8058), allowing process in garnishment to be issued after judgment "in all personal actions arising upon contract, express or implied, brought in the several circuit courts or municipal courts of civil jurisdiction," and on "any judgment or decree rendered in any of the several courts hereinbefore mentioned," is meant only to cover cases in which the process could not have been issued before judgment, and does not apply to transcribed judgments from justices' courts but only to judgments of courts whose jurisdiction is similar to that of circuit courts.—Weimeister v. Singer, 44 Mich. 406.

¶ 30. A judgment by default against a nonresident defendant will entitle the plaintiff to proceed against garnishees indebted to him, even though the notice of the garnishment proceedings was served upon the principal defendant outside of the jurisdiction (How. St. §§ 8087, 8106).—Moore v. Wayne Circuit Judge, 55 Mich. 84.

¶ 31. Under the statutes relating to garnishment, How. St., c. 277, § 8058 et seq. (as amended by How. St., p. 3751), a proceeding in garnishment to collect an amount due on a decree in equity may be maintained on the law side of the court.—United States ex rel. Mudsill Min. Co. v. Swan, 65 Fed. 647.

§ 8. Jurisdictional amount or subject of controversy.

Fraudulently transferred assets, see post § 16.

¶ 32. Garnishment process in the circuit court may be based on several non-negotiable contract claims held by assignment, and aggregating enough to bring the principal action within the jurisdiction of the court.—Crippen v. Jacobson, 56 Mich. 386.

¶ 33. The right given by Comp. L. 1871, § 6498 (How. St., § 8091) to assail titles and conveyances set up by garnishees as fraudulent as against creditors is confined to titles and conveyances of such property as the garnishees have in possession at the time of making the affidavit on which they are attacked.—Fearey v. Cummings, 41 Mich. 376.

§ 9. Proper county or venue.

Averments in affidavit for writ to another county, see post § 43.
Place for service to attach jurisdiction, see post § 49.
Venue of actions in general, see Venue.

¶ 34. When both plaintiff and the principal defendant are nonresidents of Michigan, suit may, under How. St., § 8087, be maintained in this state, and such defendant's credits may be subjected to the jurisdiction of our courts in the county where a debtor of his resides. The garnishment proceedings in such case must be taken in a county where the principal defendant has property or credits subject to garnishment.—Stern v. Wayne Circuit Judge, 105 Mich. 685.

¶ 35. The fact that the writ of garnishment was in the first instance issued against a resident of one county, and was afterwards discontinued, does not give the court jurisdiction over a resident of another county who was joined as a garnishee in an action between nonresidents.—Stern v. Wayne Circuit Judge, 105 Mich. 685.

¶ 36. The fact that a garnishee corporation may be a resident of another county than that in which the principal action is brought would not deprive the circuit court of the latter county of jurisdiction in the garnishment proceeding.—Nichol v. Nevers, 196 Mich. 203.

¶ 37. A garnishee served with summons in another county than that in which the principal action is brought who respects the writ and makes disclosure thereby submits to the jurisdiction of the court, if an act of submission is necessary, and cannot object on appeal to the jurisdiction.—Nichol v. Nevers, 196 Mich. 203.

§ 10. Who entitled to garnish.

¶ 38. The word "plaintiff," as used in How. St., § 8058, providing that, in all cases where there remains any sum unpaid upon any judgment or decree, a writ of garnishment may issue on the affidavit of the "plaintiff," his agent or attorney, refers to the party moving in the garnishment proceeding; and, therefore, a defendant who has recovered judgment against the plaintiff is entitled to sue out the writ.—Esler v. Kent Circuit Judge, 108 Mich. 543.

§ 11. ——Nonresidents.

Default judgments against nonresidents as basis for garnishment, see ante § 7.

¶ 39. Under How. St., § 8087, authorizing garnishment proceedings where the principal defendants are nonresidents permits such proceedings be instituted by plaintiffs who are also nonresidents.—Newland v. Wayne Circuit Judge, 85 Mich. 151.

II. PERSONS, CHOSES AND PROPERTY SUBJECT TO GARNISHMENT.

§ 12. Persons and corporations liable.

Municipal corporations and public officers, see post § 13.
Receivers, administrators and trustees, see post § 14.
Common carriers, see post § 15.
Fraudulent transferees having property or assets of debtor, see post § 16.
Nonresident persons, see post § 17.
Joinder of two or more persons as garnishees, see post §§ 18, 19.
Persons entitled to sue out writ, see ante §§ 10, 11.
Averment of corporate existence in affidavit, see post § 42.
Inapplicability to foreign corporations of statute for personal examination of garnishee, see post § 70.
Inception of liability to plaintiff, see post § 103.
Right of assignee to garnish his assignor on cross demand, see post ¶ 338.
Proper county for the proceedings, see ante § 9.
Attachment and garnishment of corporations and debtors of corporate defendants, see Corporations § 197.
Comity as to foreign corporation's exemption, see Conflict of Laws § 5.
Liability to garnishment before justices, see Justices of the Peace, IV, C.
Provisions as to garnishment of corporations in manner like persons, see Jud. Act, chap. XXVIII, § 46; Comp. L. 1915, § 13167.

¶ 40. The right to hold a garnishee depends upon the state of the claim, as one garnishable or not, at the time of serving process.—Old Second Nat. Bank v. Williams, 112 Mich. 564.

¶ 41. Whether a corporation could be summoned as a garnishee under Comp. L. 1871, § 5290, quære.—Hewitt v. Wagar Lumber Co., 38 Mich. 701.

¶ 42. Prior to the enactment of Laws 1889, Act No. 266 a foreign corporation could not be garnished.—Milwaukee Bridge & Iron Works v. Wayne Circuit Judge, 73 Mich. 155.

¶ 43. A foreign corporation is not exempt from garnishment in Michigan where by the express terms of the garnishee law, any corporation, other than municipal, may be garnished, because exempt by the law of its home state; to hold otherwise would be putting a foreign corporation upon a better footing in this state than domestic corporations.—First Nat. Bank v. Burch, 80 Mich. 242.

§ 13. Municipal corporations and public officers.

Chancery register holding money paid into court, see post ¶ 51.
Objections open to municipality, see post ¶ 286.
Liabilities of municipalities and methods of enforcing same, see Municipal Corporations; Townships; Counties.
Provisions as to garnishment of municipal corporation, see Jud. Act, chap. XXVIII, § 46; Comp. L. 1915, § 13167.
Exemptions of levying officers and of public officers accountable for money, see Jud. Act, chap. XXVIII, § 37; Comp. L. 1915, § 13158.

¶ 44. Garnishment proceedings are not allowed against municipal corporations. It is against public policy to allow the wages of persons in public employments to be reached by garnishment.—Marathon School Dist. No. 4 v. Gage, 39 Mich. 484.

¶ 45. Act No. 257, Pub. Acts 1899, providing that "all corporations of whatsoever nature, whether foreign, domestic, municipal or otherwise, except counties, may be proceeded against as garnishees in the same manner and with like effect as individuals under the provisions of this act," etc., authorizes garnishee proceedings against municipal corporations where the principal is an officer or employee of such municipality. (By a divided court, per Brooke; Grant, Hooker and Moore, JJ., concurring; Blair, C. J., Ostrander, Montgomery and McAlvay, JJ., dissenting.)—Dunkley v. City of Marquette, 157 Mich. 339.

¶ 46. A school district cannot be garnished even by its own consent unless the debtor also consents.—Marathon School Dist. No. 4 v. Gage, 39 Mich. 484.

¶ 47. While the payment of a liquor tax in instalments is unauthorized (How. St., § 2283c7), a county treasurer to whom such payments have been voluntarily made, and who has turned the same into the treasury, cannot be garnished at the suit of a creditor of the liquor dealer, since the latter could not himself maintain an action to recover the moneys.—Bay City Brewing Co. v. McDonell, 106 Mich. 172.

§ 14. Receivers, administrators, executors, assignees for creditors, and trustees.

Trust or other equitable interests as subject of garnishment, see post § 31.
Necessity of leave to proceed against receiver, see Receivers, IV, C.
General law of procedure by or against receivers, see Receivers.
General law of procedure by or against representatives and trustees, see Estates of Decedents, XI; Trusts, IX.
Right to garnishee assignor on ground that assignment for creditors is avoided, see also Bankruptcy ¶ 38.

¶ 48. Whether a receiver appointed after the dissolution of a corporation can be held on garnishment for the dividend of one of three joint claimants will depend upon the proofs showing or failing to show a separable claim.—Van Bianchi v. Wayne Circuit Judge, 124 Mich. 462.

¶ 49. A receiver appointed in proceedings for the dissolution of a corporation Comp. L. 1897, chap. 300, is subject to garnishment. —Van Bianchi v. Wayne Circuit Judge, 124 Mich. 462.

¶ 50. A member of an insolvent mutual benefit association incorporated in Indiana will not be allowed to subject, through garnishment proceedings instituted after the appointment of a receiver in Indiana, though before the appointment of an ancillary receiver here, the society's property in Michigan to a judgment upon a certificate that matured after insolvency proceedings were begun, but before a receiver was actually appointed; the title vests in the domiciliary receiver and as of the time of commencing receivership suit.—Wheeler v. Dime Sav. Bank, 116 Mich. 271.

¶ 51. A register in chancery with whom money has been deposited by a receiver under order of court cannot be garnished on account thereof, even though the proceedings under which the money was paid have been determined.—Voorhees v. Sessions, 34 Mich. 99.

¶ 52. An administrator cannot be garnished.—White v. Ledyard, 48 Mich. 264.

¶ 53. Administrators and executors are, as a general rule, exempt from process of garnishment.—Hudson v. Saginaw Circuit Judge, 114 Mich. 116.

¶ 54. Although an administrator cannot be garnished he may be made a party to a bill in equity to subject assets in his hands to the payment of debts due from heirs of the estate.—Earle v. Kent Circuit Judge, 92 Mich. 285.

¶ 55. Possession of property under a valid common-law assignment for the benefit of creditors does not give the creditors the right to garnish the assignee.—Cook v. Rogers, 31 Mich. 391.

¶ 56. Garnishment proceedings cannot be sustained against a judgment debtor where it appears that the judgment, prior to the institution of the suit, had been assigned by the principal defendant to a third party in trust for certain of his creditors, unless it is established that the assignment was fraudulently made.—Blumenthal v. Simons, 110 Mich. 42.

¶ 57. It is a question whether a trustee is garnishable where the principal debtor no longer controls the property in the trust.—Keppel v. Moore, 66 Mich. 292.

§ 15. Common carriers and bailees.

To whom carrier is bound to deliver goods, see Carriers, II, C, D.

Property in carrier's possession under bills of lading, see Comp. L. 1915, §§ 8197, 8206.

¶ 58. A common carrier cannot be charged as a garnishee for goods consigned to defendant, when it does not know whether they belong to defendant or not.—Walker v. Detroit, G. H. & M. R. Co., 49 Mich. 446.

§ 16. Fraudulent transferees and bulk sale buyers.

Assignees for creditors holding assets, see ante § 14.

Burden of proof of fraud, see post § 78.

Evidence of the fraud, see post §§ 79, 80; and see Fraudulent Conveyances, I, V.

Court and jury questions as to fraudulency of transfer, see post § 82.

Instructions on fraudulency, see post § 84.

Suits to set aside and other remedies to reach fraudulently transferred assets, see Fraudulent Conveyances, V; Creditors' Suits.

Liability of transferee as garnishee independent of right of principal defendant to maintain action, see Jud. Act, chap. XXVIII, § 32; Comp. L. 1915, § 13153.

Effect of service to bind transferees, see Jud. Act, chap. XXVIII, § 2; Comp. L. 1915, § 13123.

¶ 59. Property conveyed in fraud of creditors may be reached by process of garnishment (Comp. L. 1871, § 6498, How. St., § 8091).—Fearey v. Cummings, 41 Mich. 376; Farrington v. Sexton, 43 Mich. 454; Cummings v. Fearey, 44 Mich. 39; Blake v. Hubbard, 45 Mich. 1.

¶ 60. Laws of 1889, Act No. 244, which amends How. St., §§ 8059, 8091, so as to enable creditors to reach the value of the principal defendant's property received and held under a conveyance or title void as to creditors, and which he has disposed of, applies to garnishment proceedings instituted after the act took effect, although the goods were received and disposed of prior to that date.—Heineman v. Schloss, 83 Mich. 153.

¶ 61. The right, under Comp. L. 1871, § 6498 (How. St. § 8091) to assail titles and conveyances set up by garnishees, on the ground of being fraudulent against creditors, is confined to the titles and conveyances of such property as the garnishees have in possession at the time of making the affidavit for the writ.—Fearey v. Cummings, 41 Mich. 376.

¶ 62. Where a creditor takes a deed and bill of sale purporting to convey to him absolutely all of his debtor's property, to whom he gives a secret defeasance, and, acting under such deed and bill of sale as absolute owner, takes possession of the property, the value of which is largely in excess of his

debt, and, after being summoned as garnishee of his debtor, sells the property as his own, and on the trial of the statutory issue refuses to state the value of the property, or what he sold it for, the transaction is a fraud upon the other creditors, and he is chargeable as garnishee for property and effects in his hands or under his control belonging to the principal defendant.—Meigs v. Weller, 90 Mich. 629.

¶ 63. Where garnishees had taken chattel and real estate mortgages upon property of the principal defendant and kept them from record, and during the time they were so kept from record, plaintiff extended credit to the principal defendant, and where thereafter the principal defendant, the mortgagee in the chattel mortgage and a prospective purchaser got together and "taking the mortgage into consideration," managed a sale, the garnishees releasing the mortgage, and where the record showed that the proceeds of such sale received by the garnishees were in fact the proceeds of such mortgage; the transaction was within How. St., § 8091, providing that if any person garnished shall have received and disposed of property of the principal defendant which is held by conveyance or title that is void as to his creditors, he may be adjudged liable as garnishee on account of such property.—Baker v. Parkhurst, 119 Mich. 542.

¶ 64. A creditor of a vendor may garnishee the vendee where the latter fails to comply with the Bulk Sales Statute (No. 223, Pub. Acts 1905).—National Grocer Co. v. Plotler, 167 Mich. 626.

¶ 65. Under How. St., § 8091, providing that if any person garnisheed shall have in his possession any of the property of the principal defendant, which he holds by a conveyance or title that is void as to creditors, or if any person garnisheed shall have received and disposed of any of the property of the principal defendant which is held by a conveyance or title that is void as to creditors of the defendant, he may be adjudged liable as a garnishee on account of such property and for the value thereof, a creditor, by and through the agency of a garnishment proceeding, may reach and subject to the payment of his judgment against the principal debtor property or the proceeds thereof which the garnishee may hold by conveyance or title that is fraudulent as to creditors of such debtor, and the effect of such statute is not to enlarge the liability of the garnishees but to render them liable at law in all cases where they could be reached in equity.—Treusch v. Ottenburg, 54 Fed. 867.

§ 17. Nonresidents.

Foreign corporations, see ante § 12.
Sufficiency of service to give jurisdiction, see post § 49 et seq.
Sufficiency of notice or service on resident garnishee to give jurisdiction of debt owing to nonresident, see post § 54.
Sufficiency of evidence of nonresidence, see post § 80.
Inapplicability of statute relating to examination of garnishee, see post ¶ 197.

¶ 66. How. St., § 8087, providing for garnishment proceedings in cases where the principal defendant is a nonresident, does not apply to a case where there are several defendants some of whom are residents, and who are personally served with process within the jurisdiction.—Wilson v. Wayne Circuit Judge, 82 Mich. 169.

¶ 67. Michigan courts may by garnishment acquire jurisdiction over a nonresident defendant in order to subject a debt due to him from a citizen of the state to the payment of plaintiff's demand.—Serviss v. Washtenaw Circuit Judge, 116 Mich. 101.

§ 18. Joining garnishees.

Joining mortgagees as garnishees, see post § 19.
Garnishment of two insurers under common name, see post ¶ 268.
Necessity of serving all joint garnishees or debtors, see post § 50.
Impropriety of garnishment of debt belonging to several parties, see post §§ 28, 29.
Statutory provisions for joinder, see Jud. Act, chap. XXVIII, § 33; Comp. L. 1915, § 13154.

¶ 68. Several persons cannot be held as joint garnishees unless their liability is joint, and this is so whether the garnishment proceeding is based upon a debt or upon the possession of property.—Ball v. Young, 52 Mich. 476; Lyon v. Ballentine, 63 Mich. 97.

§ 19. ——Joint proceeding against mortgagees.

¶ 68a. Where an agent for the collection of a debt that is secured by mortgage takes possession of the mortgaged property, he cannot be held with the creditor as a joint garnishee in a proceeding in which the debtor is principal defendant.—Ball v. Young, 52 Mich. 476.

¶ 69. A joint action of garnishment against the mortgagees may be maintained by parties who hold separate and distinct chattel mortgages which were executed and filed at the same time and where the mortgagors had acted jointly in taking possession of the property.—Black v. Dawson, 82 Mich. 485.

§ 20. Garnishable debts and properties.

State of the claim at time of service as test, see also ante § 12.
Debts paid before service of the writ, see also ante ¶ 20.
Present state of the debt as measure of liability to plaintiff, see post § 103.
Effect of prior assignment or novation, see post § 108.
Money or property acquired by tort, see post § 21.
Foreign debts and obligations, see post § 22.

Immature, contingent and accountable demands, see post §§ 23, 24.
Property held as security or under mortgage, see post §§ 25, 26.
Earnest money or conditional payments, see post § 27.
Debts due in part to third persons or affected with equities, see post §§ 28-31.
Negotiable paper, bank deposits and insurance, see post §§ 33-35.
Certificates of stock, see post § 36.
Verdicts and judgments, see post § 37.
Exemptions, see post § 32.
Descriptive averments of debt in affidavit, see post § 40.
Properties and choses bound by service of the writ, see Jud. Act, chap. XXVIII, § 2; Comp. L. 1915, § 13123.

¶ 70. A claim is not subject to garnishment unless the creditor can maintain an action at law for the same if due, or when it becomes due.—Farwell v. Chambers, 62 Mich. 316.

¶ 71. An item of indebtedness arising out of an admitted mistake in bookkeeping, which constitutes a present legal demand in favor of the creditor, may be reached by garnishment.—Gumberg v. Treusch, 110 Mich. 451.

§ 21. ——Money or property acquired by tort.

¶ 72. Moneys in the possession of a jailer, wrongfully taken from the person of a prisoner, are not subject to garnishment against such prisoner.—Hubbard v. Garner, 115 Mich. 406.

§ 22. ——Foreign debts and obligations.

Moneys in hands of ancillary receiver of foreign corporation, see ante ¶ 50.
Exemptions following the debt, see post ¶ 101.
Of foreign debt by foreign parties, jurisdiction of action, see also Courts § 46.

¶ 73. By a contract made in New Mexico between residents of that territory and a resident of Michigan, the latter was to make certain payments at an ascertainable date at a bank in the territory and was thereupon to receive deeds for property sold. Held, that as a payment in Michigan to third persons would not fulfil the agreement, and would not entitle him to performance, such resident of Michigan is not liable as a garnishee in the courts of this state.—Hamilton v. Rogers, 67 Mich. 135.

§ 23. Debts not yet due.

See also ante ¶ 70.
Subsequent debts, see post ¶ 329.
Nonliability on demands not existing when served, see post § 105.
Necessary averments of affidavit as to maturity of debt, see post § 40.

¶ 74. A tenant is not garnishable for rent payable in the future and not absolutely due at the time of garnishment.—Thorp v. Preston, 42 Mich. 511.

¶ 75. The purchaser of a flock of sheep cannot be garnished as a debtor of the vendor until the flock has been delivered, unless some payment has been made or credit given, and something passed by way of earnest.—Case v. Dewey, 55 Mich. 116.

§ 24. Contingent, uncertain or accountable demands.

Shares payable on dissolution of corporation, see ante ¶ 48.
Debts due in part to several persons, see post §§ 28-30.
Negotiable paper and bank deposits, see post §§ 33, 34.
Allowance of offsets and credits to garnishee, see post § 106.

¶ 76. Garnishment process cannot reach sums that will not come due until the performance of a contract at some future time; and claims for the payment of such moneys are not "contingent" within the reason of Laws 1879, Act No. 256 (How. St., § 8058), which permits contingent claims to be garnished.—Webber v. Bolte, 51 Mich. 113; Kiely v. Bertrand, 67 Mich. 332.

¶ 77. Comp. L. 1871, § 6503, subd. 3 (since amended by L. 1879, Act No. 256, see How. St., § 8096), in providing that demands to become due, absolutely, may be garnished, referred only to claims which were already fixed in amount or capable of being fixed, and not dependent for their validity or amount on anything to be done or earned in the future, or the continued liability for which might be changed by events.—Thorp v. Preston, 42 Mich. 511.

¶ 78. Garnishment does not lie upon an unperformed executory logging contract upon which nothing is due when writ issues and under which owner of logs may retain part of price until logs are put afloat and may apply final payment upon labor claims, that would become liens.—Kiely v. Bertrand, 67 Mich. 332.

¶ 79. One cannot be garnished for an indebtedness that he owes to a firm in which he and the principal defendants are copartners, and that is, therefore, subject to an accounting and settlement of the firm business.—Farwell v. Chambers, 62 Mich. 316.

§ 25. Property or money held as security.

Deposits with secretary of state by itinerant vendors, see Comp. L. 1915, § 6999.

¶ 80. Garnishment process will not reach property transferred absolutely and in good faith by a public officer to a surety on his official bond to enable the latter to secure his own and his principal's liability.—Spear v. Rood, 51 Mich. 140.

¶ 81. A bank which held property as security for a debt, was not required to relinquish its security and could not be charged as gar-

nishee until its debt was paid.—Gregg v. First Nat. Bank of Durand, 135 Mich. 285.

§ 26. ——Mortgaged property.

Joining several mortgagees as garnishees, see ante § 19.

Extent of mortgagee's liability, see post § 107.

Evidence as to possession at time of service, see post § 79.

Garnishment of chattels subject to chattel mortgage lien, see also Chattel Mortgages § 77.

¶ 82. The possession of a mortgagee of chattels cannot ordinarily be disturbed by garnishment process for the sake of reaching a surplus after the lien is satisfied; and the receiver provided for by How. St., § 8065 can, at most, exercise no greater power over such chattels than a sheriff could in levying execution.—Smith v. Menominee Circuit Judge, 53 Mich. 560.

¶ 83. Garnishment process cannot affect the contract rights of mortgagees, and cannot reach goods mortgaged by the principal defendant but in the mortgagee's possession.—Daggett v. McClintock, 56 Mich. 51.

¶ 84. Garnishment process will reach assets that are covered by an unrecorded mortgage made before the debt was incurred for which the mortgagee is garnished. And no previous proceedings need be taken to exhaust other remedies.—Crippen v. Jacobson, 56 Mich. 386.

¶ 85. Chattels were seized and in the sheriff's hands for the foreclosure of two mortgages upon them to secure three different firms and separate debts. The mortgagees were garnished by creditors of the mortgagor. They never had any actual possession and none bore any liability towards the mortgagor at the time. Held, that they could not be held as garnishees.—Lyon v. Ballentine, 63 Mich. 97.

¶ 86. Where the garnishee had taken the principal's goods in payment of a debt and was therefore not accountable for them, he is not garnishable for their value over his debt though he also held a chattel mortgage on them; since his right was not derived under the mortgage.—Crusoe Bros. Co. v. Kudner, 136 Mich. 583.

¶ 87. Where a mortgagee of chattels has replevied the mortgaged goods he cannot repudiate the ownership thus asserted in proceedings against him as garnishee.—Cummings v. Fearey, 44 Mich. 39.

§ 27. Earnest money or conditional payments.

See also ante ¶ 75.

¶ 88. Earnest money put up to bind a contract for the sale of a homestead was not subject to garnishment for a debt of the husband, where the wife refused to join in the deed.—H. Stern, Jr., & Bros. Co. v. Wing, 135 Mich. 331.

§ 28. Debts due in part to third persons.

Joint and several demands, see post § 29.

Demands belonging to one of several defendants, see post § 30.

Debts owing to firm of which defendant is a partner, see also ante ¶ 25.

¶ 89. A demand due in part only to the principal defendant cannot be reached by garnishment.—Kennedy v. McLellan, 76 Mich. 598; Markham v. Gehan, 42 Mich. 74.

¶ 90. The garnishment law does not contemplate proceedings to determine the relative rights of several joint defandants where some of them might be entitled to contribution from the others for an excess of property taken beyond their shares.—Ford v. Detroit Dry Dock Co., 50 Mich. 358.

§ 29. ——Joint and several demands.

Joining garnishees, see ante § 18.

¶ 91. Where insurance policies payable to A. and B. jointly are held by C. as collateral security from A., they cannot be subjected to garnishment for B.'s debt without making A. a party to the proceedings.—Kennedy v. McLellan, 76 Mich. 598.

¶ 92. A demand due to two parties jointly could not be garnished in a suit against one of such parties alone.—Stone v. Dowling, 119 Mich. 476.

¶ 93. A demand due to a partnership, could not be garnished in a suit against one of the partners alone.—Stone v. Dowling, 119 Mich. 476.

¶ 94. Where a suit is brought against a principal defendant and a garnishee defendant, and another person is joint owner with the principal defendant of the debt due from the garnishee defendant, the garnishment proceedings must fail.—Nachtegall v. Reilley, 165 Mich. 347.

§ 30. ——Demands belonging to one of several defendants.

Demands belonging in part to persons not joined as parties, see ante §§ 28, 29.

Effect of dismissal of infant member of firm sued as principal defendant, see post ¶ 301.

¶ 95. Garnishees cannot be held in a suit against joint defendants if their disclosure shows an indebtedness to only a part of the defendants.—Ford v. Detroit Dry Dock Co., 50 Mich. 358.

¶ 96. As to the effect of the amendment to How. St., § 8058, by Laws 1885, Act No. 128, on the rule that garnishment as a debtor of two defendants is bad if the debt is to only one, quaere.—Farwell v. Chambers, 62 Mich. 316.

¶ 97. An indebtedness due to one of several defendants is, under § 10600, Comp. Laws 1897, § 13436, How. St., 2nd Ed., subject to garnishment in an action against all of them.—Roof v. Blake, 187 Mich. 38.

§ 31. Equities and trust interests.

Funds in hands of receivers, see ante § 14.
Immunity or liability of trustee to garnishment, see ante § 14.
Property in hands of fraudulent transferees, see ante § 16.
Creditors' suits to reach equitable assets, see Creditors' Suits.

¶ 98. Garnishment proceedings will not avail to reach a trust of the vendor's equity in a land contract where several years prior to the sale the land had been placed in the hands of a trustee who had made the sale and subsequently assigned his cestui's interest as vendor to the garnishee to secure a loan and subsequent to that the garnishee had supplanted the original trustee; such an interest must be reached by bill in equity.—Peninsular Savings Bank v. Union Trust Co., 127 Mich. 355.

¶ 99. Whether under the garnishment laws it was meant to permit the creditor to reach demands to which the debtor had no equitable right, though retaining the legal title, quære.—Kane v. Clough, 86 Mich. 436.

§ 32. Exempted debts or property.

Who entitled to object, see post § 92.
Right of principal defendant to intervene to urge exemptions, see post ¶ 357.
Persons entitled to exemptions and exemptions in general, see Exemptions, I.
Statutory exemption of wages due and owing, see Jud. Act, chap. XXVIII, § 37; Comp. L. 1915, § 13158.
Claims under Employers' Liability Act, see Comp. L. 1915, § 5451.

¶ 100. Property exempt from execution cannot be reached with garnishment process.—Wilson v. Bartholomew, 45 Mich. 41.

¶ 101. An exemption follows the debt into another jurisdiction where the debtor himself has not been personally subjected to such jurisdiction.—Drake v. L. S. & M. S. R. Co., 69 Mich. 168.

§ 33. Negotiable instruments and money represented thereby.

Bank deposits, see post § 34.
As to non-negotiable instrument, see also ante ¶ 21.
Liability of the garnishee to plaintiff, see also post ¶ 325.
Rights and liabilities on negotiable paper, see Negotiable Instruments.

¶ 102. Negotiable paper not overdue is not liable to be reached by garnishee process against the maker.—Littlefield v. Hodge, 6 Mich. 326.

¶ 103. A promissory note may be garnished after maturity.—Somers v. Losey, 48 Mich. 294.

¶ 104. A promissory note past due is subject to garnishment.—Serviss v. Washtenaw Circuit Judge, 116 Mich. 101.

¶ 105. A draft purchased by a firm of liquor dealers, and made payable to the treasurer of the proper county, and delivered to a third person for delivery to the payee in payment of their liquor tax, is held subject to garnishment at the suit of their creditors while in the hands of such third person.—Elser v. Rommel, 98 Mich. 74.

¶ 106. Money represented by a draft payable to and received by a garnishee in return for a check which he has forwarded to a bank upon request of the defendant is subject to garnishment.—Weaver v. Irons, 129 Mich. 368.

§ 34. Bank deposits.

Bills, checks and notes, see ante § 33.
Sufficiency of affidavit, see post ¶ 122.
Sufficiency of evidence of right to deposits, see post § 80; and see also Banking, II.
Ownership as jury question, see post § 82.
Rights and liabilities between banker and depositor, see Banking, II-V.

¶ 107. Where a bank and its depositor have agreed that he shall maintain a balance of $1,000 to cover liability on account of drafts credited to him, but which, if returned, are to be charged back, it cannot be charged as his garnishee for a credit, at the time of garnishment, of less than $1,000, which is more than offset by drafts afterwards returned.—Rice v. Third Nat. Bank, 97 Mich. 414.

¶ 108. The garnishee bank would be liable, under How. St. § 8059, for moneys belonging to the principal defendant, a corporation, paid to it without authority as interest upon the individual debt of the defendant's president, if it received such moneys with knowledge that they were corporate funds.—Ferry v. Home Sav. Bank, 114 Mich. 321.

¶ 109. If a man with his wife's knowledge and consent mingles his own funds with hers in a bank, upon the understanding that the entire fund is to be treated as his, the whole is garnishable for his debt.—McIntyre v. Farmers' & Merchants' Bank, 115 Mich. 255.

§ 35. Claims under insurance policy or certificate.

Policies payable jointly, see ante § 29.
Exemptions of benefits payable by fraternal associations, see Pub. Acts 1917, No. 256, chap. IV, § 21.

¶ 110. Under Comp. L. 1871, § 6508, subd. 3, a claim under an insurance policy was not garnishable if the company had the right

to elect whether to pay for the property lost or replace it.—Martz v. Detroit Fire & Marine Ins. Co., 28 Mich. 201; Thorp v. Preston, 42 Mich. 511.

§ 36. Certificate of stock.

Attachment or levy of execution on corporate shares, see Corporations §§ 287, 288.

Garnishment of corporations, see ante § 12; and see Corporations § 197.

¶ 111. A certificate of stock in a corporation is subject to garnishment under How. St., § 7697, providing that such stock may be taken and sold on execution, and sections 8058, 8059, providing for charging a garnishee with the property, money, goods, chattels, and effects in his hands; since the cited statutes are broad enough to support that construction in the absence of any more express statute.—Old Second Nat. Bank v. Williams, 112 Mich. 564.

§ 37. Verdicts and judgments.

Sufficiency of affidavit, see post ¶ 123.

¶ 112. A recovery for libel does not furnish an indebtedness that can be garnished until judgment is entered on the verdict.—Detroit P. & T. Co. v. Reilly, 46 Mich. 459.

¶ 113. The statute authorizing writs of garnishment to issue "in all personal actions arising upon contract, express or implied," permits garnishment in an action upon a foreign judgment; such action is one upon contract.—Wattles v. Wayne Circuit Judge, 117 Mich. 662; Union Nat. Bank v. Muskegon Circuit Judge, 117 Mich. 678.

III. AFFIDAVIT AND PROCEEDINGS FOR ISSUANCE OF WRIT.

§ 38. In general; commencement of action.

Necessity of procedure in strict conformity to statute, see ante § 3.

Requisites and sufficiency of writ, service, return, and notices, see post IV.

Appearance and disclosure and proceedings for fuller and further disclosure or for examination, see post V.

Trial of the issues and manner of forming issues, judgment on the garnishment, and executions, see post VI.

Proper action or judgment to form basis for garnishment, see ante § 7.

What constitutes commencement, see post ¶¶ 138, 139.

Averments of affidavit as to commencement or pendency of action, see post § 39.

Time for issuance of the writ relative to the commencement of the action, see post § 48.

Delay in perfecting service in main case as ground for discontinuance of garnishment, see post § 98.

Waiver of delay in completing service in main case, see post ¶ 308.

When action is deemed to be "commenced," see Actions § 6; Limitations, V.

Leave to garnish receivers, see Receivers, IV, C; and see also Creditors' Suits ¶ 133.

¶ 114. To give jurisdiction for the purpose of supporting proceedings against a garnishee some sort of service as to the principal defendant must be made within the county, either upon the person, or upon property or credits. Merely taking out a summons which is never served is not enough.—People ex rel. McCloskey v. Wayne Circuit Judge, 26 Mich. 100.

§ 39. Affidavit and application for writ.

Averments as to debt or demand owning, see post § 40.

Averments as to joint and several demands, see post § 41.

Averments against corporations, see post § 42.

Averments for writ to another county, see post § 43.

Averments as to beliefs and apprehensions, see post § 45.

Averments in affidavit by agent or attorney, see post § 44.

Amendment of affidavit, see post § 46.

Conformity of writ to affidavit, see post § 47.

Responsiveness, sufficiency and effect of the disclosure, see post § 59 et seq.

Presumptions in aid of affidavit, see post ¶ 276; and see also Appeal, XII, C; Judgments, VII.

Affidavits before justices, see Justices of the Peace, IV, C.

Matters relating to affidavits in general, see Affidavits; Oaths.

¶ 115. Under How. St., § 8058, the affidavit for garnishment need not state that a suit which it alleges to have been commenced by defendant against the principal defendant is still pending; such pendency being presumed from the fact of commencement.—State Sav. Bank v. Wayne Circuit Judge, 95 Mich. 100.

¶ 116. An affidavit for a writ of garnishment, made upon the same day with the commencement of the original suit, and reciting that the suit is "about to be commenced," is sufficient under How. St., § 8058, providing that the affidavit shall be filed "at the time of or after the commencement of suit," but not specifying the time for making it.—Millard v. Lenawee Circuit Judge, 107 Mich. 134.

¶ 117. It was error for the circuit court to quash a writ of garnishment and the proceedings thereunder because the affidavit for the writ embraced the allegation that the garnishee had property, goods, chattels, credits, or effects in his hands or under his control belonging to defendants, and further alleged that the garnishee was indebted to the defendants as partners; the fact that the garnishee may be indebted to the principal defendant and have property in his posses-

sion or under his control belonging to the principal defendant are matters which may be tried in one suit, the statute not requiring separate proceedings and separate affidavits to reach the property and indebtedness, and a judgment may be rendered conformable to the facts developed on the trial.—Peninsular Stove Co. v. Wayne Circuit Judge, 85 Mich. 400.

§ 40. ——Averments of contract and indebtedness.

Combining affidavits for debt and property in one, see ante ¶ 117.

Description in the writ, see post § 47.

Statutory contents of affidavit, see Jud. Act, chap. XXVIII, § 1; Comp. L. 1915, § 13122.

¶ 118. Under the statute the affidavit must state whether the principal suit is on an express or implied contract, and must distinctly connect the garnishee's indebtedness sworn to with a suit or contract.—Weimeister v. Manville, 44 Mich. 408; Conway v. Ionia Circuit Judge, 46 Mich. 28.

¶ 119. An affidavit for a writ of garnishment which, while averring an action arising upon contract, does not show whether the contract is express or implied, and fails to aver an indebtedness upon such contract, is fatally defective.—Coe v. Hinkley, 109 Mich. 608.

¶ 120. The affidavit is not required by the statute (How. St., § 8058) to show that the debt upon which the principal action is brought is due at the time the garnishee proceedings are begun.—State Sav. Bank v. Wayne Circuit Judge, 95 Mich. 100.

¶ 121. A corporation cannot be garnished merely on evidence that the debtor has been doing a job for it and that its books indicate that a balance on the contract with him remains unpaid; it should also appear whether the balance has yet become an actual debt against the corporation, and if so whether the claim still belongs to the principal debtor or has been assigned to some other person.—Hewitt v. Wagar Lumber Co., 38 Mich. 701.

¶ 122. An affidavit in garnishment which states that the garnishee, a bank, has money, etc., under its control belonging to the principal defendant, is sufficient to charge the garnishee with money belonging to the principal defendant which such defendant, with intent to defraud a creditor, has withdrawn from deposit in his own name and has redeposited in a third person's name.—Connor v. Third Nat. Bank, 90 Mich. 328.

¶ 123. An affidavit is not contradictory because stating that the cause is a personal action, arising upon an implied contract, and also that it is upon a judgment rendered in a foreign court of record.—Union Nat. Bank v. Muskegon Circuit Judge, 117 Mich. 678.

§ 41. ——Against joint or several garnishees.

Combining affidavits for garnishment of debts and property in one, see ante ¶ 117.

¶ 124. Under How. St., § 8092, one affidavit severally charging two or more defendants with being "severally liable" to the principal defendant may be filed for writs of garnishment against such persons; each then answers for himself and the issues are framed and tried thereon.—State Sav. Bank v. Wayne Circuit Judge, 95 Mich. 100.

§ 42. ——Against corporations.

Responsiveness of writ to affidavit, see post ¶ 134.

Pleading corporate existence in general, see Corporations §§ 189, 193.

¶ 125. No jurisdiction in garnishment is acquired where the affidavit merely names the "F. Insurance Company" but does not show that the company named as garnishee is a party amenable to the laws of this state; whether it is a corporation, domestic or foreign; whether it is located in this state or in another state or country; and whether it ever did business or had any legal existence.—Ettelsohn v. Fireman's Fund Ins. Co., 64 Mich. 331.

§ 43. ——For writ to another county.

Proper county for garnishment proceedings, see ante § 9.

¶ 126. An affidavit for a writ of garnishment to another county than that in which the principal action is brought should specify whether the garnishee is a resident of such other county or a foreign corporation.—Nichol v. Nevers, 196 Mich. 203.

§ 44. Affidavits by agents and attorneys.

Sufficiency to support amendment, see post § 46.

¶ 127. The affidavit, when made by an agent or attorney, need not state affirmatively that the affiant is such agent or attorney. The statement by way of recital is sufficient.—Wetherwax v. Paine, 2 Mich. 555.

§ 45. Knowledge, beliefs and fears of affiant.

¶ 128. An affidavit for a writ of garnishment is defective if based upon the apprehension of any other person than the actual affiant.—Weimeister v. Manville, 44 Mich. 408.

¶ 129. An affidavit made by one of the plaintiffs in the original suit, in which affiant avers that plaintiffs are justly apprehensive of the loss of the debt unless the writ issue, is sufficient, his personal knowledge of that fact being presumed.—Williams v. International Grain Stock Board, 99 Mich. 80.

¶ 130. An affidavit in garnishment, made by an attorney stating that the plaintiff (not

the affiant) is justly apprehensive of a loss of the debt unless a writ of garnishment issue is not sufficient to confer jurisdiction to issue the writ.—Duryea v. Raymond, 146 Mich. 488.

§ 46. Amendment of affidavit.

Amendment of return to writ, see post § 56.

¶ 131. Where, through a clerical error shown by the record the affidavit for garnishment was dated June 3, 1895, though in fact sworn to June 3, 1897, an amendment was properly allowed.—Wattles v. Wayne Circuit Judge, 117 Mich. 662.

¶ 132. And where the affidavit was erroneously dated April 11, the record showing that no suit was in fact commenced until April 12, an amendment should have been permitted.—Union Nat. Bank v. Muskegon Circuit Judge, 117 Mich. 678.

¶ 133. An affidavit in garnishment, made by an attorney stating that the plaintiff (not the affiant) is justly apprehensive of a loss of the debt unless a writ of garnishment issue, not being sufficient to confer jurisdiction to issue the writ in the first place, is not amendable.—Duryea v. Raymond, 146 Mich. 488.

IV. THE WRIT, SERVICE, RETURN, AND NOTICES.

§ 47. The writ and its contents.

Sufficiency of the writ to make disclosure binding, see post § 63.
Effect of error in name of garnishee, see also post ¶ 279.
Time for issuance of the writ, see post § 48.
Service of the garnishment writ, see post §§ 49-53.
Notice to or service on principal defendants, see post § 54.
Return to the writ, see post § 56.
Receivership of the garnished property or debts, see post § 55.
Sufficiency of jurisdictional process in garnishment for purpose of binding garnishee, see also Courts ¶ 133.
Nature and requisites of the writ under the statute, see Jud. Act, chap. XXVIII, § 1; Comp. L. 1915, § 13122.

¶ 134. The writ must describe a corporate garnishee, responsively to the affidavit, thereby showing it to be one amenable to the jurisdiction.—Ettelsohn v. Fireman's Fund Ins. Co., 64 Mich. 331.

¶ 135. A writ of garnishment is not defective because the day of the week and the day of the month named as the return day thereof do not correspond; the day of the month controls.—State Sav. Bank v. Wayne Circuit Judge, 95 Mich. 100.

¶ 136. A defendant in garnishment cannot be held on the ground that he has property belonging to the principal defendant, when the process simply charges him with being indebted to the principal defendant, and vice versa.—Botsford v. Simmons, 32 Mich. 352.

§ 48. Time for issuance.

¶ 137. How. St. § 8058 authorizing a writ of garnishment to issue "at the time of or after the commencement of suit," refers to the filing of the declaration or other act entitling plaintiff to process.—McDonald v. Alanson Mfg. Co., 107 Mich. 10.

¶ 138. Filing the affidavit and issuing the writ of garnishment at the time of filing the declaration and entering a rule to plead is a sufficient compliance with Session Laws 1881, p. 1, relating to time for issuance of the writ.—Hurd v. Stone, How. N. P. 1.

¶ 139. Under How. St. § 8058, authorizing the issue of a writ of garnishment "at the time of or after the commencement of suit," suit is commenced when declaration is filed or other act done entitling plaintiff to process.—McDonald v. Alanson Mfg. Co., 107 Mich. 10.

§ 49. Service of writ or summons on garnishees.

On persons jointly liable, see post § 50.
On foreign corporations, see post § 51.
Copy for service, see post § 52.
Proper or qualified persons to make service, see post § 53.
Service of notice on the principal defendant, see post § 54.
Return to the writ, see post § 56.
Service of writ as commencement of liability to plaintiff, see post § 103.
Effect of service of the writ, see also ante ¶ 6.
Effect of service before existence of debt, see post § 90.
Effect of disclosure before proper service completed, see post § 63.
Service of writ from justice of the peace, see Justices of the Peace, IV, C.
General rules for service of original process, see Process, II.
Agents for service of corporations, see Process, II, B.
Service outside of county in other county, see Jud. Act, chap. XXVIII, § 36; Comp. L. 1915, § 13157.

¶ 140. How. St. § 8145, providing a mode of commencement of suits against foreign corporations by the service of process, does not apply to garnishment suits, as the service of a writ of garnishment is not the commencement of an action.—Milwaukee Bridge & Iron Works v. Wayne Circuit Judge, 73 Mich. 155. [But see Laws 1889, Act No. 266, subsequently enacted.]

¶ 141. Where an affidavit in garnishment proceedings set up that the plaintiff was a resident of the county where the venue was laid and that the defendants were residents of another county, and the writ was served

on the garnishee in the county of his residence, and on the other defendant outside the state, and no service of any kind made in the county of venue the service of the writ on the garnishee was insufficient to confer jurisdiction over him.—Fell v. Gorman, 144 Mich. 521.

§ 50. ——Persons jointly liable.

¶ 142. All persons jointly liable to the principal debtor on the claim must be summoned.—Wetherwax v. Paine, 2 Mich. 555.

¶ 143. Garnishment process cannot reach a joint debt where there is service on only one of the joint debtors.—Wetherwax v. Paine, 2 Mich. 555; Hirth v. Pfeifle, 42 Mich. 81.

¶ 144. The garnishee statute, if valid at all against non-residents, has no provision for reaching joint debtors when all of them are not notified.—Hamilton v. Rogers, 67 Mich. 135.

§ 51. ——On foreign corporations.

See also ante ¶ 140.

¶ 145. Laws 1873, Act No. 155, § 7, How. St. § 4368, Comp. L. 1897, § 10021), entitled "An act relative to the service of process upon insurance companies not incorporated under the laws of this state," which provides that "the word 'process' in this act shall include any writ, declaration, summons, order, or subpoena whereby any action, suit, or proceeding at law or in chancery shall be commenced against any such insurance company," etc., includes a summons in garnishment.—German-American Ins. Co. v. Chippewa Circuit Judge, 105 Mich. 566.

¶ 146. The mode of service of garnishee process upon foreign corporations is absolutely within the discretion of the legislature; and their right to do business in this state is dependent upon a compliance with How. St. § 8086, which authorizes such service to be made upon any officer or agent of the corporation found within this state, whether here upon corporate business or not.—First Nat. Bank v. Burch, 80 Mich. 242.

¶ 147. The provision of How. St. § 7086, that "in all cases of proceedings by garnishment against corporations, whether foreign or domestic, service of any process in the manner above provided for in case of foreign corporations [i. e., on any officer, member, clerk, or agent thereof within this state], shall have like force and effect as personal service upon natural persons," is by its title limited in its application to garnishment proceedings in which the original suit is commenced by attachment.—Kirby Carpenter Co. v. Trombley, 101 Mich. 447.

§ 52. ——Copy and sufficiency thereof.

¶ 148. The omission of the date of the issuance of a writ of garnishment from a copy served upon the garnishee and the want of the clerk's signature to such copy is not a fatal error where the garnishee is duly informed by the original that the writ had been issued and an examination of the original alone would have disclosed a mere mistake, and the garnishee defendant appears specially and moves that the writ be quashed.—Lyon v. Baldwin, 194 Mich. 118.

§ 53. ——Who may make service.

Powers and functions of sheriffs, constables and their deputies, see Sheriffs, II, V.

¶ 149. Whether or not the garnishment statute makes it necessary for a garnishee precept to be served by some officer commissioned to serve process, or by some person deputed to make the particular service, it is safer to intrust service to such persons.—Johnson v. Delbridge, 35 Mich. 436.

§ 54. Notice to or service on principal defendants.

Notices of trial of issues, see post § 72.
Notice of interpleader, see post ¶ 360.
Necessity of plea in addition to appearance by principal defendant in order to entitle him to notice, see post ¶ 204.
Manner and sufficiency of service of principal summons on principal defendant, see Process, II.
Propriety and sufficiency of substituted or constructive service on nonresident party, see Process, II, C.
Statutory provisions for service on nonresident principal defendants, see Jud. Act, chap. XXVIII, § 29; Comp. L. 1915, § 13150.

¶ 150. A writ of attachment and garnishment, returned on the day of issue not served upon the principal defendant, cannot bind him.—Kraft v. Raths, 45 Mich. 20.

¶ 151. The joint debt of two nonresidents cannot be reached by garnishing their debtor in this state unless both are served with notice within the statutory period.—Landsberg v. Bullock, 79 Mich. 278. See Hamilton v. Rogers, 67 Mich. 135.

¶ 152. The validity of the substituted form of service on the principal defendant in garnishment proceedings, where he is a nonresident, provided by How. St. § 8087, does not depend upon the disclosure of the garnishee, although no judgment can be had in such case against the principal defendant unless some credits are found in the garnishee's hands; as the existence or nonexistence of such credits is the subject of inquiry under section 8068.—Serviss v. Washtenaw Circuit Judge, 116 Mich. 101.

¶ 153. In garnishment proceedings an objection to the judgment against the principal debtor, that in the copy of the declaration served the name of the county was omitted in the entitling, was held to be of no force.—Allen v. Hazen, 26 Mich. 142.

§ 55. Receivership of property or choses garnished.

Power of receiver of mortgaged chattels, see also ante ¶ 82.

Mandamus to vacate order for payment to receiver, see Mandamus, II.

Common law and chancery receivers, see Receivers.

Delivery of notes, bills and the like or other property to commissioner or other receiver, see Jud. Act, chap. XXVIII, §§ 7, 8; Comp. L. 1915, §§ 13128, 13129.

¶ 154. A receiver, provided for by How. St. § 8065, has no more power to disturb a mortgagee in possession by garnishment process to reach a surplus after the lien is satisfied than a sheriff would have in levying an execution.—Smith v. Menominee Circuit Judge, 53 Mich. 560.

¶ 155. The receiver provided for in garnishment proceedings to take possession of chattels mortgaged by the principal debtor, but in the hands of the mortgagee (How. St. § 8065), may properly be empowered to examine and inventory the property for the purpose of an intelligent sale; but he must give bond, and all his proceedings must be at the expense of the fund realized on the sale, and not at that of the mortgagee. And no sale can be made unless more than the mortgage secures can be realized, and if made at all, it must be a sale in gross, subject to the mortgage lien, and not a sale in parcels.—Smith v. Menominee Circuit Judge, 53 Mich. 560.

§ 56. Return and amendments or further returns.

Effect of erroneous date in return, see post § 90.

Amendment of affidavit, see ante § 46.

Trial of issue of truth of return on motion to quash, see post ¶ 294.

Duty to return, see Jud. Act, chap. XXVIII, § 1; Comp. L. 1915, § 13122.

¶ 156. Jurisdiction is not conferred on the court by a return to a writ of garnishment against a corporation which does not show that the person served was an officer of the company.—McCain v. Wayne Circuit Judge, 187 Mich. 73.

¶ 157. An amendment of the return of a service of a writ of garnishment will not be deemed to be a nullity because the amendment is, in form ordered by the court, and is not made by the officer, where the application for such amendment is based upon the affidavit of the officer.—Lyon v. Baldwin, 194 Mich. 118.

¶ 158. After a motion by a corporation to vacate its default and to set aside a judgment against it because the return to a writ of garnishment did not show service on an officer of the company, a motion by the plaintiff to amend the return so as to show a proper service, comes too late to cure the want of jurisdiction to render the judgment.—McCain v. Wayne Circuit Judge, 187 Mich. 73.

V. APPEARANCE, ANSWER OR DISCLOSURE, AND SPECIAL INTERROGATORIES.

§ 57. Appearances and making disclosure.

Dismissal on appearance and motion for that purpose, see post ¶ 277.

Default for nonappearance or disclosure, see post § 71.

Making disclosure before service on or appearance by principal defendant, see post ¶ 182.

Contents and sufficiency of disclosure, see post §§ 59, 60.

Necessity of making disclosure to take objection, see post § 95.

Appearance as waiver of defective service, see post § 93.

Appearance as waiver of time for trial, see post ¶ 211.

Appearances to actions in general, see Appearance.

Making disclosure as general appearance, see Appearance § 8, ¶ 31.

Plea in abatement by attorney and not in proper person as general appearance, see Appearance ¶ 20.

Appearance to main action, effect to admit validity of garnishment proceedings, see Appearance § 12, ¶ 56.

Appearance to challenge process or service of the garnishment, see Appearance § 9, ¶ 39.

Attorney appearing for defendant as attorney for garnishee, see Attorneys ¶ 58.

Time for disclosure specified in writ, see Jud. Act, chap. XXVIII, § 1; Comp. L. 1915, § 13122.

Extension of time for further disclosure, see Jud. Act, chap. XXVIII, §§ 3, 4; Comp. L. 1915, §§ 13124, 13125.

Time for disclosure in response to special interrogatories, see Jud. Act, chap. XXVIII, § 4; Comp. L. 1915, § 13125.

Extension of time for disclosure by court commissioner or judge, see Jud. Act, chap. XXVIII, § 6; Comp. L. 1915, § 13127.

Appearance to submit to examination, see Jud. Act, chap. XXVIII, § 4; Comp. L. 1915, § 13125.

§ 58. Nature and function of disclosure.

Contents and sufficiency of disclosure, see post §§ 59, 60.

Completeness of disclosure as dispensing with trial of issues, see post § 72.

¶ 159. The disclosure of a garnishee is the answer of a party, and analogous in its functions to an answer in chancery; it does not stand upon the same footing as the testimony of a witness, and whatever it admits may be regarded as established.—Allen v. Hazen, 26 Mich. 142.

§ 59. Contents, construction, and sufficiency of disclosure.

Separate disclosures to affidavit against joint garnishees, see ante ¶ 124.

As to the debt or liability admitted or denied, see post § 60.

Objections and modes of completing or perfecting disclosure, see post § 66 et seq.

Amendments of disclosures and further or supplemental disclosures, see post §§ 67, 68.

Sufficiency of belated disclosure, see also post ¶ 339.

Clearness of disclosure requisite to judgment, see also post § 80.

As to matters not in affidavit, see also post ¶ 192.

Penalty for false disclosure or answer, see Jud. Act, chap. XXVIII, § 40; Comp. L. 1915, § 13161.

¶ 160. The disclosure may state every fact within the garnishee's knowledge having any legitimate tendency to show that he should not be charged.—Drake v. Lake Shore & M. S. Ry. Co., 69 Mich. 168.

¶ 161. A garnishee's disclosure is to be taken altogether, and no part of it can be excluded merely for being made on information and belief.—Sexton v. Amos, 39 Mich. 695.

¶ 162. The purchaser of a flock of sheep was garnished as the vendor's debtor, and in his disclosure stated that on the day the summons was served the sheep were "delivered" to him and he helped drive them to the scales. But it also appeared that they were to be paid for by weight and had not been weighed when the summons was served. Held, that there had been no complete delivery and the purchaser was not therefore garnishable.—Case v. Dewey, 55 Mich. 116.

§ 60. ——As to debt or liability.

¶ 163. It is a garnishee's duty when he makes a disclosure to set forth the true condition of the liability.—Hirth v. Pfeifle, 42 Mich. 31; Hosley v. Scott, 59 Mich. 420.

¶ 164. A disclosure that does not show that a garnishee had or controlled any personal property belonging to the principal defendant, or was indebted to him, will not support a judgment against the garnishee.—People ex rel. Townsend v. Cass Circuit Judge, 39 Mich. 407.

¶ 165. Persons cannot be held as garnishees upon a disclosure which admits neither an indebtedness nor the possession of property belonging to the principal defendant.—Ball v. Young, 52 Mich. 476.

¶ 166. A disclosure admitting an indebtedness to the principal defendant of a stated sum unless the garnishees had become liable to other parties upon certain orders drawn on them by the principal defendant aggregating a certain larger sum is sufficient to enable plaintiff to demand a trial of the statutory issue thus framed under How. St., § 8068; and plaintiff is not required to file special interrogatories.—Hobson v. Kelly, 87 Mich. 187.

¶ 167. Judgment cannot be rendered against a garnishee, whether he appeared on the return day of summons or not, if his disclosure does not prima facie show a liability.—Hackley v. Kanitz, 39 Mich. 398.

¶ 168. A disclosure in garnishment setting out that the principal defendant had left with the garnishee a check payable to a third person and indorsed in blank, and that the garnishee had sent it to the bank and received a draft in return, is sufficient to make out a prima facie case for judgment against the garnishee.—Weaver v. Irons, 129 Mich. 368.

¶ 169. A garnishee cannot be held on a disclosure that he has nothing except a draft payable to the wife of the principal defendant.—Kraft v. Raths, 45 Mich. 20.

¶ 170. A garnishee's statement that he does not know whether he owes the principal defendant or some one else for certain work, and that the defendant told him he only wanted enough money to pay expenses, and that the rest was to go to another person, is not such a disclosure as will sustain a judgment against the garnishee.—Lyon v. Kneeland, 58 Mich. 570.

¶ 171. A railway company, being garnished, disclosed by its agent that as common carrier it had in its possession goods consigned to the principal defendant, but the agent did not know whether they belonged to such defendant and had no personal knowledge of his business or other consignments. Held insufficient to make the company liable as garnishee in a proceeding before a justice.—Custer v. White, 49 Mich. 262.

¶ 172. A disclosure which sets out the giving of a warranty deed of certain lands by the garnishee to the principal defendant for a consideration named, and the dispossession of the principal defendant by legal proceedings under paramount title, makes the garnishee liable for the amount of the consideration money; and the deed is sufficiently proved thereby.—Allen v. Hazen, 26 Mich. 142.

¶ 173. Under the statutes treating the affidavit as a declaration and the disclosure as a plea thereto, a disclosure in garnishment that garnishee received goods from the principal debtor in March is not an admission that he retained the goods at the end of July; and the burden remains on the plaintiff to show that the goods were in the garnishee's possession in July when the writ was served upon him. There was no pre-

sumption that the goods continued in the garnishee's possession four or five months after they were admitted to be in his possession.—Bethel v. Linn, 63 Mich. 464.

¶ 174. A garnishee is not charged by his admission that he has in his possession property which he had hired from the principal defendant, where he also states that a third person had since told him that he had bought it from the defendant.—Sexton v. Amos, 39 Mich. 695.

§ 61. Conclusiveness and effect of disclosure or admissions.

Evidence to impeach disclosure, see post § 79.
Taking disclosure as a whole, see also ante ¶ 161.
Effect of admissions, see also ante ¶ 159.
Admission in general terms overcome by specific averments in disclosure, see ante ¶¶ 162, 173, 174.
Disclosure of debt due in part to strangers, see ante ¶ 95.
Construction and interpretation of the disclosure, see ante §§ 59, 60.
Construction of admission of debt at specific earlier time, see ante ¶ 173.
Disclosures by agents and corporate officers, see post § 62.
Disclosure under invalid or defective writ, see post § 63.
Effect of disclosure upon plaintiff or principal defendant, see post §§ 64, 65.
Answer to controvert disclosure and form issues for trial, see post § 75.
Scope of the issues for trial, see post § 77.
Power of garnishee to waive errors and defects in procedure, see also post § 93.
Payment into court with disclosure to obtain release, see post § 117.
Privilege against use of disclosure in prosecution for crime except perjury in the making thereof, see Jud. Act, chap. XXVIII, § 27; Comp. L. 1915, § 13148.

¶ 175. The garnishee is not permitted to show errors and mistakes in his disclosure except by permission of the court.—Allen v. Hazen, 26 Mich. 142.

¶ 176. Where a garnishee discloses voluntarily that he has given a warranty deed to the principal defendant, and states the consideration therefor, any objection to this manner of proving the deed and consideration is waived by him; since his disclosure has the effect of an answer.—Allen v. Hazen, 26 Mich. 142.

¶ 177. A garnishee's disclosure cannot be made less conclusive by allowing a jury, upon the trial of an issue demanded by the garnishee, to consider inconclusive testimony as to what such garnishee had previously said in answer to unauthorized inquiries as to whether he had received possession of the principal defendant's property before or after the entry of the judgment against him.—Quinn v. Blanck, 55 Mich. 269.

¶ 178. On garnishment of a building owner as debtor of the principal defendant, contractor, a disclosure, that though the work is done nothing is due because it had not been accepted and no architect's certificate was issued and that money is owing for labor which may become a lien, may be controverted by proof that the contract has been fully performed and that the certificate has been waived or is improperly withheld; since that would show that the money is due from the garnishee.—McMillan v. Schneider, 147 Mich. 258.

§ 62. ——Disclosures by agents and corporate officers.

Sufficiency of disclosure aided by other evidence, see also post § 81.

¶ 179. A garnisheed bank is not bound by disclosures not made by its proper officers.—Karp v. Citizens' Nat. Bank, 76 Mich. 679.

¶ 180. A disclosure made and filed by a recognized agent of a foreign corporation, after service of garnishee process under How. St., § 8086, admitting the liability of the principal, is binding upon the corporation.—First Nat. Bank v. Burch, 80 Mich. 242.

§ 63. ——Disclosure under defective or invalid writ.

¶ 181. The disclosure has no effect if no garnishee was described in the writ.—Ettelsohn v. Fireman's Fund Ins. Co., 64 Mich. 331.

¶ 182. A disclosure in garnishment before jurisdiction of the principal case has been obtained is of no force, and the subsequent appearance of the principal defendant does not cure it.—Iron Cliffs Co. v. Lahais, 52 Mich. 394.

¶ 183. Where a bank is served with a writ of garnishment which is defective and is subsequently properly served, but in the meantime has paid out the money involved, it is not estopped by its disclosure from showing the exact condition of things at the time of the alleged defective service.—Dunn v. Detroit Sav. Bank, 118 Mich. 547.

§ 64. ——Effect upon garnishment plaintiff.

Effect on principal defendant, see post § 65.

¶ 184. Where a garnishee in the circuit court makes disclosure denying plaintiff's claim, and then claims an issue under Comp. L. 1871, § 6475 (How. St., § 8068), the denial made in the disclosure is not conclusive on the plaintiff; but he is entitled to prove an indebtedness from the garnishee to the principal defendant, and even to show that it is collusive and intrinsically dishonest.—Fearey v. Cummings, 41 Mich. 376.

¶ 185. Disclosures by garnishees are not conclusive, the plaintiff having the right to an examination and trial upon which he may establish the garnishee's liability over their denial.—National City Bank v. Torrent, 130 Mich. 259.

¶ 186. A disclosure by a garnishee that he does not know whether or not a past due note executed by him to the principal defendant was still in the latter's hands at the time of service of process is not conclusive against his liability to plaintiff, since the statute (How. St., § 8068) provides for a trial of the issue framed by the affidavit and the disclosure.—Serviss v. Washtenaw Circuit Judge, 116 Mich. 101.

§ 65. ——Effect on principal defendant or third persons.

Effect on plaintiff, see ante § 64.

¶ 187. The garnishee may by his disclosure admit away his own rights, but he cannot thus admit away or prejudice the rights of others.—Hebel v. Amazon Ins. Co. of Cincinnati, 33 Mich. 400.

¶ 188. A garnishee cannot waive or admit away the rights of the principal defendant, as by disclosing that the debt was due to some other person.—Hirth v. Pfeifle, 42 Mich. 31.

¶ 189. The garnishee cannot waive the rights of third parties.—Tabor v. Van Vranken, 39 Mich. 793.

§ 66. Objections to disclosure; motion or demand for further disclosure.

Examination of garnishee, see post § 69.

Sufficiency of disclosure unless objected to within ten days, see Jud. Act, chap. XXVIII, § 3; Comp. L. 1915, § 13124.

¶ 190. Where a garnishee's disclosure in the circuit court is not satisfactory, the only authorized course is to proceed under Comp. L. § 6467 (see How. St., § 8060) to obtain a further disclosure; otherwise the case must rest on the showing as first made.—People ex rel. Townsend v. Cass Circuit Judge, 39 Mich. 407.

¶ 191. The disclosure of a garnishee is deemed sufficient unless further inquiry is prosecuted as provided by the statute governing such proceedings.—Smith v. Holland, 81 Mich. 471.

¶ 192. Where the answer of a garnishee is full and explicit to the allegation in the affidavit on which the writ of garnishment issues, there is no room for an exception for insufficiency; nor can a disclosure be required concerning matters not alleged in the affidavit.—Mack v. Brown, 20 Mich. 335.

§ 67. Amendment of disclosure.

Further and supplemental disclosures, see post § 68.

¶ 193. It is within the power of the court to open a case and allow the amendment of a disclosure by a garnishee, at any time before judgment, upon due notice to the opposite party.—Dunn v. Detroit Sav. Bank, 118 Mich. 547.

§ 68. Further or supplemental disclosure.

¶ 194. A garnishee may make a further and supplemental disclosure.—Drake v. Lake Shore & M. S. Ry. Co., 69 Mich. 168.

¶ 195. A garnishee may make a supplemental disclosure on being summoned to show cause why judgment should not be rendered.—Allen v. Hamburg-Bremen Fire Ins. Co., 121 Mich. 86.

¶ 196. Where debtors of an insolvent have been sued by their creditor's assignee after being garnished, they should ask leave to file a supplemental disclosure setting up the alleged assignment.—Butler v. Wendell, 57 Mich. 62.

§ 69. Examination of garnishee.

Submission to examination as waiver of defects in process and service, see post ¶ 289.

Of foreign corporate garnishee, see post § 70.

Refusal to answer interrogatories as contempt, see Contempt § 8.

Service and filing of special interrogatories, see Jud. Act, chap. XXVIII, § 4; Comp. L. 1915, § 13125.

Statutory provisions as to examination on demand, see Jud. Act, chap. XXVIII, § 4; Comp. L. 1915, § 13125.

Examination respecting negotiable paper in garnishee's hands, see Jud. Act, chap. XXVIII, §§ 24-26; Comp. L. 1915, §§ 13145-13147.

¶ 197. How. St., § 8061, providing that a garnishee shall submit to an examination upon a notice of not less than three nor more than ten days, cannot be construed to include nonresident garnishees, inasmuch as such construction would entail undue hardship upon nonresidents.—Raniville v. Kent Circuit Judge, 118 Mich. 196.

§ 70. ——Of foreign corporation garnishee.

Statutory provisions as to examination and testimony of agents and officers, see Jud. Act, chap. XXVIII, § 4; Comp. L. 1915, § 13125.

¶ 198. How. St., § 8061, requiring a garnishee to appear before a circuit judge or circuit court commissioner and submit to a personal examination touching his liability as garnishee, does not apply to a foreign corporation when summoned as garnishee.—Shafer Iron Co. v. Iron Circuit Judge, 88 Mich. 464.

¶ 199. A circuit judge has no power to order any or all of the officers of a foreign

corporation, against which garnishment proceedings are pending, to appear and bring before him the books and papers of the corporation, and submit to an examination on oath concerning its liability as such garnishee.—Shafer Iron Co. v. Iron Circuit Judge, 88 Mich. 464.

§ 71. Defaults.

Default in making further disclosure, see post ¶ 248.
Default by plaintiff as discontinuing garnishment, see post ¶ 298.
Sufficiency of affidavit of default, see also Defaults ¶ 36.
Nature of motion to set aside judgment by default against garnishee, see Defaults ¶ 125.
Opening default for want of showing that proper officer of corporate garnishee was served, see Defaults ¶ 89.
Time for application to vacate default, see also Defaults ¶¶ 122, 123.
Grounds for relief in equity against judgment founded on default, see Judgments, VI.
Mandamus to compel vacation of default, see Mandamus, II.
Defaulting garnishee for want of disclosure or examination, see Jud. Act, chap. XXVIII, § 5; Comp. L. 1915, § 13126.
Provisions for default of foreign corporations on failing to answer or disclose, see Jud. Act, chap. XXVIII, § 46; Comp. L. 1915, § 13167.
Necessity of taking default against principal defendant to prevent discontinuance of garnishment, see Jud. Act, chap. XXVIII, § 45; Comp. L. 1915, § 13166.

¶ 200. After a garnished corporation puts in its answer it is not in default, and judgment cannot be rendered against it unless the answer discloses a liability.—Lorman v. Phoenix Ins. Co., 33 Mich. 65.

¶ 201. Notice of a garnishee's default after service or notice of assessment of damages is not required in order to enter judgment of default on motion.—Nichol v. Nevers, 196 Mich. 203.

¶ 202. Circuit Court Rule 12 providing that no default shall be set aside unless the application shall be made within six months after personal service, applies to judgments against garnishee defendants.—Caille Bros. Co. v. Saginaw Circuit Judge, 155 Mich. 480.

VI. TRIAL OF ISSUES, JUDGMENT AND EXECUTION.

§ 72. In general; demand for trial and notice.

Time and stage of action for trial, see post §§ 73, 74.
Formation and joinder of issues, see post §§ 75, 76.
Scope of the issues and inquiry, see post § 77.
Presumptions, burden of proof, admissibility and sufficiency of evidence on the trial, see post §§ 78-81.
Court and jury questions and instructions on the trial, see post §§ 82-84.
Verdicts, findings and judgment, see post §§ 85-88.
Executions, see post § 89.
Sufficiency of disclosure to support demand for trial of issues, see ante ¶ 166.
Examination of garnishee, see ante § 69.
Calendars for trial of causes and proceedings to place cause on trial calendar, see Calendar.
Before justices of the peace, see Justices of the Peace, IV, C.
Completion of issues for trial and demand for trial, see Jud. Act, chap. XXVIII. § 11; Comp. L. 1915, § 13132.

¶ 203. Where the only question raised under a disclosure in garnishment is whether the fund belongs to the principal defendant or to a third party claimant, a demand for the trial of the statutory issue under How. St., § 8068, is unnecessary as against the garnishee.—Muncey v. Sun Ins. Office, 109 Mich. 542.

¶ 204. Under the provisions of 1897, C. C. Rule 35, relating to notice of future proceedings in a cause where appearance has not been followed by "plea or demurrer," defendant having pleaded is not entitled to have the writ of garnishment dismissed because he has not been served in advance with notice of an intention to issue the same or of subsequent proceedings thereunder.—Ketcham v. Kent Circuit Judge, 115 Mich. 60.

§ 73. Time and stage for trial.

Time for entry of judgment, see post § 86.
Waiver of time for trial, see post § 74.
Time when garnishment issues shall stand for trial as dependent on stage of the main case, see Jud. Act, chap. XXVIII, § 12; Comp. L. 1915, § 13133.
Time and stage for trial after affirmance of judgment against principal defendant, see Jud. Act, chap. XXVIII, § 17; Comp. L. 1915, § 13138.
Notice by principal defendant of intention to move for new trial or to remove case on writ of error as requisite to prevent garnishment issues from coming on for trial, see Jud. Act, chap. XXVIII. § 13; Comp. L. 1915, § 13134.

¶ 205. A garnishee who has only disclosed claims of creditors held under assignment wherein he has no personal interest can be held only upon the trial of an issue; and such issue is not ripe for trial before judgment in the principal case.—Conway v. Ionia Circuit Judge, 46 Mich. 28.

¶ 206. A garnishee cannot be forced to trial within two days from the trial of the principal suit (How. St., § 8070); and if the principal defendant appeals, a judgment in

garnishment, if rendered, can be stayed until the judgment appealed from is disposed of.—Crippin v. Jacobson, 56 Mich. 386.

¶ 207. Where the right to proceed to the trial of an issue against a garnishee depends on the state of the principal case, the court is at liberty to consider the record in that case without separate proof.—Farrington v. Sexton, 43 Mich. 454.

¶ 208. The trial of the statutory issue in garnishment proceedings should be postponed pending the appeal in the principal suit, although How. St. § 8070 providing that the statutory issue shall stand for trial unless the principal defendant shall within two days after judgment, serve upon the garnishee notice of a motion for new trial, or of his intention to remove the case to the supreme court was not complied with by the service of a notice; and though an appeal in the principal case was seasonably prosecuted, in view of section 8074 indicating that if the principal case is appealed the issue should not be tried until after the determination of the appeal.—Wattles v. Wayne Circuit Court, 119 Mich. 356.

§ 74. ——Waiver of time.

¶ 209. It seems that the issue in garnishment can be tried on the same day with the principal suit if the garnishee is willing; and if such trial is had without objection at the time it cannot afterwards be said to have been premature.—Crippen v. Jacobson, 56 Mich. 386.

¶ 210. A garnishee defendant waives the right secured to him by How. St. §§ 8069, 8070, to have the statutory issue tried at the same term at which judgment is rendered against the principal defendants, by noticing the case for trial for a subsequent term.—Cluett v. Rosenthal, 100 Mich. 193.

¶ 211. The garnishee defendant did not waive his right under the statute (Comp. L. 1897, § 10610) to 10 days after the filing of the oral examination in which to demand a trial of the cause, by appearing and arguing the case at the time the disclosure was filed; where both the disclosure and the oral examination deny liability, and the record merely shows that judgment was rendered after hearing the proof offered and the argument of counsel for the respective parties.—King v. Harrigan, 145 Mich. 436.

¶ 212. Where the statutory right (How. St. §§ 8069, 8070) to have garnishment issues tried at the same term as the main case, is waived, the case must thereafter proceed as other issues of fact, subject to notice by either party.—Cluett v. Rosenthal, 100 Mich. 193.

§ 75. Formation of issues; answer.

Function of disclosure, see also ante § 58.

Formation of issues on joint garnishment, see ante ¶ 124.

Affidavit for writ as statutory declaration, see Jud. Act, chap. XXVIII, § 11; Comp. L. 1915, § 13132.

Statutory effect of disclosure to form issues, see Jud. Act, chap. XXVIII, § 11; Comp. L. 1915, § 13132.

¶ 213. Garnishment proceedings do not become adversary until the plaintiff contests under the statute, the answer of the garnishee.—Barlow v. Lincoln-Williams Twist Drill Co., 186 Mich. 46.

¶ 214. The declaration against the garnishee under the second summons, provided for in Sess. L. 1849, p. 153, How. St. § 8038, must be predicated upon his disclosure.—Maynards v. Cornwell, 3 Mich. 309.

§ 76. ——Bill of particulars.

Bills of particulars of pleadings in general, see Pleading, V.

¶ 215. A bill of particulars of what is to be established against a garnishee is not a matter of right, especially where the garnishee has made disclosure.—Strong v. Hollon, 39 Mich. 411.

§ 77. Scope of issues and inquiry.

Issues triable on motion to quash, see post § 96.

Effect of general issue by garnishee, see post ¶ 288.

Admissible evidence on the trial, see post § 79.

Intervention and interpleader of adverse claimants, see post §§ 114, 115.

¶ 216. The inquiry in a garnishment proceeding is whether any sum is owing by the garnishee defendant to the principal defendant.—Robbins v. Vandermeiden, 182 Mich. 674.

¶ 217. In a proceeding against a garnishee to whom a chattel mortgage had been given before he was put in possession of the property, questions as to the validity of the mortgage were immaterial so long as there was no showing that he took possession by virtue of it.—Folkerts v. Standish, 55 Mich. 463.

¶ 218. In an action of garnishment where the principal issue was whether a benefit certificate held by the garnishee defendant was exempt, the question as to the amount of property which the principal defendant has is immaterial.—Recor v. Commercial & Sav. Bank of St. Clair, 142 Mich. 479.

¶ 219. The right of a plaintiff in garnishment to try the title to a fund, the existence of which was disclosed by testimony taken under How. St. § 8085, should extend to any stage where the disclosure and examination show a disputed claim to a fund in the garnishee's possession, which plaintiff claims to be the property of the principal defendant

or owing to him; and there is no reason for limiting the application of the statute to cases where the fact appears in the disclosure so called.—Marx v. Wayne Circuit Judge, 119 Mich. 19.

¶ 220. It is immaterial to a garnishee plaintiff as against the garnishee defendant whether a resolution of the principal defendant transferring to the garnishee the title to its property on which he held a chattel mortgage was in effect a common law assignment for creditors void because preferential, where the mortgage itself was a fraudulent hindrance to plaintiff and other creditors.—Wood v. Eldredge, 147 Mich. 554.

¶ 221. The trial of a garnishment, being essentially between the garnishee and the creditor, does not properly admit of interference by subsequent attaching and garnishing creditors or third persons as parties, but the garnishee may show the condition of his holding.—Keppel v. Moore, 66 Mich. 292.

¶ 222. On the trial of a garnishment, although the affidavit in garnishment was technically defective but the defect may have been waived by the garnishee, testimony was admissible to aid in determining whether the garnishee had not become bound by his conduct and acquiescence to answer for the property in his hands to apply upon plaintiff's debt, so as to make plaintiff stand preferred to subsequent garnishing creditors.—Keppel v. Moore, 66 Mich. 292.

§ 78. Presumptions and burden of proof.

Effect of disclosure to admit facts, see ante § 61 et seq.

Burden of proof and evidence of frauds on creditors, see generally Fraudulent Conveyances, I, V.

¶ 223. Under How. St. § 8059, which provides that from the time of the service of the writ the garnishee shall be deemed liable to plaintiff in the amount of property which such garnishee holds by conveyance, transfer or title that is void as to the creditors of the principal debtor, plaintiff must show that the transfer to the garnishee from the principal defendant was fraudulent as to creditors of the latter.—Bethel v. Linn, 63 Mich. 464.

¶ 224. Where the principal debtor is alleged to have made a transfer to the garnishee defendant in fraud of creditors of whom plaintiff is one, and the whole right of plaintiff depends on that fact, he must establish it else the garnishee will not be liable regardless of the question whether he had anything subject to garnishment.—Bethel v. Linn, 63 Mich. 464.

§ 79. Admissibility of evidence.

Scope of the issues on trial of garnishment, extraneous claims, see ante § 77.

Evidence on interpleader of claimant, see post § 115.

Sufficiency and weight of the evidence, see post §§ 80, 81.

Proper contents of disclosure, see ante §§ 59, 60.

Effect of disclosure to waive formal proof of deed, see also ante ¶ 176.

[Note. Generally speaking the substantive rights and liabilities of garnishees are provable in the same manner and means as those of other parties to actions claiming the same rights. Therefore the specific topics treating of the right, title or interest asserted or topics treating of the relation between the principal defendant and the garnishee should be consulted. Thus evidence of a sale of goods and of the amount due for the price will be treated in Sales, and evidence of payment will be treated in Payment.]

General law of evidence, see Evidence.

Mode of proving principal judgment, see Evidence § 545.

Res inter alios evidence of settlements, see also Evidence ¶ 531.

Admissibility of principal debtor's self-serving statement in garnishment proceedings, see Evidence ¶ 2550.

Cross-examination on trial, see Examination of Witnesses, II.

Admissibility of collateral evidences of fraud against garnishee as dependent on his knowledge of the facts, see Fraud ¶ 269.

Statutory provisions as to admissibility, see Jud. Act, chap. XXVIII, § 14; Comp. L. 1915, § 13135.

¶ 225. The judgment against the principal debtor may be shown by the judgment entry.—Strong v. Hollon, 39 Mich. 411.

¶ 226. Upon a trial of a suit against a garnishee, proof of the admissions or declarations of the garnishee, as to his indebtedness to or possession of property of the principal debtor, is inadmissible.—Maynards v. Cornwell, 3 Mich. 309.

¶ 227. The plaintiff's judgment against the principal defendant, having been attacked by the garnishee on the ground that it was based upon a note received by plaintiff after maturity, and without consideration, it was error to exclude testimony offered by him to show that the note was given for a bona fide indebtedness, which existed prior to the application of money in its hands as payments by the garnishee.—Ferry v. Home Sav. Bank, 114 Mich. 321.

¶ 228. On a plaintiff's impeaching the good faith of a garnishee's disclosure the entire antecedents of the dealings between the garnishee and principal defendants and their agents, and all transactions regarding the property and its disposal, are admissible in evidence, fraud on the part of the garnishee as against the creditors of the principal defendant being in question.—Cummings v. Fearey, 44 Mich. 39.

¶ 229. Where, in garnishment proceedings the only material issue was whether the principal defendants were indebted to a person to whom, before the garnishment, they had assigned their claim against the garnishee, it was not error to exclude testimony bearing upon their insolvency.—Childs v. Nordella, 116 Mich. 511.

¶ 230. A garnishee may give in evidence matters of hearsay, even, touching his liability to the principal defendant.—Drake v. Lake Shore & M. S. Ry. Co., 69 Mich. 168.

¶ 231. Evidence that a demand for the retraction of a libelous article was not complied with by the publishers is inadmissible in garnishment proceedings against the transferee based upon the alleged fraudulent transfer of the newspaper proprietor's assets pending an appeal from a judgment for the libel, since the inference of malice to be drawn therefrom would not, any more than the judgment for libel show a motive for a fraudulent disposition of the property.—Long v. Evening News Ass'n, 113 Mich. 261.

¶ 232. In garnishment, where the garnishees claimed to have purchased the stock of groceries in question from creditors of plaintiff's debtor to whom it had been transferred in payment of a debt, but where there was testimony tending to show that the relation of vendor and vendee existed between such debtor and the garnishees, and that the latter had made statements supporting such relationship and had made no objection when informed of plaintiff's intention to garnish; a contract drawn by such creditor's bookkeeper providing for the sale of the stock to the garnishees, which was delivered to and kept by the garnishees until after the garnishment and then turned over unexecuted to such creditor and a different contract executed by the debtor, was admissible as a circumstance, although the garnishees claimed that it was erroneously drawn and that the bookkeeper had no instructions to draw it as he did.—Seitz v. Starks, 136 Mich. 90.

¶ 233. In garnishment proceedings against a chattel mortgagee, as bearing upon the issue whether the garnishee was in possession at the time of the service of the writ, evidence that, on the day after such service he made a written demand for the possession of the goods, and that the board of directors of the mortgagor, a corporation, formally acted upon such demand, and turned the goods over to him, is admissible.—Krementz v. Howard, 109 Mich. 466.

¶ 234. Upon the defense that money due for goods has been paid over by the defendants in a garnishment proceeding, it is competent to show that the money is still within the defendant's control.—Harris v. Chamberlain, 126 Mich. 280.

§ 80. Sufficiency and weight of evidence.

Sufficiency of admissions in disclosure, see ante §§ 59, 60.

Sufficiency of disclosure aided by other evidence, see post § 81.

Questions of law and fact, see post § 82.

Direction of verdict on the evidence, see post § 83.

On intervention and interpleader issues, see post § 115.

¶ 235. A judgment cannot be maintained against the garnishee without proof of the money value of the property, works of art, disclosed to be in the garnishee's hands.—Keppel v. Moore, 66 Mich. 292.

¶ 236. Unless the liability of a garnishee is clear and unqualified as shown by his disclosure, answers to interrogatories and oral examination, no judgment can pass against him.—Smith v. Holland, 81 Mich. 471.

¶ 237. A garnishee is plaintiff's witness so far as his answers are responsive, and though they are not conclusive if met by adequate testimony, they constitute part of the evidence in the case.—Whitfield v. Stiles, 57 Mich. 410.

¶ 238. In garnishment proceedings, claimant declaring, in trover, the findings of the trial court that the contract for work on which money was due was made with the claimant was held to have been supported by evidence, where there was testimony that the husband at the time had lost everything he possessed except a few articles of personalty, which were incumbered and of little value, and that he had used money belonging to her and turned his property over to her that she might continue the business, and the husband thereafter acted solely as her agent, and she testified positively that he had no interest in the contract and that it was her contract, therefore she was entitled to the money.—Dietz v. Bignall, 86 Mich. 292.

¶ 239. Where the officers of a bank garnished by a depositor's creditor have testified to an agreement with the depositor that he should at all times keep a balance to his credit of $1,000 to cover liability on returned drafts, such agreement is not negatived by testimony that both before and after service of garnishment the balance was far less than $1,000.—Rice v. Third Nat. Bank, 104 Mich. 176.

¶ 240. In garnishment against a wife upon a judgment against the husband, where both were present at the hearing, and where neither was sworn and no testimony was offered on their behalf, and where the only question of fact was whether the garnishee defendant had property or effects in her hands belonging to her husband sufficient to pay the judgment and the testimony strongly tended to show that she had, the verdict of

the jury in favor of plaintiff will not be disturbed.—Morgan v. Sprague, 124 Mich. 131.

¶ 241. There was nothing due the contractor that could be reached by garnishment, where, in an action against a garnishee of such contractor, it appears that the contract under which such contractor was installing heating and plumbing work for garnishee provided for payment of a certain sum of money when the work had reached a certain stage, and the remainder of the contract price when the work was completed, and that such first payment had been made and the work was not yet completed.—Simmons Hardware Co. v. Rose, 140 Mich. 123.

¶ 242. A building contractor was to finish his job at a certain date, but was to forfeit a certain sum to his customer for every day that it should remain unfinished afterward. A creditor of the contractor garnished the customer and the latter disclosed that the job was still unfinished; that a certain amount of the contract price remained unpaid, and that he was entitled to a certain sum every day from the contractor. It did not appear whether the job would ever be finished, or whether anything more would be due to the contractor, or whether there would be any liability outside of the express contract. Held, that the garnishee was entitled to judgment.—Hopson v. Dinan, 48 Mich. 612.

¶ 243. The rule that a plaintiff cannot be permitted to recover a fund, the ownership of which is in doubt, had no application to a garnishment where plaintiff claimed that defendant had purchased the stock of groceries in question from plaintiff's debtor, and defendants claimed to have purchased from a creditor of such debtor other than plaintiff and that there was danger that they might be compelled to pay twice if plaintiff recovered, the assumption being that the jury would find the same in both cases as all the parties knew all of the facts connected with the transaction.—Seitz v. Starks, 136 Mich. 90.

¶ 244. That a franchise of the assignor in the Associated Press was transferable only with the consent of the association, and that its business had for several years been conducted at a loss, is insufficient to show that the franchise and good will were properly disregarded in the transfer as of no value; it being for the jury to determine, upon proper evidence in garnishment proceedings, whether their inclusion without compensation was in fraud of creditors.—Long v. Evening News Ass'n, 113 Mich. 261.

¶ 245. In attachment proceedings where the defendant had been garnished, and exemption was claimed evidence that the debtor was indebted to plaintiff for board and lodging furnished prior to January 9, 1906, and at that time he left her house taking all his clothes saying that he expected to leave town and accept a position on a railroad in the West and she had not seen him since, is sufficient to warrant a finding that the garnishee was a nonresident.—Kelson v. Detroit, G. H. & M. R. Co., 146 Mich. 563.

§ 81. ——Disclosure supplemented by other evidence.

Conclusiveness and effect of disclosure, see ante §§ 61-65.

Right of plaintiff to controvert disclosure, see ante § 64.

Right of principal defendant to controvert disclosure, see ante § 65.

Evidence contradictory of admissions in disclosure, see also ante ¶ 177.

Effect given to parts of disclosure based on information and belief, see ante ¶ 81.

¶ 246. A garnishee's disclosure, even if it does not positively confess liability, may establish it when aided by other evidence.—Lyon v. Kneeland, 58 Mich. 570.

¶ 247. A disclosure in garnishment showed that the garnishee had a contract with the principal defendants for a house, on which he owed them, or would owe them, a specified sum, less any damages he might have against them for nonfulfillment. Held, that upon satisfactory proof of the completion of the contract by the contractors and plaintiffs, as their assignees, substantially within the contract period, the plaintiffs were entitled to recover; the garnishee being bound to pay for the house if built properly. It did not concern him, when it was so built, whether it was done by the contractors or by plaintiffs as their assignees.—Zimmer v. Davis, 35 Mich. 39.

¶ 248. A disclosure made by an agent of a foreign insurance company, as garnishee, is sufficient to justify the finding of an indebtedness, although an incomplete disclosure was made on the return day, and an adjournment was taken to permit a further disclosure, and although the garnishee did not appear on the adjourned day, the supplemental showing being made on a summons to show cause. The court did not lose jurisdiction by a failure of the garnishee to appear on the adjourned day and the agent was in duty bound to represent the garnishee.—Allen v. Hamburg-Bremen Fire Ins. Co., 121 Mich. 86.

§ 82. Questions of law or of fact.

Propriety of directed verdict, see post § 83.

Particular questions and issues as jury questions, see specific topics treating of such matters, e. g., Contracts, X, C; Payment, V; Sales, VIII, IX.

¶ 249. A draft came to the garnished bank, indorsed by one of its directors as secretary and treasurer of the principal defendant, a corporation, and was forwarded for collec-

tion. Nearly one-half of the proceeds were used to pay an overdraft due the bank from the principal defendant, and the balance was credited to the teller of the bank, as agent of the director who indorsed the draft. It was so credited when process was served in the garnishment proceeding, and was subsequently turned over to the treasurer of the corporation upon the teller's check. The bank at the time held as security all of the stock of the principal defendant, except three shares, and had possession of its books. It was undisputed that the money belonged in fact to the principal defendant. Held, that it was for the jury to determine whether the bank had knowledge of the ownership of the fund; because, if the bank when served with process, knew that the fund belonged to the principal defendant it would be liable, although the deposit stood in a third person's name.—Ferry v. Home Sav. Bank, 114 Mich. 321.

¶ 250. In garnishment against a bank to reach moneys deposited in the name of the debtor's wife, the fact that, the bank having paid the fund to the wife after service of the writ, the loss, in case plaintiff should prevail, would fall upon the bank, and not the wife, is not a defense for the garnishee or a material fact that the parties are entitled to have brought to the attention of the jury in the instructions.—Sykes v. City Sav. Bank, 115 Mich. 321.

¶ 251. In garnishment the question was for the jury where defendant claimed to have purchased the stock of groceries in question from creditors of plaintiff's debtor to whom it had been transferred in payment of a debt, but where there was testimony tending to show that the relation of vendor and vendee existed between such debtor and the defendants, and that the latter had made statements supporting such relationship and had made no objection when informed of plaintiff's intention to garnish.—Seitz v. Starks, 136 Mich. 90.

¶ 252. In garnishment proceedings where it was claimed that the garnishee defendants were indebted to the principal defendants for groceries and fixtures, and the defense was that there was no sale made to the garnishee defendants but to a creditor of the principal defendants from whom the garnishee defendants bought, the claim that this defense is a subterfuge and pretense presents an issue of fact for the jury.—Seitz v. Starks, 144 Mich. 448.

§ 83. ——Direction of verdict.

See also ante ¶ 222.

General rules as to directing verdicts, see Directing Verdict.

¶ 253. Where it appears that some of the goods were in the hands of the garnishees at the time of the service of the writ, it is improper to take the case from the jury on the ground that there is no proof that any of the goods were in their possession.—Bethel v. Linn, 63 Mich. 464.

¶ 254. In garnishment proceedings the question being whether the indebtedness referred to was due at the time of the trial, it was held that under the evidence a verdict was properly directed against the grantees.—Hobson v. Kelly, 87 Mich. 187.

¶ 255. Where, upon the burning of a manufacturing company's property which had been taken possession of by a mortgagee in trust for creditors, a compromise was effected between the mortgagor, the mortgagee, and an insurance company that had written insurance policies payable to the mortgagee, whereby the company agreed to pay part of the insurance, and where, in garnishment against the company at the suit of one of the mortgagor's creditors, there was evidence that the amount of the insurance as agreed upon would not satisfy the debts secured by the mortgage, and no evidence that the compromise was fraudulent, a verdict was properly directed for the garnishee.—Williams v. Buchanan Mfg. Co., 102 Mich. 49.

¶ 256. A directed verdict against a garnishee, who disclosed that as owner of a building he owed nothing because, though the work was done, it had not been accepted and no architect's certificate had been issued as required, and because labor claims were unpaid and might become a lien, is supported by testimony that the architect stated that he would never issue a certificate until the claim of the plaintiff was paid, and by a concession on appeal that when the writ was served the full contract price was owing to the defendant contractor, and where there is no evidence but the disclosure that the work was not completed or not accepted.—McMillan v. Schneider, 147 Mich. 258.

§ 84. Instructions.

General law of instructions, see Instructions.

Instructions on particular subjects, see topics treating of such subjects.

¶ 257. In instruction entitling a plaintiff to recover property belonging to a debtor if in the hands of a garnishee was sufficient under the evidence although nothing was said about the liability of the garnishee in case it was indebted to the debtor.—Sloman v. Goebel Brewing Co., 118 Mich. 442.

¶ 258. An instruction that a bill of sale was bona fide and was not fraudulent unless executed with an intent to hinder, delay, or defraud creditors, held to sufficiently present the question of good faith in an action where the plaintiff garnisheed property and the garnishee claimed title under a bill of sale.—Sloman v. Goebel Brewing Co., 118 Mich. 442.

¶ 259. In garnishment where the issue was whether defendant purchased the property

in question from plaintiff's debtor or from a creditor of such debtor to whom it had been transferred in payment of a debt, it was error to refuse a request stating that it was immaterial whether at some time during the negotiations defendants may have supposed they were getting the property of the debtor, provided the jury believed that the debtor actually sold to the other creditor.—Seitz v. Starks, 136 Mich. 90.

¶ 260. In garnishment where the issue was whether defendants purchased the property in question from plaintiff's debtor or from another creditor, it was error to tell the jury that an unsigned contract indicating a sale between the debtor and defendants, which had been admitted as circumstantial evidence although claimed to have been drawn without authority by a bookkeeper, was a valid contract regardless of its not being signed.—Seitz v. Starks, 136 Mich. 90.

¶ 261. In a proceeding by judgment creditors under How. St., § 8091, which makes a garnishee liable on account of and for the value of any of the property of the principal defendant in his possession, or which he has received and disposed of, and which is or was held by a conveyance or title void as to creditors of the principal defendant, it is error for the court, in its instruction to the jury, to predicate the right of recovery upon fraud perpetrated, not upon general creditors by the transfer of the property, but upon individual creditors, other than plaintiffs, from whom the property had been purchased by the principal defendant.—Gumberg v. Treusch, 103 Mich. 543.

§ 85. Verdict and findings.

Principal judgment as limitation on verdict, see also post ¶ 323.
General law relating to verdicts and findings, see Verdicts and Findings.
Provisions for report and for further report or amendment of report, see Jud. Act, chap. XXVIII, §§ 10, 26, 43; Comp. L. 1915, §§ 13131, 13147, 13164.
Report of judge, commissioner or receiver as to order for delivery of property and as to value of same, see Jud. Act, chap. XXVIII, § 10; Comp. L. 1915, § 13131.

¶ 262. It is suggested that in garnishment proceedings plaintiff should specially ask the jury what property of the principal defendant was in the garnishee's possession when the writ was served, and also what was the value of the property.—Bethel v. Linn, 63 Mich. 464.

§ 86. Judgments and costs.

Sufficiency of the disclosure to support judgment, see also ante §§ 59-65.
Filing supplemental disclosure on order to show cause against entry of judgment, see ante ¶ 195.
Time and conditions for entry of default, see ante § 71.
Necessity of proof of value of property to sustain money judgment against garnishee, see ante ¶ 235.
Discontinuance of garnishment on failure of main case, see post §§ 97-99.
Sufficiency of objections to main judgment to defeat garnishment, see post § 91.
Asking costs as waiver of right to discontinue, see post ¶ 306.
Necessity of judgment in main case before trial of garnishment issues, see ante § 73.
Effect of the judgment, see post § 87.
Executions, see post § 89.
Right and propriety of payment before judgment, see post § 118.
General law of judgments, see Judgments.
Nunc pro tunc entries to support judgments, see Judgments, III.
Right to costs and parties entitled, see Costs §§ 10, 53.
Amount allowable as costs, see Costs § 67.
Reviewability of garnishment proceedings, see Appeal § 16.
Scope of review on appeal from judgment, see Appeal § 300.
General statutory rule as to amount of the judgment, see Jud. Act, chap. XXVIII, § 31; Comp. L. 1915, § 13152.
Amount of the judgment to be entered against garnishee, see Jud. Act, chap. XXVIII, § 15; Comp. L. 1915, § 13136.
Rule for allowance of costs to or against garnishee, see Jud. Act, chap. XXVIII, § 16; Comp. L. 1915, § 13137.
Judgment in garnishment awaiting outcome of main case, see Jud. Act, chap. XXVIII, § 12; Comp. L. 1915, § 13133.
Withholding judgment on immature obligations, see Jud. Act, chap. XXVIII, § 18; Comp. L. 1915, § 13139.
Proper judgment where garnishee is chargeable with property of principal defendant, see Jud. Act, chap. XXVIII, §§ 19, 20; Comp. L. 1915, §§ 13140, 13141.
Right to have review or setting aside of garnishment judgments as with ordinary judgments, see Jud. Act, chap. XXVIII, § 42; Comp. L. 1915, § 13163.
Right to deduct costs, fees and expenses on making disclosure, see Jud. Act, chap. XXVIII, § 39; Comp. L. 1915, § 13160.

¶ 263. Judgment cannot be rendered against a garnishee until he has been summoned to show cause to the contrary, or has consented in person or by attorney (How. St. § 8038).—Iron Cliffs Co. v. Lahais, 52 Mich. 394.

¶ 264. Judgment can be rendered against a garnishee either upon disclosure made or upon default for want thereof.—White v. Ledyard, 48 Mich. 264.

¶ 265. A judgment against a garnishee defendant for the amount of the judgment against the principal defendant, rendered on the same day that the oral examination of such garnishee defendant was filed, was erroneous, since under Comp. L. 1897,

§ 10610, he was entitled to 10 days thereafter to demand a trial of the cause.—King v. Harrigan, 145 Mich. 436.

¶ 266. Under Comp. Laws 1897, § 10610, where the admissions of a garnishment defendant in his oral examination clearly show his liability, judgment may be entered against him at any time after final judgment against the principal defendant on motion of the plaintiff and without further notice to said garnishee.—Heald v. Montcalm Circuit Judge, 166 Mich. 297.

¶ 267. No judgment can be rendered against garnishees unless it will discharge them from any liability to the principal defendants.—Hamilton v. Rogers, 67 Mich. 135.

¶ 268. Two insurance companies which issue policies together under a common name to wit, "Cincinnati Underwriters," may be garnished under such name by creditors of a policy-holder for the amount due under his policy, and a single judgment taken (How. St. § 8092), although it appear upon the trial that, by the terms of the policy, the liability of the companies is several for their proportionate share of the loss.—Ferry v. Cincinnati Underwriters, 111 Mich. 261.

¶ 269. A money judgment cannot be rendered against a person cited under How. St. § 8057a, to defend his claim to money, etc., due from, etc., a garnishee, the object of the statute being merely to conclude such person by a verdict that he is not entitled to the fund, from recovering from the garnishee; in case the plaintiff fails to take proper steps to charge the garnishee, no binding judgment can be rendered.—Pecard v. Peter Home & Co., 91 Mich. 346.

§ 87. Effect of judgment.

Rights of plaintiff against garnishee, see post IX.

Rights between garnishee and principal defendant, see post X.

Rights of third persons, see post XI.

Conclusiveness on plaintiff notified to defend of judgment had against garnishee, see also Former Adjudication § 60, ¶ 315.

Denial on motion of vacation of judgment as bar to bill to vacate it, see Former Adjudication ¶ 61.

Operation as res adjudicata of decision on motion to set aside default judgment, see Former Adjudication ¶ 96.

Effect of judgment to release garnishee, see Jud. Act, chap. XXVIII, § 35; Comp. L. 1915, § 13156.

¶ 270. The lawful owner of a claim cannot be estopped by garnishment proceedings unless in them the garnishee has been put by regular course of law into a position to bind such owner.—Hebel v. Amazon Ins. Co. of Cincinnati, 33 Mich. 400; Hirth v. Pfeifle, 42 Mich. 31.

¶ 271. A judgment against a garnishee defendant does not bind his actual creditors where his indebtedness was to them and not to the principal defendant. And there is no need of a motion to vacate such a judgment unless, perhaps, where the debt was itself a judgment and proceedings to collect it had been stayed.—First Nat. Bank v. Mellen, 45 Mich. 413.

¶ 272. A judgment in a garnishment action in favor of a particular garnishee is not binding upon the creditor in a subsequent suit under the Bulk Sales Act, Pub. Acts 1905, No. 223, How. 2nd Ed., § 2612 et seq., where such particular garnishee is not a party to such suit.—Humiston, Keeling & Co. v. Bridgman, 195 Mich. 82.

¶ 273. Under Comp. L. 1897, §§ 10, 685, How. St., 2nd Ed., § 13741, providing that the "judgment against any person, as a garnishee, shall acquit and discharge such garnishee * * * from all demands by the principal defendant * * * for all such money or property, as aforesaid, paid or delivered by the garnishee by force of such payment; and if any garnishee shall be sued therefor or for anything done by virtue of the provisions of this chapter, he may, under the general issue, give the special matter in evidence," a judgment by a creditor against a bank as garnishee does not exonerate the principal defendant from liability to plaintiff and cannot do so until paid by the bank, and hence does not constitute a novation.—In re Ransford, 194 Fed. 658.

§ 88. ——Avoidance by bankruptcy proceedings.

Dissolution of lien by subsequent bankruptcy, see Bankruptcy § 9.

Effect of nonintervention by trustee in bankruptcy to avoid garnishment, see Bankruptcy § 18, ¶ 111.

¶ 274. A judgment in an action of garnishment rendered within four months from the filing of an involuntary petition in bankruptcy against the defendant, disposing of a fund belonging to him, is automatically vacated by the subsequent rendition of a judgment vesting the right to such fund in the bankrupt's trustee.—Wilson v. Van Buren County Farmers' Mut. Ins. Co., 184 Mich. 530.

§ 89. Executions.

Sale by receiver, see ante ¶ 155.

General law of executions, see Executions.

General statutory rule as to executions, see Jud. Act, chap. XXVIII, § 31; Comp. L. 1915, § 13152.

Provisions for executions against principal defendant for unsatisfied balance, see Jud. Act, chap. XXVIII, § 34; Comp. L. 1915, § 13155.

Against goods to have been delivered by garnishee to principal defendant, or against other property of garnishee on failure to expose them to levy, see Jud. Act, chap. XXVIII, §§ 22, 23; Comp. L. 1915, §§ 13143, 13144.
Executions to other counties, see Jud. Act, chap. XXVIII, § 36; Comp. L. 1915, § 13157.

¶ 275. Notice of an application for an order for execution against them need not be given to sureties in the bond filed by the principal defendant under Comp. L. 1871, § 6512, to obtain discharge of garnishment. Their undertaking is to be bound by what binds their principal, and that in case of judgment against him execution may issue directly against them.—People ex rel. Loh v. Wayne Circuit Judge, 26 Mich. 186.

VII. OBJECTIONS TO WRIT; QUASHAL OR DISSOLUTION, DISMISSAL, ABATEMENT, AND REVIVAL.

Appealability of garnishment proceedings, see Appeal § 16.
Objections to the disclosure, motions for further disclosure, and special interrogatories, see ante § 66 et seq.
Assertion of right to exemptions and procedure to enforce them, see Exemptions, III.

§ 90. Defects in writ or garnishee process.

Omission of date of issuance in copy of writ left for service, see ante ¶ 148.
Omission of name of county in copy served, see ante ¶ 153.
Effect of disclosure under defective or invalid writ, see ante § 63.
Defects in the main case, see post § 91.
Amendments ordered but not formally made, see ante ¶ 157.

¶ 276. When the affidavit upon which the writ of garnishment is sued out is defective in stating the statutory grounds no presumption arises in favor of the proceeding to help out such deficiency.—Weimeister v. Manville, 44 Mich. 408.

¶ 277. Where proceedings in garnishment are based upon an affidavit that is jurisdictionally defective under the garnishee law of 1879, but the garnishee appears and discloses assigned claims in which he has no personal interest, it is within the court's discretion to dismiss the proceedings on motion made by the garnishee before judgment is entered in the principal case, especially if the affidavit is not amended after notice to dismiss and the garnishee's conduct has not caused prejudice.—Conway v. Ionia Circuit Judge, 46 Mich. 28.

¶ 278. A mere clerical error as to the month in the return day of a summons in garnishment is waived by appearance and answer on the day intended, and is not fatal to the proceedings, and the summons might be amended in this regard after answer, or the mistake be disregarded.—Wellover v. Soule, 30 Mich. 481.

¶ 279. A garnishee summons which, by a clerical mistake, warns the agent of the plaintiff who made the affidavit, instead of the garnishee, to pay no more money to the principal defendant, is not fatally defective, but may be amended so as to conform with the statute.—Millard v. Lenawee Circuit Judge, 107 Mich. 134.

¶ 280. The writ must describe a garnishee, otherwise a disclosure has no effect.—Ettlesohn v. Fireman's Fund Ins. Co., 64 Mich. 331.

¶ 281. A garnishee defendant is properly discharged if it appears that the summons in garnishment was delivered for service before the garnishee had become indebted by the delivery of the goods for which he had bargained with the principal defendant.—Hitchcock v. Miller, 48 Mich. 603.

§ 91. Defects in principal action, process or judgment.

Discontinuance of garnishment on failure of or fatal defect in main case, see post §§ 97-99.
Nunc pro tunc entry of judgment against principal defendant, see Judgments, III.

¶ 282. The fact that the service of process upon a principal defendant is made outside the state affords no ground for quashing the garnishment proceedings where the garnishee is served within the state.—Nachtegall v. Reilley, 165 Mich. 347.

¶ 283. An alias summons can be taken out against the principal defendant in a garnishment proceeding, even though the return of the first summons was informal; the return may be amended.—Axtell v. Gibbs, 52 Mich. 639.

¶ 284. In garnishment proceedings it is no objection to the judgment against the principal defendant that the order of default purports to be based on a return by the undersheriff in his own name, or that, in the copy of the declaration served, the name of the county was omitted in the entitling.—Allen v. Hazen, 26 Mich. 142.

¶ 285. The judgment against a principal defendant is not void for slightly exceeding the sum named in the statement of the defendant in garnishment; it is not a jurisdictional fault, but is open to correction on error or appeal.—Bigalow v. Barre, 30 Mich. 1.

§ 92. Person or party entitled to make objection.

¶ 286. Where municipal corporation is garnished exemptions from garnishment be-

long to the person whose debt is garnished rather than to the debtor, and the garnishee cannot waive objection to the jurisdiction. —Marathon School Dist. No. 4 v. Gage, 39 Mich. 484.

§ 93. Waiver, estoppel or cure of objections.

Waiver of time for trial of garnishment issues, see ante § 74.

Waiver of discontinuance or discharge, see post § 99.

Necessity of objections to prevent disclosure being taken as sufficient, see ante § 66.

Variance of main judgment in amount from that in writ of garnishment, see ante ¶ 285.

Alias summons in main case to cure defect, see ante ¶ 283.

Propriety of trial of issues where defect in affidavit may have been waived by garnishee, see ante ¶ 222.

General law as to waiver of errors and preclusion to urge them on review, see Appeal, XI, D; Saving Questions.

¶ 287. Where the garnishee, being a trustee so empowered, has full authority to bind the principal debtor, he has power to waive the formalities in the proceedings as to the principal as well as to himself.—Keppel v. Moore, 66 Mich. 292.

¶ 288. By pleading the general issue to a declaration in assumpsit for money had and received, based on a disclosure of indebtedness, the garnishee defendant does not waive the right to object to the proceedings in the original suit as void for want of jurisdiction, but may raise such objections on appeal.—Segar v. Muskegon Shingle & Lumber Co., 81 Mich. 344.

¶ 289. A garnishee defendant by appearing in court, submitting to an examination, being represented by counsel and not objecting to the jurisdiction waives irregularities as to the issuance and service of the process in garnishment.—Chamberlain v. Wallace, 176 Mich. 609.

§ 94. ——Amendments to cure defects.

See also ante ¶ 277.

Amendments of affidavits, see ante § 46.

Amendments of returns and further returns, see ante § 56.

Amendments of disclosures, see ante § 67.

Amendment of name of garnishee, see ante ¶ 270.

Supplying jurisdiction by amendment, see also ante ¶ 158.

¶ 290. An amendment of proceedings in garnishment so as to make the christian name of the principal defendant "Jonathan" instead of "John" cannot be sustained against an intervening claimant whose rights were acquired in good faith before the amendment was made.—Moore v. Graham, 58 Mich. 25.

§ 95. Mode of proceeding to object.

¶ 291. Where a garnishee defendant, without filing his disclosure, moves to dismiss the proceeding on the ground that his creditor is a bankrupt, and that the plaintiff and the trustee in bankruptcy are seeking to impound the same assets, and that the assets in his hands, if there are any, passed to the trustee upon the adjudication of bankruptcy, such motion should be dismissed without requiring plaintiff to traverse the facts set up in the motion; the garnishee should be required to file his disclosure, upon which the inquiry should proceed in the manner provided by statute.—Starr v. Whitcomb, 150 Mich. 491.

¶ 292. Plaintiff brought garnishment against James Reilley, principal defendant, and one Perkins, garnishee defendant. A written compromise agreement had been made between plaintiff and James Reilley and Eugene Reilley by which a fund of $1,000 was to be placed in the hands of said Perkins to be paid over upon the performance of certain conditions by James Reilley. It did not clearly appear whether the $1,000 was to be paid by Perkins to James Reilley or to James and Eugene Reilley jointly. Defendant James Reilley made a motion to quash the suit on the ground that the $1,000 was due jointly to himself and Eugene Reilley. At the instance of said Perkins, Eugene Reilley had been interpleaded. Held, the trial court was in error in granting the motion to quash, and should have ordered an issue to be formed as to the ownership of the said $1,000 and to proceed to trial.—Nachtegall v. Reilley, 165 Mich. 347.

§ 96. Motions to quash or set aside return.

Trial of issue of ownership as better practice where title is disputed, see ante ¶ 292.

Finality of order of quashal for purposes of review, see Appeal § 32, ¶ 126.

¶ 293. In an action of garnishment the question as to whether the indebtedness arose prior or subsequent to the death of the defendant's husband is one which cannot be decided on a motion to quash the writ of garnishment, being an issue which the plaintiff is entitled to try on its merits.—Recor v. Commercial & Sav. Bank of St. Clair, 142 Mich. 479.

¶ 294. On a motion to set aside the return of service of a writ of garnishment based upon an affidavit of an officer of the garnishee that the original writ was not shown, where the return of the officers indicated that the original writ was shown to the person served, held that it was proper for the court to try the question on motion and affidavit and not to frame an issue of facts, there being no suggestion by the moving party that an issue of facts ought to be framed, and that the conclusion of the court denying the motion, being supported by evidence, would

not be disturbed on appeal.—Lyon v. Baldwin, 194 Mich. 118.

§ 97. Discontinuance by outcome of main case.

Discontinuance for failure to prosecute main case, see post § 98.

Waiver of discharge or discontinuance, see post § 99.

General law as to discontinuances and dismissals, see Discontinuance.

Statutory provision that garnishment shall discontinue on failure to recover in main case, see Jud. Act, chap. XXVIII, § 41; Comp. L. 1915, § 13162.

Discontinuance of garnishee proceedings at instance of garnishee for plaintiff's delay in prosecuting main case, see Jud. Act, chap. XXVIII, § 45; Comp. L. 1915, § 13166.

Discontinuance by filing of bond for stay, see Jud. Act, chap. XXVIII, § 44; Comp. L. 1915, § 13165.

¶ 295. Garnishment proceedings fall when the judgment in the principal case is set aside.—Withington v. Southworth, 26 Mich. 381.

¶ 296. Garnishment proceedings are ancillary to the principal case, and if that is defective go down with it.—Iron Cliffs Co. v. Lahais, 52 Mich. 394.

¶ 297. Where the judgment against the principal defendant is void, the garnishee proceedings must fall with it—Segar v. Muskegon Shingle & Lumber Co., 81 Mich. 344.

¶ 298. Garnishment proceedings are ended by plaintiff's failure to appear on the return of a summons to the garnishee to show cause why judgment should not be entered against him; and the subsequent appearance of both plaintiff and garnishee cannot affect rights acquired by a third person as assignee of the debtor's demand against the garnishee, even though the assignment was made on the same day the writ of garnishment issued.—Johnson v. Dexter, 38 Mich. 695.

¶ 299. A change of parties to the record in the principal case does not defeat garnishment process, if at the date of service the claim was garnishable, and if plaintiff in the principal case has recovered judgment (How. St. § 8059).—Bethel v. Superior Court Judge, 57 Mich. 379.

¶ 300. Garnishees are not discharged nor are the proceedings against them discontinued by any such change in the record of the principal case as would result from the death of a joint defendant therein.—Bethel v. Superior Court Judge, 57 Mich. 379.

¶ 301. Where the principal defendant is a firm, a verdict discharging one of the partners because he is an infant does not release the garnishee, who would be fully protected as against the firm by paying a judgment against him. The infant could not individually sue the garnishee for firm property.—Bethel v. Superior Court Judge, 57 Mich. 379.

§ 98. ——For delaying principal suit.

Effect of payment to plaintiff after abandonment of suit, see post ¶ 368.

¶ 302. Garnishment proceedings must be dismissed if service upon the defendant in the principal case has not been obtained within the statutory period, whatever steps have been taken to keep the principal suit alive for the recovery of a personal judgment.—Axtell v. Gibbs, 52 Mich. 640.

¶ 303. The garnishee act contemplates a speedy determination of the garnishee's liability; and any considerable delay by plaintiff, not consented to or acquiesced in by the garnishee, will be cause for a dismissal of the proceedings against him.—Kiely v. Bertrand, 67 Mich. 332.

¶ 304. Pendency of a cause for fifteen months will not, of itself, warrant the dismissal of garnishment proceedings if the defense has raised no question of laches.—Webber v. Bolte, 51 Mich. 113.

¶ 305. Garnishment proceedings against an assignee for the benefit of creditors were allowed to rest for two years until plaintiffs had obtained a decree on a bill in aid of execution which they had filed after taking out garnishment process. Plaintiffs then attempted to bring the garnishment issue to a hearing. Held, that the proceedings in garnishment could not have been kept open without either a formal continuance or some action equivalent to consent by the garnishee; and even consent might not be allowed to cut off intervening rights, as a garnishee cannot waive the rights of other persons.—Blake v. Hubbard, 45 Mich. 1.

§ 99. ——Waiver of discharge or discontinuance.

¶ 306. Where the garnishee's attorney applied for and obtained an attorney fee as costs of a continuance, this was a waiver of such delay as would otherwise have entitled the garnishee to a discharge.—Kiely v. Bertrand, 67 Mich. 332.

¶ 307. Laches on plaintiff's part in failing to bring the statutory issue, framed in a garnishee case, to trial at the next term after the rendition of judgment against principal defendant, held to have been waived by the failure of garnishees to deny the truth of the statement, made by plaintiff's attorney on the hearing of garnishee's motion to dismiss at the next succeeding term, that he had forfeited his right to a dismissal by consenting that the case stand from day to day, and not be taken up for trial before the first day of such succeeding term.—Meigs v. Weller, 90 Mich. 629.

¶ 308. Service upon the principal defendant after the time within which, under How. St., § 8087, jurisdiction of a nonresident principal defendant must be acquired to support garnishment proceedings in an action commenced by the filing of a declaration and entry of rule to plead, will support a judgment subsequently entered against the garnishee, where he did not avail himself of his right to a discharge.—Coe v. Hinkley, 109 Mich. 608.

§ 100. Abatement and revival of writ.

Effect of change in parties to the main action, see ante § 97.
Discontinuance of garnishment with failure of main case, see ante §§ 97-99.
Effect of assignment to abate garnishment, see also Abatement ¶ 20.
Substitution of personal representatives in general, see Estates of Decedents, XI, A.
Avoidance of judgment by bankruptcy, see ante § 88.

¶ 309. Garnishment process is not defeated by a change of parties to the record if at the date of serving process the claim was subject to garnishment and the plaintiff in the principal case has recovered judgment.—Bethel v. Superior Court Judge, 57 Mich. 379.

¶ 310. Where a garnishee dies before disclosure made or default taken, his administrator cannot be brought in since he could make no disclosure.—White v. Ledyard, 48 Mich. 264.

VIII. OTHER SUITS AND PROCEEDINGS PENDING GARNISHMENT; STAY; CONTINUANCES; ETC.

§ 101. Other suits in general affecting garnishment.

Effect of other suits and proceedings on the writ, see post § 101.
Another action pending as ground for abatement, see Abatement.
Mode of pleading pendency of other suits or proceedings in abatement, see Pleading, III.

¶ 311. Where, after a receiver had been appointed in Indiana for the benefit of the creditors of a mutual benefit association organized under the laws of that state but having local branches in Michigan, garnishment was instituted (prior, however, to an ancillary receivership in this state), in aid of suits commenced against the association upon matured certificates issued to Michigan members, an injunction to restrain such proceedings was properly refused as the plaintiff in garnishment had a right to be heard therein; but the local receiver was also entitled to be heard in order to protect the fund.—Baldwin v. Wayne Circuit Judge, 101 Mich. 432.

¶ 312. Where, on the same day that a receiver was appointed in Indiana for a mutual benefit association organized there, but having local branches here, a Michigan member brought suit, accompanied by garnishment, upon a matured certificate issued by one of said local branches, it was held, that in the absence of proof that the receiver's appointment preceded the institution of the garnishment proceedings, the pendency of the suit in which the appointment was made did not deprive plaintiff of his remedy.—Cohen v. Supreme Sitting of Order of Iron Hall, 105 Mich. 283.

¶ 313. As nothing that had its origin in transactions subsequent to the issue of garnishment can be reached in a garnishee's hands, the objection by garnishee that a former suit is pending in another circuit court has no force.—Wattles v. Wayne Circuit Judge, 117 Mich. 662.

¶ 314. A chancery suit in aid of execution begun after garnishment process could not affect the validity of the proceeding in garnishment, and a final decree by the supreme court in favor of the creditor could not preclude further investigation at law as to whether he had not waived his right to complain of the assignment.—Blake v. Hubbard, 45 Mich. 1.

¶ 315. The garnishee on being sued after disclosure by an assignee of the principal debtor should notify the plaintiff in garnishment to defend the assignee's action, whereupon the plaintiff will be bound by the result of the action.—Butler v. Wendell, 57 Mich. 62.

§ 102. Stay of proceedings and continuances.

Stay of garnishment judgment pending appeal of main case, see also ante ¶ 206.
Postponement of trial of garnishment issues pending disposal of main case, see also ante ¶ 208.
Stay pending outcome of foreign suit against garnishee, see Stay of Proceedings.
Provisions for stay on bond, see Jud. Act, chap. XXVIII, § 44; Comp. L. 1915, § 13165.

¶ 316. Comp. L. 1897, § 1009 suspending a creditor's right of action for money garnished during the pendency of the proceedings, applies to actions to recover possession of premises for nonpayment of rent, even though the tenant had notice of the landlord's claim that the rent was exempt, and acted in collusion with the plaintiff in the garnishee proceedings.—O'Connor v. White, 124 Mich. 22.

¶ 317. Under the statute providing that no suit shall be maintained by the defendant in the principal action while garnishment is pending, pendency of garnishment proceedings does not prevent a wife's replevying exempt property in the garnishee's hands.—Hanselman v. Kegel, 60 Mich. 540.

¶ 318. Pending garnishment does not bar another action, but may be pleaded in abatement.—Near v. Mitchell, 23 Mich. 382.

¶ 319. Garnishment proceedings may be pleaded in abatement of an action brought by the principal defendant against the garnishee, but they are not an absolute bar unless judgment has been obtained against the garnishee.—Grosslight v. Crisup, 58 Mich. 531.

IX. RIGHTS, DEFENSES AND LIABILITY OF GARNISHEE TOWARDS PLAINTIFF.

§ 103. In general.

[Note. Since the liability of the garnishee to the plaintiff is measured by the liability to the principal defendant, it will be necessary to consult other specific topics dealing with the various contracts and other obligations. See generally Contracts; Negotiable Instruments; Sales; Implied Contracts; and other topics treating of rights and liabilities.]

Nature of lien or claim created, see also post ¶ 340.

Liability of bank for corporate money deposited or paid to officer as individual, see also ante ¶ 108.

Effect and conclusiveness of disclosure and right of plaintiff to rebut it, see ante §§ 61-65.

Proper scope of issues on trial of garnishment, see ante § 77.

Liability of plaintiff to refund money received under false disclosure, see post § 113.

Claims by third persons in opposition to garnishment parties, see post XI.

Manner of obtaining discharge or release, see post XII.

Exemption in garnishment proceedings, see Exemptions § 40.

Public policy as to agreement to indemnify garnishee for prompt payment, see Contracts § 62, ¶ 250.

Liability for failure to deliver property or choses in action, see Jud. Act, chap. XXVIII, § 9; Comp. L. 1915, § 13130.

Nature and extent of garnishee's liability under executory contract for goods or property other than money, see Jud. Act, chap. XXVIII, §§ 19-21; Comp. L. 1915, §§ 13140-13142.

¶ 320. The garnishee is liable from the time of the service of the summons.—Maynards v. Cornwell, 3 Mich. 309.

¶ 321. Under the Wisconsin laws, which are conformable to the general doctrine, the service of a garnishee process creates a lien upon the property of the principal defendant in the hands of the garnishee defendant, entitling the plaintiff to hold such property for the satisfaction of his claim.—Rickman v. Rickman, 180 Mich. 224.

¶ 322. The right to hold a garnishee defendant liable depends upon the state of the claim as one garnishable or not, at the time of the service of the writ of garnishment.—Martz v. Detroit Fire & Marine Ins. Co., 28 Mich. 201; Bethel v. Superior Court Judge, 57 Mich. 379.

¶ 323. A garnishee's liability is limited by the amount of the judgment against the principal debtor, and a verdict for an excess would not be binding.—Strong v. Hollon, 39 Mich. 411.

¶ 324. Plaintiff in a garnishment suit seeking to reach money due the principal defendant from the garnishee defendants, has no different or greater rights than the principal defendant.—Clay Lumber Co. v. Harts Branch Coal Co., 174 Mich. 613.

¶ 325. A bank garnished in respect of negotiable certificates of deposit issued by it to the principal debtor is not compelled to hunt up possible holders or to pay any person but the holder.—Karp v. Citizens' Nat. Bank, 76 Mich. 679.

§ 104. Defenses open to garnishee.

On garnishment of subvendee for purchase price, see post ¶ 348.

See generally such topics as Fraud; Duress; Mistake; Payment; Limitations; Frauds, Statute of; Accord; Releases.

Right of garnishee to assail plaintiff's right as assignee for creditors, see Assignments for Creditors § 34.

Waiver by principal defendant of right to claim discharge in bankruptcy, see Bankruptcy, ¶¶ 60, 61.

¶ 326. Where plaintiff in a garnishment suit seeks to reach money due the principal defendant on a note, the garnishee defendants may interpose any defense they have against the principal defendants on the note.—Clay Lumber Co. v. Harts Branch Coal Co., 174 Mich. 613.

¶ 327. A garnishee defendant cannot set up the defense that the fund held by him is secured by a labor lien in favor of the principal defendant.—Keister v. Donovan, 173 Mich. 328.

§ 105. Rights and demands accruing after service and disclosure.

Presumptive liability from and after disclosure, see also ante ¶ 223.

Statutory effect of service of writ to bind garnishee, see Jud. Act, chap. XXVIII, § 2; Comp. L. 1915, § 13123.

¶ 328. A garnishee cannot be held if he is not shown to be indebted to the principal defendant at the time the proceeding was instituted; the establishment of his liability afterwards is not enough.—Hopson v. Dinan, 48 Mich. 612.

¶ 329. Garnishee process cannot reach an indebtedness created after the writ is issued.—Cogswell v. Mitts, 90 Mich. 353.

§ 106. Amount of indebtedness; offsets and credits.

See also ante ¶ 828.

Right to claim credits as depending on proper disclosure, see also post ¶ 354.

Accountable demands and demands subject to adjustment as subject of garnishment, see ante § 24.

Deposits in bank, see ante § 34.

Individual debt to firm reducible by accounting, see also ante ¶ 79.

Assigned demand and cross demand remaining unpaid, see post ¶ 338.

Admissibility of evidence as to reality of plaintiff's debt, see ante ¶ 227.

Liability of bank where contingent liabilities more than offset balance to account of defendant, see also Banking ¶ 69.

Statutory right of offsets, see Jud. Act, chap. XXVIII, § 38; Comp. L. 1915, § 13159.

Right to deduct allowable costs and expenses and fees, see Jud. Act, chap. XXVIII, § 39; Comp. L. 1915, § 13160.

¶ 330. The garnishee's right, under Comp. L. 1871, § 6504 (How. St. § 8097), to deduction of any demand to which he may be entitled as against the principal defendant does not apply where the property in his hands was wrongfully obtained, as under a chattel mortgage, which, by reason of being kept from record, was fraudulent as against other creditors.—Cummings v. Fearey, 44 Mich. 89.

¶ 331. Where A. has agreed to do a job of logging for B., who has agreed to pay the labor claims of A.'s men, B. cannot be garnished by A.'s creditor and compelled to pay the price for the job before paying such claims.—Kiely v. Bertrand, 67 Mich. 332.

¶ 332. Where the assignee of a garnisheed claim intervenes in garnishment proceedings brought against a guarantor of the claim assigned, and obtains vacation of a judgment, but permits the case to proceed and a valid judgment is rendered later against the guarantor, from which no appeal is taken by the intervenor, the amount of such judgment must be credited to the guarantor in reduction of the claim.—Coe v. Hinkley, 109 Mich. 608.

§ 107. ——Mortgagee's or lienholder's liability for surplus.

Liability of property held for security to be garnished, see ante §§ 25, 26.

Rights of mortgagee taking mortgaged goods in payment of distinct debt, see also ante ¶ 86.

Preclusion of mortgagee to deny mortgage right after taking goods by replevin, see also ante ¶ 87.

Rights and powers of receiver, see ante ¶¶ 154, 155.

Rights of chattel mortgagee as against garnishment or involuntary transfer, see also Chattel Mortgages § 77.

¶ 333. A mortgage or other security holder cannot be held liable as garnishee until he has foreclosed his security and received either the property or money in excess of the money loaned.—Merchants' Nat. Bank of Toledo v. Barrett, 122 Mich. 650.

§ 108. Effect of assignment and novation.

See also ante ¶ 57.

Rights of assignees or transferees, see post § 112.

Right to garnishee assignee for creditors, see ante § 15.

Transfer or novation as barring garnishment, see also ante § 5.

What constitutes novation barring garnishment, see also ante ¶ 273.

Notice to plaintiff to defend suit by assignee, see ante ¶ 315.

General rights of assignees as against third persons, see Assignments, III.

Nature and requisites of novation, see Novation.

¶ 334. A garnishee whose indebtedness has been assigned before the suit, and who has been notified of the assignment after the suit was begun but before his disclosure, is not liable.—Tabor v. Van Vranken, 39 Mich. 793.

¶ 335. Whether a garnishing creditor's claim upon a fund garnished without notice of an assignment, and where the garnishee had no notice of it, would or would not be valid, quære.—Newell v. Blair, 7 Mich. 103.

¶ 336. A debt actually due under an existing contract can be orally assigned with the debtor's consent, and, if so assigned in good faith to a creditor of the assignor to protect his claim, the debtor cannot then be charged as garnishee of the assignor.—Neumann v. Calumet & H. Min. Co., 57 Mich. 97.

¶ 337. The fact that labor claims may become liens upon one's logs if not paid constitutes a good consideration for his promise to a contractor to pay the latter's laborers, as against a creditor garnishing the promisor as debtor to the contractor.—Kiely v. Bertrand, 67 Mich. 332.

¶ 338. The assignee of a cause of action may garnish his assignor, where the latter remains indebted to the defendant on a cross demand.—Barlow v. Lincoln-Williams Twist Drill Co., 186 Mich. 46.

X. RIGHTS, DEFENSES AND LIABILITY OF GARNISHEE TOWARDS DEFENDANT.

§ 109. In general.

Inconclusiveness of disclosure on principal defendant, see ante § 65.

Effect of the judgment on the principal defendant, see ante § 87.

Judgment as discharge from liability, see ante ¶ 267.
Errors and defects in procedure waivable by garnishee, see ante § 93.
Scope of issues on trial of garnishment, see ante § 77.
Liability of garnishee paying plaintiff under invalid judgment, see post § 119.
Claims by others in opposition to garnishment parties, see post XI.
Manner of obtaining discharge from or release from the proceedings, see post XII.
Stay of other actions by principal defendant against garnishee pending outcome of garnishment, see ante § 102.
[Note. With respect to the obligations which may subsist between the garnishee, as a debtor or bailee and the principal defendant, see topics treating of the contract, debt, bailment, or obligation garnished. It is not the purpose to treat here the general law which determines one's liability to his creditor.]
Exemption in garnishment proceedings, see Exemptions § 40.
Collusive garnishment of money while yet in lender's hands as ground for canceling mortgage, see Fraud ¶ 581.

¶ 339. Owing to sickness a garnishee failed to answer for more than two months after being summoned—the case being adjourned from time to time—and then made affidavit that he "is indebted" to the principal defendant, and paid the money in court. Held a sufficient admission that the indebtedness existed at the time of service; and the garnishee was not thereafter liable to the principal defendant.—Barber v. Howd, 85 Mich. 221.

¶ 340. Garnishment does not create a lien upon effects or credits in the same sense that attachment by direct seizure creates a lien upon property, but it does create a lien of such a character that, so long as it continues and the garnishee seeks to preserve his own rights he cannot pay to the principal defendant, nor can the principal defendant collect his debt from him the inchoate lien created by it takes effect from the time of service and can be perfected only by judgment, on the rendition of which the garnishee becomes a judgment debtor of the creditor; though the lien is not absolute, but a qualified one, which may at any time be divested by the payment of the judgment by the debtor or by any one acting in his interest.—In re Ransford, 194 Fed. 658.

¶ 341. It is no defense to a suit on a joint note that one of the defendants had been garnished in a former suit as indebted to the husband of the plaintiff in the later one, and had admitted that he was indebted to the husband on the note in suit, since such garnishment was defective for want of parties. —Hirth v. Pfeifle, 42 Mich. 31.

XI. CONFLICTING AND PARAMOUNT CLAIMS; INTERPLEADER AND INTERVENTION.

§ 110. In general.

Inconclusiveness of disclosure as affecting rights of third persons, see ante § 65.
Scope of issues and matters properly triable on issues joined with garnishee, see ante § 77.
Rights and title of adverse claimants to bank deposits, see Banking §§ 7, 8.
Multifariousness of bill for accounting and relief from garnishment suits, see also Equity ¶ 272.
Effect on foreclosure of garnishment proceedings against mortgagor by creditors of mortgagee, see Foreclosure § 7.
Actions of trover or replevin or assumpsit based on disregard of garnishment by third person, see Assumpsit; Conversion; Replevin.

¶ 342. The garnishment statute does not attempt to cut off the rights of strangers to the litigation.—Walker v. Detroit, G. H. & M. R. Co., 49 Mich. 446.

§ 111. Priorities among creditors and claimants.

Impropriety of trying priorities in the garnishment proceeding, see also ante ¶ 221.
Burden of proof of priority, see post § 115.
Priority of attachments, see Attachment, VIII.
Priority of executions, see Executions, V.
Lien and priority of chattel mortgages, see Chattel Mortgages, III.
See also other topics treating of liens or claims to preference.
Statutory priority of mechanics' liens, see Comp. L. 1915, § 14804.

¶ 343. Whether a trustee who has taken the principal debtor's property for benefit of others can be garnished at all, if the trust is recognized as valid, quære. Certainly the process gives plaintiff no preference over other creditors having rights secured by the trust.—Keppel v. Moore, 66 Mich. 292.

¶ 344. Under Comp. L. 1897, § 10711, requiring both the husband and wife jointly to sign a contract for the improvement of land held jointly by them in order to create a mechanic's lien, both homesteads and lands held jointly are classed together; and where the wife failed to sign she cannot by consent to the entry of a decree establishing a lien postpone the rights of a garnishing creditor of the contractor.—McMillan v. Schneider, 147 Mich. 258.

§ 112. Rights of assignees or transferees.

Effect of assignment or novation, see ante §§ 5, 108.
Necessity of judgment in main case before trial of issues against garnished assignee, see ante ¶ 205.

Duty of garnishee to notify plaintiff to defend suit by assignee, see ante ¶ 315.
Burden of proof of assignment, see post § 115.

¶ 345. If a garnishee notified that his debt was assigned before suit thereafter admits an indebtedness without disclosing his knowledge of the assignment, and pays over the money, he cannot, when sued by the assignee, defend on the ground of former recovery.—Tabor v. Van Vranken, 39 Mich. 793.

¶ 346. Whether, when a garnishee who has disclosed and paid over is sued by an assignee of the principal debtor, he cannot show that the assignment was invalid as against the creditors who garnished him, quære.—Wood v. Losey, 50 Mich. 475.

¶ 347. Where a garnishee has no possession when garnished, and the title to the property has to be litigated to show the plaintiff's interest, the property cannot be followed into the hands of strangers nor its proceeds into the garnishee's.—Folkerts v. Standish, 55 Mich. 463.

¶ 348. Where B. purchases goods of A. and sells them to C., who is not a creditor of A., nor a representative of any of A.'s creditors, and who does not take the goods as A.'s bailee or vendee, C. cannot defend against payment for the goods on the ground that he has been garnished by A.'s creditors. and such garnishment proceedings will not deprive B. of his remedy in trover against C. for a conversion of the goods, B. not being a party to the proceedings.—McAuliffe v. Farmer, 27 Mich. 76.

¶ 349. Where, after being notified of an assignment of the account, the debtor is garnished as the assignor's debtor, and, claiming to be in doubt as to the fact of the assignment, pays the debt to the garnishing plaintiff without waiting for a summons to show cause, he is not protected against the true creditor.—Union Bank v. Hanish, 97 Mich. 404.

§ 113. Accountability to true creditor or owner.
See also ante ¶ 349.
Effect of the judgment upon rights of real creditor, see ante § 87.

¶ 350. Creditors are interested in the character of the disposition made of the debtor's assets by a garnishee, and if unreasonable, and the price realized is below the fair value, it seems that they are entitled to have the account between the debtor and the garnishee stated as though the assets had brought their fair value, and to hold the garnishee answerable over accordingly, if found indebted to the defendant thereon.—Fearey v. Cummings, 41 Mich. 376.

¶ 351. If a garnishee wrongly assumes to be the debtor of the principal defendant, the proceeding will not protect him against his true creditor.—Hosley v. Scott, 59 Mich. 420.

¶ 352. When a judgment against a garnishee, rendered upon a false disclosure is vacated in the discretion of the court, if the garnishee has already made payment it will not protect him against the claim of his actual creditor. The plaintiff, also, will hold the money paid as to the creditor's use, and the latter is entitled to have it refunded to him on demand.—First Nat. Bank v. Mellen, 45 Mich. 413.

¶ 353. One who has obtained a judgment against a garnishee upon a false disclosure must refund the money paid thereon to the garnishee's actual creditor upon the latter's demand after the judgment is vacated. And the plaintiff cannot retain the amount of the attorney fee paid to the garnishee's attorney.—First Nat. Bank v. Mellen, 45 Mich. 413.

¶ 354. The respondent in a criminal case deposited with his lawyer some money belonging to his employer, to secure bail. The lawyer turned the money over to the bondsman, and the latter, being afterward garnished by creditors of the respondent, paid out the money to satisfy their claims, though he had known, when garnished, that it was the money of the employer. Held, that he should have so disclosed, and that in a suit against him by the employer, as for money had to plaintiff's use, he could not set up the application of the money in payment of the claims of the creditors.—Kimball v. Macomber, 50 Mich. 362.

¶ 355. Money paid by garnisheed maker of a note to sheriff after disclosure, and by sheriff paid over to garnishing plaintiff, is not recoverable from latter by an indorsee of such note as money had and received.—Corey v. Webber, 96 Mich. 357.

§ 114. Intervention and interpleader of claims.
Quashal of proceeding or trial of ownership as proper practice, see also ante ¶ 292.
Impropriety of trial of issues with garnishee where conflicting claim is sole issue, see ante ¶ 203.
Effect of amendment as against intervening claimant, see ante ¶ 290.
Form of judgment against person cited to defend claim, see ante § 86.
Right of intervention in general, see Parties.
Interpleader suits in general, see Interpleader.
Right of partnership doing business without statutory affidavit to assert rights as claimant, see Trade Marks, V.
Statutory provisions as to trial of third party claims, see Jud. Act, chap. XXVIII, § 28; Comp. L. 1915, § 13149.

¶ 356. Where the answers of a garnishee to interrogatories and his oral examination

show that his indebtedness to the principal defendant is evidenced by a promissory note, which is claimed by a third party, plaintiff may interplead not only the principal defendant, but such claimant (Laws 1885, Act No. 178).—Smith v. Holland, 81 Mich. 471.

¶ 357. The principal defendant has the right, at least in the absence of objection by the garnishee, to intervene in garnishment proceedings, and urge the exemption of the garnished fund, by reason of a mortgage to a third person.—McDougall v. Lamb, 113 Mich. 69.

¶ 358. Under How. St., § 8085, providing that if any person shall claim any property in the hands of a garnishee, the court may permit or cause him to appear and maintain his rights, and that the testimony of the principal defendant and others may be taken and attached to the disclosure, etc., it was proper to order the interpleader of a copartnership consisting of the debtor and his brother, where after the garnishee in its disclosure had denied that it had a fund of the debtor, its subsequent examination under the statute disclosed that it had a fund deposited by the debtor in the name of such partnership.—Marx v. Wayne Circuit Judge, 119 Mich. 19.

¶ 359. How. St. § 8085, providing that a claimant of property in the hands of a garnishee may appear and maintain his right in such mode as the court shall direct, is not limited to cases where the interest of the third person or his claim is revealed by the disclosure, but extends to one where examination of the garnishee after disclosure reveals the claim.—Marx v. Wayne Circuit Judge, 119 Mich. 19.

¶ 360. Interpleading the principal defendant's copartner after a garnishee's disclosure showing that it had money belonging to them as a copartnership, but none to the defendant alone, and without notice of such interpleader to the defendant is erroneous at most and not void; and without meritorious reason will not be ordered to be vacated because of such error.—Marx v. Wayne Circuit Judge, 119 Mich. 19.

¶ 361. Payment of the money into court by the garnishee is not a prerequisite to interpleading a claimant to it, as allowed by How. St. § 8085.—Marx v. Wayne Circuit Judge, 119 Mich. 19.

§ 115. ——Burden of proof and evidence.

¶ 362. One interpleaded in garnishment proceedings under Comp. L. 1897, § 10627, as claimant of the fund garnished, has the burden of sustaining his claim.—Jackson v. People's Savings Bank, 120 Mich. 702.

¶ 363. When the intervener claims an assignment of a claim prior in point of time to the institution of garnishment proceedings, the burden of proving priority rests with him, and such is a reasonable application of the rule that the burden of proof should rest with the party who is presumed to be in possession of the facts.—Burnham v. Home Ins. Co., 119 Mich. 588.

¶ 364. Where upon intervention in a garnishment proceeding the garnishee defendant paid the fund into court, and the parties agreed to try the case upon the theory that the intervening claimant should be considered the plaintiff and the original plaintiff the defendant, a charge that the burden of proof was on the plaintiff, was correct.—Kahn v. Minthorn, 178 Mich. 312.

¶ 365. In garnishment proceedings evidence that the money due was the purchase price for beans grown on a farm belonging to the defendant's wife, that she had made inquiry concerning the price of the beans and that her husband had taken the beans to market without any definite statement on his part as to the ownership, is sufficient to show the property in the wife as an intervening claimant.—Bullard v. Avery, 126 Mich. 711.

XII. RELEASE OR DISCHARGE OF GARNISHEE; VOLUNTARY PAYMENT.

§ 116. Release and discharge as garnishee; bonds.

[Note. In a sense a payment before service of the writ is a discharge or release. More technically it extinguishes the debt and leaves no ground for garnishment. See ante §§ 5, 20.]

Rights and liabilities of garnishee towards principal parties in the action resulting from the service of the writ and the judgment, see ante IX, X.

Accountability to true creditor after payment, see ante § 113.

Discharge by paying into court, see post § 117.

Effect of payment before judgment or under invalid judgment, see post §§ 118, 119.

Inefficacy of former defective garnishment as discharge, see ante ¶ 341.

Payment before service as bar to attainment of jurisdiction, see ante ¶ 20.

Execution against sureties on release bond, see ante § 89.

Bond to release and discontinue garnishment, see Jud. Act, chap. XXVIII, § 44; Comp. L. 1915, § 13165.

Effect of judgment as release and acquittal, see Jud. Act, chap. XXVIII, § 35; Comp. L. 1915, § 13156.

§ 117. Right to pay into court.

See also ante ¶ 339.

Necessity of payment into court in order to interplead, see ante ¶ 361.

General law of payments into court, see Payment, I, B, IV.

¶ 366. Under Comp. L. 1897, § 10627, a defendant in garnishment may at once file the disclosure admitting his liability, pay the money into court and then relieve himself from liability for interest; and the failure of the garnishee to avail himself of this statute makes him liable for interest.—Stephens v. Pennsylvania Casualty Co., 135 Mich. 189.

¶ 367. A garnishee defendant who has made disclosure, showing that B was a claimant, and the latter was cited but failed to appear and make good his claim, may set up such garnishment proceedings as a bar pro tanto in an action by B, to the extent of money paid into court for the benefit of other creditors whose claims were allowed, since Comp. L. 1897, § 1017 expressly provides that in such case the garnishee shall be discharged.—Bryant v. Wilcox, 137 Mich. 669.

§ 118. Right to pay before judgment.

Effect of payment before valid service of writ, see also ante ¶ 183.

Right to pay before suit commenced but after informal notice that one would be commenced, effect of such notice, see Notice and Record of Title, I.

Plaintiff as agent of principal defendant to receive goods deliverable under contract, see Jud. Act, chap. XXVIII, § 22; Comp. L. 1915, § 13148.

¶ 368. When garnishment proceedings are dropped on disclosure and are not carried to judgment the garnishee acts at his peril in making payment to the plaintiff.—Hitchcock v. Miller, 48 Mich. 603.

¶ 369. If a promissory note owned by the principal defendant is garnished after maturity, the garnishee's liability becomes fixed by the disclosure, and he will be protected in paying over the money after judgment against the principal defendant without waiting for a formal judgment against himself. Comp. Laws 1871, § 6445 (How St., § 8037).— Somers v. Losey, 48 Mich. 294.

§ 119. Payment under void judgment.

Accountability to true creditor, see also ante § 113.

¶ 370. A garnishee is not protected in paying a judgment against him if the judgment in attachment proceedings in the principal suit is void.—Dutcher v. Grand Rapids Fire-Ins. Co., 131 Mich. 671.

GAS.

TREATS of manufacture and distribution to the general public of illuminating or fuel gas.

Analysis.

§ 1. In general; franchises and corporations.
§ 2. Connections, service and rates.
§ 3. ——Regulation by the public.
§ 4. Injuries from gas or use of gas.

[Note. The portions of the topic Electricity which correspond to this should be consulted for such analogies as it may contain.]

§ 1. In general; franchises and corporations.

Franchises in general, granting power, construction and effect, conditions, and transfer, see Franchises.

Powers of municipalities to provide for public lighting or to own gas producing and selling systems, see Municipal Corporations.

Nature of municipal function exercised in providing by contract for gas service, see Municipal Corporations, III, VIII.

Estoppel of city granting gas franchise to deny incorporation of grantee, see Corporations § 12.

Giving up use of gas as consideration for electric light, see Electricity ¶ 7.

Right to lay pipes as easement, see Easements § 2.

Mandamus to compel grant of permit to use streets, see Mandamus, III.

Crimes against or relating to gas pipes and lines, see Crimes; Indictment.

General law of corporations, see Corporations.

Incorporation of gas companies, see Comp. L. 1915, § 9017.

Consolidations of gas lighting corporations, see Comp. L. 1915, § 8571 et seq.

Statutes relating to pipe line corporations, see Comp. L. 1915, chap. 163.

¶ 1. The statute (Comp. L. 1871, chap. 96, How. St., §§ 4168-4181) for the incorporation of gas companies contemplates that permission to lay pipe in the streets will not be refused or burdened unreasonably.—People ex rel. Maybury v. Mutual Gas-Light Co. of Detroit, 38 Mich. 154.

¶ 2. The right to lay gas pipes in the streets is not a state franchise, but a local easement resting only on a contract or license, the violation of which does not concern the state and is open to legal remedy.—People ex rel. Maybury v. Mutual Gas-Light Co. of Detroit, 88 Mich. 154.

¶ 3. An ordinance authorizing a gas company to supply the city declared that, if it should enter into any combination with any company concerning rates, the ordinance should be void, and if it sold its property, franchises or privileges to any other gas company, it should forfeit its property. The company mortgaged its property and afterwards made an arrangement with another company to divide the city between them. On foreclosure of the mortgage the company's property, rights and franchises were bought in by an individual who transferred it to a new corporation. On a bill to enjoin both companies from supplying the city, it was held that they could not be subjected to the forfeiture of the city's consent to supply gas, or of their property, as such a measure of damages was not recognized either at law or in equity, and the bill was accordingly dismissed.—Detroit v. Mutual Gas-Light Co., 43 Mich. 594.

¶ 4. It is incumbent upon a purchaser of the franchise of a gas company organized to supply gas to a given city, which franchise, by its terms, is notice that certain of its essential features are limited to a period of time which has elapsed at the time of the purchase, to examine the records at hand for the purpose of discovering what new arrangements were made with the city at the expiration of such period, and if he fails, through no misrepresentation of the seller, to make such examination, he is estopped from complaining that certain corporate privileges, which he believed to be perpetual, were limited by subsequent agreements.—Lewis v. Weidenfeld, 114 Mich. 581.

§ 2. Connections, service and rates.

Regulations of service, see post § 3.
Construction of rate ordinance, see post ¶ 10.
Measure and elements of damages for unlawful disconnection and removal of meter, see Damages ¶ 470.
Right to recover money paid for service at excessive or illegal rates as money illegally exacted, see Payment, VI.

¶ 5. A gas company is of a public nature if it exercises its rights by virtue of a state law and local ordinances; and wherever, within its assigned limits, it has connected its mains and service pipes with the pipes and fixtures of individuals, it is bound to supply them with gas, on reasonable conditions, when they ask for it.—Williams v. Mutual Gas Co., 52 Mich. 499.

¶ 6. A gas company can require those who wish for gas to give security for the payment thereof, or to deposit a fair sum in advance, as a reasonable condition to supplying them. So held where the consumer used about sixty dollars' worth a week, and the company required him to keep one hundred dollars on deposit with them. But the requirement that the consumer should also make a special contract with them would be unnecessary, as the law would imply whatever contract was needed.—Williams v. Mutual Gas Co., 52 Mich. 499.

¶ 7. A gas company has the right to remove its meter from a consumer's premises on the consumer's failure to pay the cost of the service pipe in accordance with the agreement under which the meter was put in place, just as it might do for failure to pay for gas used, and may maintain replevin if delivery is denied.—Detroit Gas Co. v. Moreton Truck & Storage Co., 111 Mich. 401.

¶ 8. Where a citizen using gas for fuel purposes is lawfully charged eighty cents per thousand feet, he cannot bring a bill to enjoin unjust discrimination on the ground that the gas company is charging only sixty cents for gas for power purposes.—Boerth v. Detroit City Gas Co., 152 Mich. 654.

§ 3. ——Regulation by the public.

Application of restrictions to corporate successor, see ante § 1.
Public service regulations in general, see Public Service.
Municipal regulative power, see Municipal Corporations, IX.
Reasonableness of rate regulations by ordinance or by the Railroad Commission, see Municipal Corporations, V, IX; Public Service.
Judicial review of rate regulations, see Public Service.

¶ 9. Municipalities may not act arbitrarily or captiously in fixing the rates required of a gas company as a condition for use of the streets, but when a reasonable condition upon the use of the street is imposed the public utility is at liberty to accept or reject it, and, if it rejects, it may not occupy the streets, and if already in possession under an expired franchise may be ousted.—City of Kalamazoo v. Kalamazoo Circuit Judge, 200 Mich. 146.

¶ 10. Where an ordinance admitting a gas company to the streets prescribes that it shall not charge over ninety cents per 1,000 feet for gas, the company is thereby authorized to charge any figure up to ninety cents.—Boerth v. Detroit City Gas Co., 152 Mich. 654.

§ 4. Injuries from gas or use of gas.

General law of negligence, see Negligence.
Liability of gas company for injury in street due to conditions created by it, see Highways, XII, G.
Negligence respecting explosives, see Explosives.

Injury to plants and trees by fumes or gases, see note 1 N. C. C. A. 697-703.
Liability of gas company for injuries to plants and trees due to escape of gas, see note 11 N. C. C. A. 331-341.
Liability of gas company for injuries caused by gas escaping because of acts of servants in making repairs or in connecting or discontinuing service, see note 11 N. C. C. A. 284-305.
Liability of gas company for injury from escape of gas due to breaking of pipes in use or repair of street or highway, see note 11 N. C. C. A. 561-580.
Liability of manufacturer or seller of gasoline or acetylene lighting system for injury to purchaser, see note 12 N. C. C. A. 499-518.
Application of doctrine of res ipsa loquitur in action for injuries caused by accumulation of gas, see note 5 N. C. C. A. 54.
Duty to shut off gas or electricity in case of fire on premises, see note 8 N. C. C. A. 884-887.

GASOLINE to GIFT ENTERPRISES.

Cross-Referenecs.

Gasoline—
General law of explosives, see Explosives.
Judicial notice of properties, see Evidence § 3.
Conditions of insurance relating to having or using, see Insurance, VIII, XII.
Gates—
See specific topics treating of that to which a gate may be a proper or necessary appurtenance, e. g., Buildings § 5 et seq. (elevators); Bridges; Fences; Highways; Railroads, VIII; Toll Roads.
Obstruction of way by gate, see Easements, V; Highways, XI.
Negligence in opening or failing to close gates, see Animals; Fences; Railroads, VIII, F.
Duty or burden of maintaining gates on right of way, see Easements § 19.
General—
The word "general" as a distinctive adjective of description is coupled with so many legal terms that a complete enumeration would serve no useful purpose. Search for the word described as general or special or limited, e. g., Agency; Appearance; Partnership; Pleading, IV (demurrer); Statutes, II (general and local laws); Wills, VI (general and special legacies).
General Issue—
See Pleading, IX, C.
Construction of general and particular words, see Contracts, VI, A; Deeds, III, A; Wills, VI, A; Statutes, V.
Reputation as evidence, see Evidence, VII, B; Indictment, VIII, B.
Genuineness—
Of instruments, see Execution of instruments, I; Alteration of Instruments.
Of handwriting, evidence as to, see Evidence, VI (opinions), IX (comparisons); Indictment, VIII, B.
Implied warranty of genuineness of goods sold, see Sales, VI.
Implied warranty of paper by indorsement, see Negotiable Instruments, VII.
Geography—
Judicial knowledge of, see Evidence § 9; Indictment, VIII, A.
Gestation——
Period of gestation as evidence, see Indictment, VIII; Bastards.
Gift enterprises—
As crimes, see Crimes § 103.
Public policy as to contracts for chance schemes, see Contracts § 74.

GIFTS.

TREATS of donative transfers of property to private persons or corporations, excluding Dedication (to the public) and voluntary transfers working fraud upon creditors (see Fraudulent Conveyances) and disposal of property by will (see Wills).

Analysis.

I. General nature, requisites and kinds.
§ 1. In general; gifts and other transfers distinguished.
§ 2. Consideration; voluntariness.
§ 3. Conditions.
§ 4. Gift causa mortis.
§ 5. Subjects of gift.
§ 6. Executory gifts or promises to give.
§ 7. Kind of gift; inter vivos or causa mortis.

II. Intent to give.

§ 8. In general.
§ 9. Presumptions and evidence.
§ 10. Questions of fact and instructions.

III. Delivery and acceptance or other transfer.

§ 11. Necessity and sufficiency of delivery.
§ 12. Delivery to or through intermediary.
§ 13. Retention or resumption of possession or joint possession.
§ 14. Taking in trust for donee.
§ 15. Placing title in donee's name.
§ 16. Choses in action, deposits and partial interests.
§ 17. Assignments, indorsements and other written transfers.
§ 18. Acceptance.
§ 19. Time for acceptance.
§ 20. Presumptions and evidence.
§ 21. Questions of fact and instructions.

IV. Validity and effect; undue influence and incapacity.

§ 22. Validity and effect in general.
§ 23. ——Conditions or reserved rights.
§ 24. Gift by invalid parol transfer.
§ 25. Gifts in view of death.
§ 26. Revocability.
§ 27. Unfair or unnatural gifts.
§ 28. Meretricious gifts.
§ 29. Mental incapacity or undue influence.
§ 30. Burden of proof and presumptions.
§ 31. Evidence of gift.
§ 32. ——Of undue influence or incapacity.
§ 33. Sufficiency of proofs.
§ 34. Questions of fact and instructions.

Charitable gifts and trusts, see Charities; Trusts; Wills.
Testamentary gifts, see Wills, VI.
Advancements to heirs, see Descent § 27.
Inheritance tax on transfers in view of death, see Taxes, XIII.
Gifts over on failure of preceding estate, see Wills, VI; Perpetuities; Life Estates, Remainders and Reversions.

I. GENERAL NATURE, REQUISITES AND KINDS.

§ 1. In general; gifts and other transfers distinguished.

Requisites of gifts and characteristic kinds of gifts, see post §§ 2-7.
Necessity and fact of intent to give, see post, II.
Necessity and sufficiency of delivery and acceptance or transfer, see post, III.
Evidence as to character of the transfer or transaction, see post §§ 31-33.
Questions for court and jury, see post § 34.
Dedication as gift to public of land, see Dedication § 1.
Gifts amounting to advancements, see Descent § 27; Estates of Decedents § 365.
Trusts and the general law of trusts, see Trusts.
Voluntary transfers or gifts, to hinder or delay creditors, see Fraudulent Conveyances, I, C.
Gifts from one spouse to other as fraudulent transfers, see Fraudulent Conveyances § 49.

¶ 1. Money remitted by one brother to another for relief of an indigent and imbecile sister, and disbursed by the latter brother through the sister's daughter is a gift and not a debt, and therefore is improperly included in a mortgage given by the daughter to cover further advances by the disbursing brother; where it appears on conflicting evidence that a mortgage was made to include it in order to protect the sister from other children, and that the mortgage was made by her as guardian under judicial sanction; and on a bill to redeem and for an account such sum originally intended as a gift and included in the mortgage by defendant's

wrongful act was deducted.—Gordon v. McGinnis, 92 Mich. 97.

¶ 2. Under the circumstances of the case, certain allowances made to a widow by her father-in-law, who held her distributive share of her husband's estate, were held to be allowances and not payments on her share where the sum was within the income realized and no other sum was paid for support.—In re Ward's Estate, 73 Mich. 220.

¶ 3. A payment of money by an aged parent to a child held to be a gift or advancement, and not made in consideration of future support.—Moeller v. Notter, 184 Mich. 355.

¶ 4. Where a father deposits money in a bank and a certificate is indorsed upon the ledger sheet of a bank ledger stating that the sum deposited to the account belongs to the father and daughter jointly, and that it is understood that each may withdraw on his or her individual order during their joint lives and that any balance remaining upon the death of either shall go to the survivor, and signed by both, a gift inter vivos of the property of the father, and not a testamentary disposition thereof is created, and it is immaterial that the father retains the pass book in his possession.—Negaunee Nat. Bank v. Le Beau, 195 Mich. 502.

§ 2. Consideration; voluntariness.

See also post ¶ 42.

Recital of consideration as evidence against gift, see post ¶ 34.

Promises to make gifts, see post § 6.

Necessity of delivery, see post § 11 et seq.

General law of consideration for contracts, see Contracts, V.

Want of consideration for note made as token of gift, see Contracts § 135.

Effect of voluntary transfers against creditors, see Fraudulent Conveyances.

¶ 5. A voluntary deed is good as between the parties and successors claiming in the right of the grantor.—Warren v. Tobey, 32 Mich. 45; Wallace v. Harris, 32 Mich. 380; Gale v. Gould, 40 Mich. 515; Barber v. Milner, 43 Mich. 248.

¶ 6. In an action upon a note no further consideration need be shown for the transfer thereof than that the transferee was the daughter of the payee who gave it to her during his last illness.—Latourette v. McKeon, 104 Mich. 156.

§ 3. Conditions.

Irrevocability, see post §§ 8, 26.

Effect of conditions and reservations, see post § 23.

¶ 7. Testimony that the fiancée received as a Christmas present from the fiancé a watch with her initials engraved upon it, indicates that it is her absolute property and the giver is not entitled to the property upon termination of the engagement.—Richmond v. Nye, 126 Mich. 602.

¶ 8. The doctrine requiring the return of presents where the recipient breaks an engagement to marry the giver has no application to a case where the parties mutually agree to break the engagement and enter into an agreement recognizing the right of the recipient in the presents.—Richmond v. Nye, 126 Mich. 602.

¶ 9. An attempt to sustain an assignment of a mortgage by a mother to her son as a gift inter vivos fails where it appears that it was given upon the understanding that the mother should have all payments made thereon during her lifetime, and only the amount remaining unpaid at her death to go to the assignee.—Snyder v. Snyder, 131 Mich. 658.

¶ 10. A statement signed by a decedent that he was about to leave town and if anything should happen to him his wife should have his property is insufficient on its face to constitute a gift inter vivos, since it is upon condition, and such a gift must be not only immediate, but absolute and irrevocable.—In re Reh's Estate, 196 Mich. 210.

§ 4. Gift causa mortis.

Distinction from inter vivos gifts, see post § 7.

Choses in action as proper subject of gift, see post § 5.

Public policy as to gifts causa mortis, see post ¶ 98.

Evidence of intent, see post § 9.

Sufficiency of evidence of the gift, see post § 33.

Necessity and sufficiency of delivery, see post III.

¶ 11. It is not essential to a gift causa mortis that the donor is in extremis and certain of speedy death, but it is sufficient if he is apprehensive of death from present malady or imminent peril, as from a necessary surgical operation which he intends to voluntarily undergo in hope of relief.—In re Reh's Estate, 196 Mich. 210.

¶ 12. A gift causa mortis is limited to personal property and may be made without writings, provided the evidence of what was said and done established the requisites for its validity.—In re Reh's Estate, 196 Mich. 210.

¶ 13. Where the owner of a certificate of deposit, in anticipation of death, delivered the certificate to his wife with the intention of giving her the entire fund in the event of his death, there is a complete gift causa mortis, subject only to revocation by his recovery.—State Bank of Croswell v. Johnson, 151 Mich. 538.

§ 5. Subjects of gift.

Of gifts causa mortis, see also ante ¶ 12.

Partial interest in debt, see also post ¶ 63.

Sufficiency of delivery of notes, deposits, mortgages, etc., see post § 16.
Assignable rights, see Assignments, I.
Validity of gift of unstamped draft, see Execution of Instruments ¶ 22.

¶ 14. The gift, by a father to his minor son, of a contract for the purchase of land, which he had before made in his son's name without his knowledge, will not entitle the son to recover back from the vendor the payment which the father had before made on the contract. The right to repudiate a contract is not a subject of gift.—Armitage v. Widoe, 36 Mich. 124.

¶ 15. Gifts causa mortis of choses in action are not prohibited.—Ellis v. Secor, 31 Mich. 185.

¶ 16. No mere contract, liability or obligation of the party himself can be the subject of a gift causa mortis by him; and therefore an unaccepted bank check, which, if not paid, merely creates a liability against the drawer, cannot be valid as a gift by him causa mortis. —Second Nat. Bank of Detroit v. Williams, 13 Mich. 282.

¶ 17. The doctrine of donatio mortis causa extends to notes, bonds, certificates of stock, certificates of deposit and other choses in action.—In re Morse's Estate, 170 Mich. 114; Caldwell v. Goodenough, Id.

¶ 18. A leasehold interest for a term of years, held not to pass as a gift causa mortis. —In re Reh's Estate, 196 Mich. 210.

¶ 19. The fact that the law of survivorship does not apply in the case of joint ownership of personal property, does not affect the right of the donor to make a gift to his surviving wife.—State Bank of Croswell v. Johnson, 151 Mich. 538.

¶ 20. A promise on consideration by a son to a father to pay a daughter a sum on the father's death is a chose in action subject to gift in praesenti between father and daughter, and the agreement of the son in the presence of both father and daughter to pay the daughter completes the transfer.—Ebel v. Piehl, 134 Mich. 64.

§ 6. Executory gifts or promises to give.
See also post ¶¶ 42, 44, 95.
Imperfectly executed assignment as executory gift, see post ¶ 69.
Revocability, see post § 26.
Promises and declarations as evidence, weight and effect, see post ¶ 129.
Binding promise or promise of gift, see also Contracts ¶ 435.

¶ 21. A gift resting merely in intention, even though evidenced by a promise, cannot be enforced and may be recalled.—Sanilac County Sup'rs v. Auditor General, 68 Mich. 659.

¶ 22. One who took a promissory note with knowledge at the time that the maker then deceased gave it to the payee as the payee's share in the maker's estate cannot enforce the note against the estate; since it is in effect nothing but an executory gift.—Conrad v. Manning's Estate, 125 Mich. 77.

§ 7. Kind of gift; inter vivos or causa mortis.
Condition as index of gift causa mortis, see ante ¶¶ 9, 10.
Requisites of intent, see post, II.

¶ 23. Where a gift is made with the intent that it shall take effect immediately and irrevocably and is fully executed by an unconditional delivery it is valid as a gift inter vivos though at the time the donor is in extremis and dies soon after.—Keller v. McConville, 175 Mich. 479.

¶ 24. Where the owner of a certificate of deposit directed that it should be changed and made payable to himself and wife, or the survivor of them, the transaction will be regarded as partaking of the nature both of a gift inter vivos and of a gift causa mortis.—State Bank of Croswell v. Johnson, 151 Mich. 538.

¶ 25. A father transferred land to one of his sons, taking in payment his son's note secured by mortgage on the land, and payable four years after the father's death to his legal heirs, the interest during the grantor's life payable to him. Held, that this was a gift inter vivos of the note of the heirs, and that at the grantor's death the proceeds of the note went to his heirs and not to his administrator.—Love v. Francis, 63 Mich. 181.

II. INTENT TO GIVE.

§ 8. In general.
Concurrence of intent with delivery, see post § 11.
Presumptions and evidence as to intent, see post §§ 10, 11.
Effect of executory promise to make gift, see ante § 6.

¶ 26. To make a good inter vivos gift, there must be a delivery, actual or symbolical, of the subject-matter, unless it is already in the possession of the donee, with an intent on the part of the donor to presently devest himself of all title and dominion over the same, and an acceptance by the donee.—Chamberlain v. Eddy, 154 Mich. 593.

¶ 27. To constitute a valid gift mortis causa the gift must be full and complete at the time it is claimed to have been made, and possession of the property or the recognized evidence of its ownership carrying title must be given by the donor to the donee, with the intent of the party delivering up such possession to transfer complete ownership by gift to the other party, passing from donor to donee legal power, title, and dominion over

the thing intended to be given.—In re Morse's Estate, 170 Mich. 114; Caldwell v. Goodenough, Id.

¶ 28. An alleged gift claimed by a daughter to have been made by her father, consisting of more than half his property, must, in order to be sustained against the father's estate, be consummated by a delivery, either actual or constructive, such as places the property beyond the control of the father, and his intention in the matter must be clearly apparent.—Campbell v. Sech, 155 Mich. 634.

§ 9. Presumptions and evidence.

See also ante ¶ 28.
Evidence as to delivery and acceptance, see post § 20.
Evidence of gift in general, see post §§ 31-33.
Of mistake in amount of certificate of deposit intended to operate as gift, see post ¶ 142.
General law of evidence, see Evidence.

¶ 29. An intention to make a gift will not be presumed from the mere fact that a bank deposit was made in the name of another.—Peninsular Savings Bank v. Wineman, 123 Mich. 257.

¶ 30. Testimony by a wife that from her accumulated savings she gave her husband from time to time various sums, sometimes depositing it in his bank account, and that the "understanding" was that he should repay such sums, of which there was no strict account kept but which were testified to have exceeded the amount of his bank balance later checked out to her, will suffice to support a finding that a loan to him and not a gift of her savings was intended.—Sykes v. City Savings Bank, 115 Mich. 321.

¶ 31. Upon the question of whether a father agreed to give a house to a child, the fact that the taxes were assessed against the father is not conclusive evidence, while the fact that the child paid them is a significant circumstance in his favor.—Fairfield v. Barbour, 51 Mich. 57.

¶ 32. A gift inter vivos of a note and mortgage is shown where a mortgagee handed a bundle of papers to another, among which were the papers in question, stating that he wanted the latter to have them, although he did not specifically mention the note and mortgage.—Hoyt v. Gillen, 181 Mich. 509. (Kuhn, Stone and Ostrander, JJ., and McAlvoy, C. J., dissenting.)

¶ 33. A gift causa mortis must, in order to be valid, be consummated by an actual or constructive delivery, and it must be clearly established that it was the donor's intention to place the property beyond his control.—Lerche v. Kishpaugh, 180 Mich. 617.

¶ 34. A conveyance in absolute form by a man 84 years old to his son-in-law cannot be sustained where it appears, from the fact that the son was at that time indebted to the grantor, the fact that the deed recited a substantial consideration, and the further fact that the claimed consideration was an agreement to furnish support, that the consideration was inadequate, and, from the fact that the grantor understood and requested that grantee would pay certain sums to other children, it further appears that the conveyance was not intended to be an absolute one.—Ladensack v. Johnson, 143 Mich. 535.

¶ 35. The deceased before his death, by suicide, put certain certificates of deposit in his sister's safe, and told her she might get the money on them and use it, and send some to him if he needed it. The evidence showed a veiled purpose on the part of deceased to commit suicide, and to give this and other property to his favorite brother and sister. Held, under this and other evidence and circumstances, that there was no intent to transfer title absolutely so as to make a good gift inter vivos.—Chamberlain v. Eddy, 154 Mich. 593. (Blair, Moore and McAlvay, JJ., dissenting.)

¶ 36. The deceased had an officer of the bank write upon her savings bank book that in the event of her death, the account should be payable to her daughter. Shortly before her death she sent for the daughter, handed her the bank book, and said she wanted to give it to her. The daughter showed the book to the bank before the death of the deceased. The deceased after the delivery of the book told friends she had divided her property. Held, these facts were sufficient to support a finding of the trial court that the present ownership of the fund was intended to be conveyed to the daughter.—Union Trust & Savings Bank v. Tyler, 161 Mich. 561.

¶ 37. Upon the question whether a donor has made a valid delivery of personal property to the donee, her subsequent declarations and admissions are admissible to strengthen other evidence that she intended to part with the title.—Garrison v. Union Trust Co., 164 Mich. 345.

§ 10. Questions of fact and instructions.

See also post ¶ 149.
On delivery and acceptance, see post § 21.
As to validity and effect or existence of gift, see post § 34.

¶ 38. In a suit by an administrator against the maker of a note delivered by the intestate to a priest to pay for masses, held, that the question of whether the intestate intended a gift or a bequest was for the jury.—Malone v. Doyle, 56 Mich. 222.

¶ 39. Where an administrator claimed that money evidenced by pass books handed to him by the deceased was a gift, but where there was no evidence showing either a

promise or a subsequent delivery; an instruction that a gift required an intent to transfer title presently to the deposits named in the pass books, and that the intent must be manifested in some usual and well understood manner, as by the delivery of the books with words indicative of an intent to pass title at once, was not erroneous as excluding the theory that delivery might have been made subsequently to the use of the words showing a gift.—Casserly v. Casserly, 123 Mich. 44.

III. DELIVERY AND ACCEPTANCE OR OTHER TRANSFER.

§ 11. Necessity and sufficiency of delivery.

Delivery to or through third person, see post § 12.
Resumption or retention of possession by donor, see post § 13.
Taking in trust or placing title in donee's name, see post §§ 14, 15.
Sufficiency of transfer by assignment or writing, see post § 17.
Necessity and sufficiency of acceptance, see post §§ 18, 19.
Necessity that delivery and intent coincide, see also ante § 8.
Presumptions, evidence and jury questions, see post §§ 20, 21.
Change of possession or lack of it as factor of proof, see post § 33.
Under contracts of sale, see Sales.
Under statute of frauds, see Frauds, Statute of.

¶ 40. A gift not completed by delivery to the donee is void for want of consideration.—Powell v. Eckler, 96 Mich. 538.

¶ 41. To constitute a sufficient delivery to support a gift, there must be an absolute delivery, with the intention of making a gift and passing title, and the delivery must be according to the nature of the property.—Shepard v. Shepard, 164 Mich. 183.

¶ 42. To constitute a valid gift inter vivos, there must be a gratuitous and absolute transfer of the property from the donor to the donee, taking effect immediately, and fully executed by a delivery of the property by the donor and an acceptance thereof by the donee.—Garrison v. Union Trust Co., 164 Mich. 345; Shepard v. Shepard, 164 Mich. 183.

¶ 43. In the case of a gift inter vivos or causa mortis there must be either an actual or constructive delivery, and the donor must part with his dominion over the property so that no further act is required of him to vest the title in the donee.—State Bank of Croswell v. Johnson, 151 Mich. 538.

¶ 44. To constitute a valid gift inter vivos, it must take effect at once and pass entirely beyond the control of the donor.—Snyder v. Snyder, 131 Mich. 658.

¶ 45. Plaintiff's intestate, a few days before his decease, put into the hands of defendant a sum of money, with instructions to pay certain bills with a portion of it, and to dispose of the balance to suit himself. Defendant paid out a small sum before the intestate's death, and it was held that there was no absolute disposition of the money by the intestate to prevent its becoming assets of his estate.—Bigelow v. Paton, 4 Mich. 170.

¶ 46. An agreement by the holder of a note with the maker that only the interest need be paid during the life of the holder and that on the death of the holder it would be "his" (the maker's) is of no force as a gift, where the note remains in the holder's hands.—Trombly v. Klersy, 141 Mich. 73.

§ 12. Delivery to or through intermediary.

¶ 47. Property put by a father in the hands of a third person to be delivered to his daughter upon his death is sufficiently appropriated to belong to her after his death occurs.—Bostwick v. Mahaffy, 48 Mich. 342.

¶ 48. The delivery of a mortgage by its owner to one person, with instructions to deliver the same to another after the owner's death, is a sufficient delivery to meet the requirements of a valid gift inter vivos.—Hagerman v. Wigent, 108 Mich. 192.

¶ 49. Where a piano previously given is at the donee's request exchanged for another which is moved into the donor's house where the donee lives, there is a sufficient delivery of the second instrument from donor to donee.—Colby v. Portman, 115 Mich. 95.

§ 13. Retention or resumption of possession or joint possession.

See also post ¶ 91.
Article in house where both parties live, see ante ¶ 49.
Acceptance without removal from common dwelling, see post ¶ 72.
Recording mortgage in donee's name and keeping note, see post ¶ 57.
Instructions, see post § 21.
Validity and effect of conditions or reserved rights, see post § 23.

¶ 50. Although delivery is essential to perfect a gift, it is not necessary that the donee should retain the property in his possession, and the subsequent possession by the donor, while it may in some cases tend to throw suspicion upon the transaction as being in fraud of creditors, is not necessarily incompatible with the donee's dominion over the property, and if satisfactorily explained, will not divest the donee of the title to the property when once it has been acquired by him.—Shepard v. Shepard, 164 Mich. 183.

¶ 51. A father handed over securities to his two sons, who marked them and left

them with the father, and they were put in the father's safe. The sons had access at any time to them and for years treated them as their own. Held, there was a valid delivery so as to constitute a good gift.—Shepard v. Shepard, 164 Mich. 188.

¶ 52. If there has been an actual or constructive delivery of the subject-matter of the gifts, with the intent to vest title, the fact that the donor retains possession of the same for any purpose is not sufficient to defeat the gift; nor is the gift defeated by the fact that the donor reserved to himself the use or income from the subject-matter of the gift.—Shepard v. Shepard, 164 Mich. 183.

¶ 53. There may be a good gift inter vivos of personal property despite the fact that the donor keeps possession of it until her death.—Garrison v. Union Trust Co., 164 Mich. 345.

§ 14. Taking in trust for donee.

Necessity of acceptance by donee, see post ¶ 71.
Putting title in donee's name, see post § 15.
General law of trusts, see Trusts.

¶ 54. Under some circumstances a donor may constitute himself a trustee for the donee, and in such case no further delivery is necessary.—Shepard v. Shepard, 164 Mich. 183.

¶ 55. To constitute a gift inter vivos there must be a delivery of the thing given, either actual or constructive, but it need not be delivered to the donee directly, though such a disposition must be made in the donee's favor as effectuates the object and places the jus disponendi beyond the donor's power to recall. Under some circumstances the donor himself may constitute himself trustee of the thing for the donee's benefit.—Love v. Francis, 63 Mich. 181.

§ 15. Placing title in donee's name.

See also post ¶ 85.
Deposit in another's name, see also ante ¶¶ 29, 30.
Presumption as to gift from making deposit in another's name, see also post ¶ 112.

¶ 56. Placing money or property in another's name is not in itself an irrevocable gift to him; much less is an arrangement for convenience between a bank and a depositor whereby the latter deposits his own money in the name of a third person but subject to his own check.—Davis v. Lenawee County Sav. Bank, 53 Mich. 163.

¶ 57. A constructive delivery of a note payable to the heirs of the donor is effected by recording the mortgage which secured the note, notwithstanding the donor kept the note and foreclosed on default in interest.—Love v. Francis, 63 Mich. 181.

§ 16. Choses in action, deposits and partial interests.

See also ante ¶ 20.
Taking title in name of donee as delivery, see ante § 15.
Delivery without naming papers included, see ante ¶ 32.
Gift by handing over pass book, see ante ¶ 39.
Delivery of certificate of deposit, see ante ¶ 13.
Note retained by donor, see also note ¶ 46.
Delivery of mortgage to third person to be turned over at death, see ante ¶ 48.
Receipt in full as gift of balance of debt, see post ¶ 122.
Revocability by disposal of whole interest, see post ¶ 102.
Irrevocability of gift of sum charged by mortgage by means of discharge of mortgage and making new one with different terms, see post ¶ 103.
Presumptions as to gift of deposit, see also post ¶¶ 112, 113.
Evidence as to ownership of deposit, see post ¶ 132.
Sufficiency of proofs of gift of deposits, see post § 33.
Existence of gift as jury question, see post § 34.
Interpretation and effect of creation of joint account with right of survivorship, see Banking § 6.

¶ 58. In the case of the gift of a chose in action, the law requires a written assignment, or some equivalent instrument to effect the transfer.—Shepard v. Shepard, 164 Mich. 183.

¶ 59. A constructive delivery of a note to his heirs as donees was effected by a grantor's receiving it and recording a mortgage to secure it, the note being payable to his "heirs" and being a gift by him of the proceeds to them though he kept it in his possession until his death and meanwhile foreclosed the mortgage.—Love v. Francis, 63 Mich. 181.

¶ 60. A gift inter vivos of a note and mortgage may be established without an indorsement of the note or a written assignment of the mortgage.—Hoyt v. Gillen, 181 Mich. 509. (Kuhn, Stone and Ostrander, JJ., dissenting.)

¶ 61. The delivery of a certificate of deposit with intent to donate the fund represented by it, is a valid gift of the deposit, although it is not indorsed.—State Bank of Croswell v. Johnson, 151 Mich. 538.

¶ 62. A valid gift of the money deposited in a savings bank may be effected by the delivery to the donee of the depositor's passbook, with intent to give the donee the deposit represented by it.—Union Trust & Savings Bank v. Tyler, 161 Mich. 561.

¶ 63. Though delivery and acceptance are essential to the validity of a gift inter vivos,

where tangible personal property, admitting of actual delivery, is concerned, and probably where the notes or bond of a third person are the subject of the gift; yet where the gift is only a part of the sum due, and is made to the debtors themselves, it does not admit of a technical delivery, and the intention of the donor ought not, on that ground, to be defeated.—Green v. Langdon, 28 Mich. 221.

¶ 64. A gift of an insurance policy to be exchanged by the donor's consent for one drawn according to the donor's wishes, held to be sufficiently consummated by delivery, when the policy was handed to the donee and returned, to be forwarded to the insurance company by the donor's order, and exchanged without objection on the part of the donor.—Crittenden v. Phoenix Mut. Life Ins. Co., 41 Mich. 442.

¶ 65. The delivery of a book of deposit in a savings bank or a certificate of deposit, though not indorsed, with intent on the part of the party making the delivery to donate the fund and give the amount of money represented thereby to the donee, is a valid gift of the money deposited.—In re Morse's Estate, 170 Mich. 114; Caldwell v. Goodenough, Id.

§ 17. Assignments, indorsements and other written transfers.

For gifts causa mortis, see also ante ¶¶ 12, 13.
Placing title in donee as good delivery, see ante § 15.
When assignment is necessary for choses in action, notes, etc., and when actual delivery is requisite, see ante § 16.
Sufficiency of execution of the instrument of assignment and delivery of it as an instrument, see Execution of Instruments.
General law of assignments, see Assignments.
Delivery of subject-matter in case of voluntary assignments, see Assignments § 24.
Change of beneficiary in fraternal society as gift, see Fraternal Beneficiary Associations ¶ 132.

¶ 66. Indorsements of part payment made upon a mortgage at the direction and in the presence of the mortgagee, as a species of testamentary act, in consideration of kindness received from those who were bound by the mortgage and in accordance with his deliberate and expressed intention to make a gift of his property to them, are, in the absence of any rule of law to prevent his intention from taking effect, sustained as an extinguishment or forgiving of the mortgage debt to that extent.—Green v. Langdon, 28 Mich. 221.

¶ 67. Delivery is no more necessary for gifts causa mortis than for any gifts, and though at common law tradition or some equivalent seems to have been necessary to pass chattels by gift, yet it was always competent to transfer them by writing.—Ellis v. Secor, 31 Mich. 185.

¶ 68. A declaration written on a slate, by a woman who died alone, was found after the writer's death, subscribed with her name and running as follows: "I wish Dr. L. S. Ellis to take possession of all, both personal, real and mixed. Rachael Hill. I am so sick I believe I shall die. Look in valise." In the valise was this paper, addressed by the deceased to Dr. Ellis: "I wish you to take possession of all my effects, to do with them as you see fit. Dunlap has the Higgins and Parr papers; the rest you will find in my valise. I have paid Dunlap $34 (thirty-four dollars) in advance. Push these according to your own judgment. All I have said about them is true. If James H. Wing should ever call on you, give him $1,000, or whatever your judgment dictates, but to no one else, for I have given the others all I ever intend to. Rachael Hill. Manistee, December 19, 1869. To Dr. L. S. Ellis." Held, that if this paper had been actually delivered it would have been a sufficient assignment on its face to pass title; that deceased did all in her power under the circumstances to create a gift causa mortis, and fully intended it, and that her written declaration must prevail as a valid appointment to the uses indicated as fully as if there had been manual delivery of the securities.—Ellis v. Secor, 31 Mich. 185.

¶ 69. The retained possession by a donor of a voluntary writing of gift is not inconsistent with its enforcement, if intended to be effectual and if capable of transferring title by its terms; but where, if delivered, it would not have been operative as an assignment, it will fail because amounting to no more than an executory agreement.—Ellis v. Secor, 31 Mich. 185.

¶ 70. The indorsement of a certificate of deposit representing a fund, and the delivery thereof with intent to make a gift, as specified in the indorsement, is as effective to pass title as if a new certificate is issued in accordance with the indorsement.—State Bank of Croswell v. Johnson, 151 Mich. 538.

§ 18. Acceptance.

Time for acceptance, see post § 19.
Presumption of acceptance, see post § 20.

¶ 71. Acceptance by the donee is necessary to perfect a gift, except where the donor makes himself trustee for the donee.—Higman v. Stewart, 38 Mich. 513.

¶ 72. Where the donor and donee reside together, as in the case of husband and wife, parent and child, etc., it is not required in order to make a good delivery that the thing given should be removed from their common residence.—Shepard v. Shepard, 164 Mich. 183.

§ 19. Time for acceptance.

¶ 73. The acceptance of a gift need not be immediate, but is sufficient if made before

the gift is revoked by death or otherwise.—Love v. Francis, 63 Mich. 181.

§ 20. Presumptions and evidence.

Evidence as to intent to give, see ante § 9.
Evidence as to other elements and validity of gift, see post §§ 31-33.
Effect of subsequent possession by donor, see ante ¶ 50.
General law of evidence, see Evidence.
Declarations evincive of state of mind incompatible with gift, see Evidence ¶ 1855.
Presumption from housekeeper's custody of unindorsed notes payable to decedent, see Estates of Decedents ¶ 236.
Presumption as to acceptance of instrument when delivered, see Execution of Instruments, III.

¶ 74. Where a gift, otherwise complete, is beneficial to the donee, an acceptance will be implied.—O'Neil v. Greenwood, 106 Mich. 572.

¶ 75. Acceptance of a beneficial gift being presumed unless the contrary appears, such a gift was valid, where the subject of it, notes, was delivered to donor's widow as a gift to her and two other donees.—In re Dunlap's Estate, 94 Mich. 11.

¶ 76. In the absence of proof that a donee did not accept a gift which was secured by a mortgage, the rule is that a gift to the donee will be presumed to have been accepted.—Holmes v. McDonald, 119 Mich. 563.

¶ 77. Acceptance of a gift of money in the bank will be presumed, though the donee did not know of it until after the death of the donor, where the donor wrote a check, which was taken to the bank, placed to the credit of the donee, and donee's pass book kept in the bank with other customers' books subject to call by such donee.—Bangs v. Browns, 149 Mich. 478.

¶ 78. Reception and retention of a deed of gift are not conclusive evidence of its acceptance. There must be intelligent assent.—Higman v. Stewart, 38 Mich. 513.

¶ 79. Acceptance of a gift of a note payable to "heirs" is evidenced by the fact that it was given by a son as the price of land bought from the donor of the note and that such son sold his interest in the note as one of the "heirs" of the donor.—Love v. Francis, 63 Mich. 181.

¶ 80. Less positive and equivocal testimony is required to establish the delivery of a gift from a father to his children than between persons not related.—Love v. Francis, 63 Mich. 181.

¶ 81. It requires less positive and unequivocal testimony to establish the delivery of a gift by a parent to a child than it does between persons not related, and in cases where there is no suggestion of fraud or undue influence very slight evidence will suffice.—Union Trust & Savings Bank v. Tyler, 161 Mich. 561; In re Morse's Estate, 170 Mich. 114; Caldwell v. Goodenough, Id.

¶ 82. A gift to a wife is not proven where her husband in his lifetime, without her knowledge directed his bank to transfer his deposit in the bank to her whereupon a pass book was issued in her name and retained by the husband until his death, and where the husband never afterwards had a deposit with the bank but made a deposit to the credit of the wife, and where three checks were paid out of the account, two being signed by the wife at the request of the husband and the proceeds used by him, and one being paid without her signature upon the statement of the husband that it was not convenient to obtain it.—Peninsular Savings Bank v. Wineman, 123 Mich. 257.

¶ 83. Where a man, who had been taking care of his mother, took away a broken stove and replaced it with a new one, saying to a third person that he wanted to have a good one there for his mother, it was held that the statement, by itself, was insufficient evidence of a gift to her.—Nugent v. Foster, 49 Mich. 434.

¶ 84. The delivery of certain notes and mortgages to defendant to take present effect, is properly found in defendant's favor by the jury in an action of trover by the donor's administrator, wherein it was shown that at the time of making what was designed to be an ante mortem distribution of his estate they were handed to defendant, a son, that there was a general assignment to him of all "mortgages, notes and demands which I may die seized of * * * to be paid in accordance with the amounts specified in notes to my several children" shortly before that, and where the son carried out the plan.—Beardslee v. Reeves, 76 Mich. 661.

¶ 85. A debtor in anticipation of death sent an agent to adjust a claim of a creditor to whom he had conveyed land by a deed absolute in form many years before. The agent was also directed to secure a reconveyance of the land, and adjusted the claim and took a quitclaim deed of the land in the name of the debtor's wife. On the agent's return and report of what he had done, and the debtor expressed himself as satisfied, and the debtor thereupon executed a deed to his daughter, his only child, of other land owned by him, such being done to distribute his estate between the wife and the daughter. Held, that the conveyance to the wife was valid as against the daughter's heirs, where no collusion was shown between the wife and the agent, and the agent acted in good faith and in accordance with his instructions, and the debtor could not be presumed to have been ignorant of the action of his agent.—Crittenden v. Canfield, 87 Mich. 152.

¶ 86. Contradictory testimony by the claimant of money as a gift, it having been kept by deceased donor in a box, the claimant testifying before commissioners on claims that there was no delivery or surrender of possession and on the trial in the circuit that there was a delivery of the box and the key and that the gift was to her and another jointly, which another witness testified was not the case and that the gift was solely to her, does not establish a gift causa mortis of money.—People's Sav. Bank v. Look, 95 Mich. 7.

¶ 87. Where unindorsed notes were after the payee's death found in his house among the effects of his housekeeper, her failure to assert her ownership at the time of her executing a sworn petition for another's appointment as special administrator, which petition said that the notes belonged to the estate, her remark at the reading of the payee's will (which compensated her services) that it was not what she had expected, and the fact that the payee, a business man, had made no transfer to her by indorsement or writing, were held conclusive evidence against her claim that the notes had been given to her.—Bellis v. Lyons, 97 Mich. 398.

¶ 88. That money was taken from the room of a sick woman shortly before her death, apparently without her knowledge, does not show a delivery sufficient to establish a gift causa mortis.—Lerche v. Kishpaugh, 180 Mich. 617.

¶ 89. A gift of notes and mortgages inter vivos is defeated by evidence that the giver never parted with possession of the subject-matter or delivered an assignment which it is claimed he made out, that he kept them in his safe and that the donee never saw the notes or mortgages or the assignment and could not state what securities were included.—Chaddock v. Chaddock, 134 Mich. 48.

¶ 90. Delivery of notes by way of gift from a father to his sons is not established by the fact that the father credited them with interest paid to him on the notes, nor by the fact that he took the notes in their names or indorsed them to the sons.—Shepard v. Shepard, 164 Mich. 183.

¶ 91. Plaintiff's aunt at a dinner party took a diamond ring from her finger and handed it to plaintiff, saying, "I will give you this ring, Jim." Plaintiff slipped it on his finger and remarked that it did not quite fit but that he could get a jeweler to fix it. He also thanked her for the ring. The aunt then said, "Jim, let me wear it till I am through with it, but the ring is yours." She kept it in her possession until her death. She stated on subsequent occasions that the ring belonged to plaintiff. Held, that there was a valid gift inter vivos to plaintiff.—Garrison v. Union Trust Co., 164 Mich. 345.

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¶ 92. Evidence showing that the decedent deposited money in a bank, receiving certificates of deposit therefor in the name of his brother, with admissions of decedent that he was loaning money to his brother, does not show a gift of such deposits to the brother, where the certificates never came into the brother's hands, but were retained and used by decedent as his own property.—Lattin v. Lattin's Estate, 156 Mich. 223.

§ 21. Questions of fact and instructions.

As to validity, effect or existence of gift, see post § 34.

¶ 93. Upon the question whether a donor has made a good gift inter vivos, the trial court properly refuses to instruct the jury that if the donor kept possession of the property until her death, no valid gift to the donee took place.—Garrison v. Union Trust Co., 164 Mich. 345.

IV. VALIDITY AND EFFECT; UNDUE INFLUENCE AND INCAPACITY.

§ 22. Validity and effect in general.

General nature and requisites of gift, see ante I.

Necessity and sufficiency of intent to give, see ante II.

Necessity and sufficiency of delivery and acceptance, see ante III.

Parol gifts invalid at law, see post § 24.

Policy as to gifts causa mortis, see post § 25.

Irrevocability of gifts, see post § 26.

Unfairness, unnaturalness and immorality, see post §§ 27, 28.

Mental capacity of donor and undue influence, see post § 29.

Burden of proof and evidence, see post §§ 30-33.

Gift of debt by taking note payable to donor's "heirs," see ante ¶ 25.

Gifts for charity, validity and effect, see Charities.

Power of association to receive gifts, see Associations § 7.

Capacity of county to take property by gift, see Counties § 18.

Validity and effect of voluntary deeds, see Deeds § 3; Fraudulent Conveyances.

Validity of contracts and transfers on real or pretended consideration between husband and wife or parent and child, see Husband and Wife, II, D; Parent and Child, IV.

Standing of grantee who has improved premises to relief from mistake in description in deed, see also Equity ¶ 55.

Rights of bona fide taker of land as against unrecorded gift, see Notice and Record of Title.

Gift as method of becoming entitled under contract, see also Contracts ¶ 1526.

Right of donee of money due to sue for money had and received, see Assumpsit ¶ 57.

Gift as cutting off distributive rights on giver's death, see also Descent ¶ 13.

Allotment of gifts to spouse to whom they were given originally in dividing property on divorce, see Divorce § 141.
Liability of donor of stock for debts of bank, see Banking § 67.
Effect of discharge of original mortgage and execution of new one on gift of note secured thereby, see Mortgages, VIII.

¶ 94. A gift by a father to his son of certain notes and mortgages, accompanied by actual delivery and retained possession, is valid, and vests the title to the securities in the son as against the heirs of the donor, or the administrator of his estate.—Beardslee v. Reeves, 76 Mich. 661.

¶ 95. The expressed wish of a deceased wife as to the disposal of her estate cannot be maintained either as a will or as a donatio causa mortis in prejudice to the statutory right of her husband to one-half of the residue of her personal property, after deducting necessary expenses. How. St. § 5847, subdv. 7.—Hughes v. Pealer, 80 Mich. 540.

§ 23. ——Conditions or reserved rights.
Conditional gift, see ante § 8.

¶ 96. An absolute gift of land made subject to a parol trust in the grantor's favor has the effect of an unconditional gift, the trust being void.—Palmer v. Sterling, 41 Mich. 218.

§ 24. Gift by invalid parol transfer.
Revocability on ground of being in parol, see post ¶ 100.
Degree of proof required to enforce parol gift of land, see post ¶¶ 126, 127.
Sufficiency of proof, see post ¶¶ 140, 143.
Holding under parol gift of lands as adverse to donor, see Adverse Possession § 24.
Equities arising under execution of parol gift of land, see Frauds, Statute of § 139.

¶ 97. A solvent donor's parol gift of land in 1859 followed by immediate, continued and adverse possession in the donee and in reliance thereon by the making of improvements by her, was sustained in 1882 as against subsequent grants and incumbrances from the donor, except such as were acquiesced in by the donee while the title stood in the donor's name.—Potter v. Smith, 68 Mich. 212.

§ 25. Gifts in view of death.
Burden of proof and evidence, see post §§ 30-33.
Court and jury questions, see post § 34.

¶ 98. Gifts causa mortis are not to be held void as contrary to public policy where the facts are clearly shown, nor can the law properly be said to treat these with disfavor, except in the sense that such transactions are scrutinized carefully to ascertain whether freely and intelligently done, since there is much room for fraud and mistakes.—Ellis v. Secor, 31 Mich. 185.

§ 26. Revocability.
Conditional gift, see ante § 3.
Irrevocability of delivery, see ante § 11.

¶ 99. That which is purely a gift may be retracted by the donor, even if it is a receipt, or a release of a mortgage, since there is no consideration, the absence of which may be shown even in the presence of a seal.—Green v. Langdon, 28 Mich. 221.

¶ 100. A solvent donor's parol gift of land followed by immediate, continued and adverse possession in donee for more than twenty years, was sustained as against subsequent grants from donor.—Potter v. Smith, 68 Mich. 212.

¶ 101. A gift resting merely in intention, though evidenced by a promise, may be recalled.—Sanilac County Sup'rs v. Auditor General, 68 Mich. 659.

¶ 102. Where the holder of a certificate of deposit gives an equal interest therein to his wife, through an indorsement of a direction upon the certificate to issue a new certificate payable to himself and wife, or to the survivor, he cannot subsequently dispose of his wife's interest in the fund without her consent.—State Bank of Croswell v. Johnson, 151 Mich. 538.

¶ 103. A mortgage by a father to his sons, conditioned upon the payment of annual interest during the life of the father, and the payment of $500 to his daughter upon his death, duly recorded and followed by statements made by the father to the daughter that she was to be paid said amount after his death, constituted a gift inter vivos, which it was beyond the power of the father to recall by the discharge of the mortgage and the execution of a new one which omitted the provision for the daughter; and the latter had the right to foreclose the first mortgage upon the failure to make payment to her upon the death of the father.—Holmes v. McDonald, 119 Mich. 563.

§ 27. Unfair or unnatural gifts.
Gift encroaching on statutory rights of surviving spouse, see ante ¶ 95.
Meretricious gifts, see post § 29.
Unfair wills, see Wills.

¶ 104. If a grantor acts understandingly in executing deeds in favor of his son a short time before his death he has a right to so dispose of his property though such disposition may be inequitable to other children.—Reagan v. Murray, 176 Mich. 231.

¶ 105. A transfer of personalty in the nature of a bequest cannot be set aside merely because it shows an unnatural disposition on the donor's part and is wrong in morals, so

long as there is no evidence that it was brought about by fraud or undue influence, and that the grantor was not of a sufficiently sound mind to dispose of his property.—Twist v. Babcock, 48 Mich. 513.

¶ 106. Deeds to a second wife and a daughter excluding other children of grantor, are valid, where all the deeds were recorded either upon the day of their execution or within a few days thereafter, and where the testimony failed to show either undue influence or mental incompetency.—Warner v. Warner, 119 Mich. 456.

¶ 107. Where satisfactory provision was made for the widow a gift to a child by a former wife by discharging a mortgage and taking a new one in trust for the child is not fraudulent.—Trabbic v. Trabbic, 142 Mich. 387.

§ 28. Meretricious gifts.

Evidence of undue influence, see post § 32.
Instructions to jury, see post § 34.

¶ 108. A gift is not invalid as against the heirs of the donor because of the existence of illicit relations between him and the donee.—Frank v. Morley's Estate, 106 Mich. 635.

¶ 109. Meretricious relations between the assignor of certain mortgages, and his assignee would not alone, as a matter of law, defeat the assignee's title to the mortgages, claimed by her as a gift in consideration of past faithful services as an employee.—Peirson v. McNeil, 137 Mich. 158.

§ 29. Mental incapacity or undue influence.

Burden of proof where gift is to spiritual adviser, see post ¶ 114.
Admissibility of evidence, see post § 32.
Questions for court and jury, see post § 34.
Gift by client to attorney, see also Attorneys § 31.
Testamentary capacity, see Wills, II.
Undue influence on making of will or bequest, see Wills, III.
Undue influence in general, see Fraud §§ 65, 66.
Presumption as to dealings in fiduciary relationship, see Fraud, II.
Mental capacity in general, see Insane Persons, I.

¶ 110. The question in determining whether a gift has been made is not what the donor had contemplated or intended, but whether his intentions were carried into effect; and to accomplish this an intelligent will directing or assenting to the act done is essential.—Duncombe v. Richards, 46 Mich. 166.

§ 30. Burden of proof and presumptions.

Presumptions as to intent, delivery and acceptance, see ante §§ 9, 20.
Admission of executory gift by insufficient allegations in petition for surrender of property by executor to donee, see Evidence ¶ 2053.

¶ 111. One who claims property as a gift causa mortis and brings suit therefor after the death of the alleged donor has the burden of clearly establishing such ownership.—People's Sav. Bank v. Look, 95 Mich. 7.

¶ 112. Where one, whether a child or stranger is intrusted with funds of another to deposit in his own name or in their joint names, and the funds have been thus treated, no presumption of a gift arises from the fact that the funds are deposited in the name of the alleged donee, especially when originally deposited in the donor's name and withdrawn and redeposited by the donee without the donor's consent.—Campbell v. Sech, 155 Mich. 634.

¶ 113. Mere possession of a mother's savings bank book by a daughter raises no presumption of the daughter's ownership of the same.—Union Trust & Savings Bank v. Tyler, 161 Mich. 561.

¶ 114. Where a gift is claimed to have been made to a spiritual adviser of a person in extremis the burden of proof to show the good faith of the transaction rests upon the donee.—McPherson v. Byrne, 155 Mich. 338.

¶ 115. Successive transfers of property, consisting of mortgages, were procured by a nephew from his uncle within a few days before the latter's death, and while he was in an enfeebled condition and in the absence of his near relatives except the beneficiary. The uncle was eighty-two years old, had made his home with his nephew, and was said to be estranged from his other near relations. He was a temperate and thrifty bachelor who had little society. The nephew was neither temperate nor thrifty and was not a money maker and what he possessed came from gifts of the uncle. Held, that as the assignments were made on the donor's death-bed, they were open to suspicion, and on a bill to set them aside the beneficiary had the burden of showing their fairness.—Duncombe v. Richards, 46 Mich. 166.

§ 31. Evidence of gift.

Gift or debt, see also ante ¶ 1.
Evidence of intent, see ante § 9.
Evidence of delivery and acceptance, see ante § 20.
As between parent and child, see also ante § 20.
General law of evidence, see Evidence.
Evidence of declarations for other purposes when inadmissible to prove gifts, see Evidence ¶¶ 494, 498.
Conclusions of witness as to ownership by gift, see Evidence § 215.
A judgment of undue influence on probate as conclusion on question of undue influence in gift about same time, see Former Adjudication ¶ 419.

¶ 116. Parol evidence is usually needed for applying any gift or sale to the person or

thing intended.—Kinney v. Kinney, 34 Mich. 250.

¶ 117. Evidence of a custom among old French settlers to give their farms to eldest sons is not admissible to establish such a gift in a particular case, where no direct evidence of such gift had been given.—Gilman v. Riopelle, 18 Mich. 145.

¶ 118. In a suit involving the right of a son to certain notes and a mortgage, claimed to belong to his father's estate, and which he claims to own through a gift to him by his father of all of his notes and mortgages, a prior deed to the son by his father of his farm, on certain conditions, as also other antecedent transactions of the father looking towards the distribution of his property among his children, are admissible in evidence as bearing upon the intent, nature, extent and character for the later disposition under which the son claims title.—Beardslee v. Reeves, 76 Mich. 661.

¶ 119. The testimony of an alleged donee of a note from a decedent, that, at the time she produced the note in response to the executor's request, she stated that it was hers by gift from the testator, is admissible to rebut any inference of an admission against her ownership, arising from the production of the note in response to such request but so far as direct proof goes it is self serving.—Harris v. Cable, 113 Mich. 192.

¶ 120. An executor is not entitled to have a verdict directed in an action for the conversion of a promissory note alleged to have belonged to the estate, where defendant's claim that the note was a gift to her from testator in his lifetime is supported by evidence that he had deposited to her credit amounts equal to the several payments of interest upon the note on the same days that interest was paid to him, that he had inquired of her in the presence of third parties as to what she wished done with the moneys from such note, that the note bore testator's indorsement, and that defendant produced it, after the testator's death, from among her own private papers.—Harris v. Cable, 113 Mich. 192.

¶ 121. It is evidence against a gift of a promissory note payable to the alleged donor or his order that it bore no indorsement and that after his death the claimant (donee) petitioned for letters on donor's estate stating that he left personal estate of a value which could not have been made up unless such note was regarded as having belonged to him.—Kimball v. Green, 148 Mich. 298.

¶ 122. The receipt by a mortgagee of a smaller sum and the giving of a receipt for full interest on a mortgage each year indicates a gift of the balance of the interest due for those years.—Holmes v. Holmes, 129 Mich. 412.

¶ 123. Upon a question of right of property in a replevin suit, proof of friendly relations between plaintiff's intestate and the defendant who was such intestate's housekeeper, and who claimed certain of the property as a gift, is admissible if there is testimony directly tending to show the gift, otherwise not.—Moore v. Machen, 124 Mich. 216.

¶ 124. In an action by an administrator for the conversion of two certificates of deposit, where the defendant claimed them as a gift, statements of the testator showing a hostile feeling towards defendant, limited to show the relations of the parties, is properly received in evidence to show a state of feeling inconsistent with the gift theory.—Pease v. Jennings, 180 Mich. 682.

§ 32. ——Of undue influence or incapacity.

Sufficiency of evidence, see post § 33.
Evidence in will cases, see Wills, III.
Evidence as to fraud and collusion to diminish an estate by procuring a gift, see Fraud ¶ 441.

¶ 125. Upon an issue as to whether defendant had given a specified sum to plaintiff, which she afterwards intrusted to him for investment, evidence of a promise by defendant "to give" plaintiff a similar sum, made eleven years thereafter, during which period the parties had been living in criminal intimacy, is admissible, having no tendency to support the claim made.—Frank v. Morley's Estate, 106 Mich. 635.

§ 33. Sufficiency of proofs.

As question for jury, see post § 34.
Evidence requisite to decree for rescission or cancellation in general, see Fraud, I, B; Mistake; Duress; Rescission, VI.

¶ 126. Bill by the widow and heir at law of A., against the widow, heirs at law and administrator of B. (who was the father of A.), to compel the conveyance to complainants of certain premises alleged to have been given by B. to A. in consideration of natural affection, but not conveyed. Held, that in such a case conveyance would only be decreed on the most conclusive proof of the gift, and of some satisfactory reason why it was not consummated by a conveyance.—Jones v. Tyler, 6 Mich. 364.

¶ 127. Possession of the premises by A., a son of the donor, subsequent to an alleged gift would be sufficiently explained by the relationship between the parties, and could not avail complainants claiming under the son who had no deed.—Jones v. Tyler, 6 Mich. 364.

¶ 128. In determining whether a gift has been made, the question of change of possession must be considered in connection with the other facts in the case, as where it passes between married persons living together.—Davis v. Zimmerman, 40 Mich. 24.

¶ 129. Evidence of declaration and admissions of the donor are not sufficient to establish a gift, and are only admissible in corroboration of other testimony.—Campbell v. Sech, 155 Mich. 634.

¶ 130. While very slight evidence is required to establish a gift from the parent to a child, where there is no suggestion of fraud or undue influence, yet such rule does not apply where the child stands in a fiduciary relation with the parent, and has access to and control over his property.—Campbell v. Sech, 155 Mich. 634.

¶ 131. Conclusive evidence of a gift from parent to child is not necessary.—Union Trust & Savings Bank v. Tyler, 161 Mich. 561.

¶ 132. Upon the issue whether or not eight hundred dollars deposited in a bank in defendant's name belonged to her as a gift from her father, or to her father's estate, the evidence showed that deceased had bequeathed eight hundred dollars to defendant in his will, and that he had stated that he had given his daughter eight hundred dollars. Held, that this statement by a layman, is as consistent with the idea of a will as of a previous gift.—Campbell v. Sech, 155 Mich. 634.

¶ 133. On a bill to set aside assignments of mortgages made on the grantor's deathbed and claimed by the transferee to have been made as a gift, testimony that the donor, though shown to be a prudent and sensible man, had confidentially disclosed to inferiors and strangers what he intended to do with his property, can give little support to a suspicious case; nor can testimony that he had once handed over to the transferee a box of mortgages, saying: "I give you all my personal property," there being no reason to suppose that he afterwards considered himself divested of the property or that the supposed donee considered himself owner; nor can testimony that after the transfers were made the donor was heard to say that the donee should have his property when he was done with it.—Duncombe v. Richards, 46 Mich. 166.

¶ 134. Evidence that a decedent had stated positively that she had given certain specified property to her sons and had previously declared an intent to give it, and that one of the sons remained at her house until her death, warrants a finding of a complete gift in præsenti, and at all events a finding that all parties understood that there was a complete gift with no intention of revocation and such possession as was possible.—Harris v. Hopkins, 43 Mich. 272.

¶ 135. A church trustee gave his note secured by a mortgage on the property of the church society to raise money which he used in his own business. There was evidence tending to show that the other trustees consented to the mortgage on his assurance that he would pay off certain debts of the society He aided the society largely and probably fulfilled his promise. He afterwards gave as additional security a mortgage on other property, and upon this foreclosure bill against his assignee in bankruptcy was sustained, as the proof tended to show that the money paid by him to the church was by way of donations, and that the original mortgage was given to raise money for him exclusively and not in part for the benefit of the church society.—Carpenter v. Buttrick, 41 Mich. 706.

¶ 136. In a claim by a daughter against the estate of her father for the gift mortis causa of a pocketbook containing money, a savings bankbook and a certificate of deposit, the evidence indicated that the father felt great affection towards the claimant for her kindness in caring for him in his old age; that he expressed to his doctor and nurses his intent to give his property to claimant; that he knew he was about to die; and that, being in sound mind, and in anticipation of death, he called his daughter, directed her to get the pocketbook, certificate and bankbook in question, and to take good care of same. Held, the evidence was sufficient to sustain a verdict finding a good gift mortis causa. In re Morse's Estate, 170 Mich. 114; Caldwell v. Goodenough, Id.

¶ 137. Where a decedent wrote and signed a certain so-called "statement" declaring he was about to leave town for his health and in case anything should happen to him, as he was a sick man, his wife was the owner of everything they possessed, and nobody else, and delivered same, together with certain leases, bank books and other papers, to his wife, and died eight days thereafter, held that such statement and contemporaneous facts stamped the transaction as a donatio causa mortis. In re Reh's Estate, 196 Mich. 210.

¶ 138. In an action by an administrator to recover the proceeds of a mortgage transferred by decedent in his lifetime to defendant, upon the ground of undue influence and mental incompetency, evidence that decedent was eighty-one years of age at the time of the transfer was almost wholly blind, and quite feeble, and that he had been under the custody and influence of defendants for more than a year, and that the transaction complained of was a departure from an understanding which had been reached at a conference between defendants, decedent, and all of the other persons interested in the estate, is sufficient to justify a verdict setting aside the conveyance.—Adsit v. Ide, 150 Mich. 367.

¶ 139. The cancellation of a debt by gift is sufficiently shown where the note evidencing it is returned to the debtor canceled, and by a letter to the debtor stating that the

debt was forgiven though the note could not be found.—Leggett v. Davison, 131 Mich. 77.

¶ 140. Parol gift of land by a father to his children is not established by evidence that they had been in possession for many years and had made necessary improvements, and that the father had stated that he had given a home to his children, where it appeared that he continued to pay the taxes and that he was familiar with real estate matters and knew that a deed was necessary to pass title.—Moross v. Moross, 131 Mich. 389.

¶ 141. A gift inter vivos of money deposited in a bank is not shown by testimony that testator had the money deposited under an arrangement permitting his wife to draw it as well as himself, that he had said to the cashier that it was her money as well as his, to the notary who drew his will, "That belongs to my wife, it is already settled," and to his spiritual adviser that it was in the name of himself and wife and that she had the same control over that money as he had, and that it was his intention that it should be at her control, since such testimony establishes only an intention to allow her to use the fund, and such authority terminated at his death.—Burns v. Burns, 132 Mich. 441.

¶ 142. A man 85 years of age and ill, on the day before his death expressed a desire to give a domestic $500 in recognition of faithful service, and the next day the cashier of a bank was sent for who produced certificates of shares in the bank aggregating $4,500 which were indorsed in pencil to the domestic. Held that the transfer was an error and not intended by the donor and should be set aside except as to the amount of $500.—Crippen v. Adams, 132 Mich. 31.

¶ 143. A completed gift of farm personal property was not shown by testimony that decedent in question stated in substance that he gave the property to the claimant for a certain purpose and that it was to be left in his hands; particularly where after the making of the statements, the decedent recovered sufficiently to be about his duties on the farm and conducted the business the same as before.—Sparling v. Smeltzer, 133 Mich. 454.

¶ 144. A gift held in trust by the donor for the donee is refuted by the circumstances that the donor, an experienced business woman of property, continued to hold the notes and mortgages which were subject of it and regularly collected the interest on them, keeping them with her other properties and securities, that the notes were executed by the person claiming as donee, that the donee was not related by blood to donor but nevertheless was made a legatee in donee's will on the same basis as blood relatives, that numerous letters passing between them made no reference to any intent to forgive the indebtedness, that donor's wealth made her independent of any need for the interest for support, that the will made no mention of the notes, and that she never mentioned a gift to her close friend who was appointed executor, though in opposition to such circumstances a witness testified that she had once declared that she had made a gift of them to the maker and had kept them in her own possession for the purpose of collecting the interest.—Botsford v. Bradfield, 141 Mich. 370.

¶ 145. In an action for an accounting from the defendant for the principal and income from certain real estate mortgages claimed to have been assigned in writing by plaintiff's mother as a gift, papers prepared before any difference arose and indicating a gift sufficed to establish one, although the oral testimony was very contradictory.—Poppleton v. Poppleton, 143 Mich. 208.

¶ 146. A gift from an old man to his daughter was sustained on evidence from which it could be inferred that it was by way of dividing his estate equally among his children, to others of whom he had given notes owing by that daughter's husband; although such husband, as it appeared, had obtained a deed to himself of other property by fraud and as a witness was not candid in explaining his dealings, where books of account and other evidence showed that the notes were all that such husband was owing to the grantor, and where on the whole the gift seems to be supported by good reason.—Ladenback v. Johnson, 143 Mich. 585.

§ 34. Questions of fact and instructions.

General law of instructions, see Instructions.

¶ 147. In an action to recover the balance of a loan, the defense of a gift was set up, but the court below found that such gift was obtained by undue influence, and these findings the supreme court refused to review because the evidence upon which it was based was not given in the record.—Fisher v. Seventh-Day Adventist Pub. Assoc., 85 Mich. 472.

¶ 148. Plaintiff presented a claim against the defendant estate, based on an alleged gift of money shortly after the birth of her illegitimate child, of which deceased was the father, which sum she subsequently returned to him to be invested, and that he had not accounted therefor. The court instructed the jury that, if deceased had sustained illicit relations with the claimant, and was the father of her child, and in consideration thereof gave her the sum mentioned for the support of herself and child, that would be a sufficient consideration in law for the transfer of the money to her, and it would become hers; and that if she afterwards transferred the money back to the deceased for investment, and he took the same, promising to invest it and to account to her therefor, claimant was entitled to

recover. Held, that the charge was not open to the objection that it gave the jury to understand that the illicit relations between the parties imposed an obligation upon the deceased.—Frank v. Morley's Estate, 106 Mich. 685.

¶ 149. The question whether or not certain notes given by a decedent and indorsed by him several days before his death and left in custody of his wife, such notes having been given in part payment of a house and lot deeded by the wife and later confirmed by a deed from both the husband and wife, constituted a gift to the wife, is for the jury, where the evidence was not conclusive as to the intention of the deceased.—Hall v. Wortman, 123 Mich. 304.

¶ 150. Where a case involving a gift mortis causa is tried by a jury, the court is not called upon to weigh the evidence and determine whether the gift as claimed was actually made, but is required to find whether there is any competent testimony legally intended to establish the essentials of such a gift.—In re Morse's Estate, 170 Mich. 114; Caldwell v. Goodenough, Id.

¶ 151. In an action by an administrator for the conversion of certificates of deposit claimed by defendant as a gift causa mortis from decedent, the refusal of the court to direct a verdict for defendant was held proper.—Pease v. Jennings, 180 Mich. 682.

¶ 152. Though there was no direct contradiction of testimony for plaintiff, suing in conversion for a horse, that it was a gift from her husband, since deceased, to her, it was proper to submit to the jury whether there was a gift, the evidence thereof being statements and admissions out of court by the husband which could be taken by the jury in different senses.—Parke v. Nixon, 141 Mich. 267.

¶ 153. In an action of trover by an administrator to recover from a spiritual adviser of decedent property which he claims was given to him by decedent in her last sickness, where the testimony shows that in parting with the property decedent attempted to make a gift for charitable purposes with the charity wholly indefinite, and where defendant's counsel conceded on the trial that the transaction could not be sustained as a gift unless the property was given to defendant for his own use or for a definite charity, there is no question of fact left to be submitted to the jury, and it is unnecessary to consider errors alleged in the charge of the court.—McPherson v. Byrne, 155 Mich. 338.

¶ 154. A requested instruction on the issue of a gift of money sued for by executors of a deceased person to recover money in the possession of defendant, the alleged donee, if the testator before her death directed her attorney to draw a check for the money, to be cashed, and the proceeds to be delivered to her, and sent by the legatee, is substantially included in an instruction given which states that, "if you find in this case that the money was to be returned," to the testator, "if you find that," such testator, "signed the check, and desired," her attorney, "to get the check cashed and send the money home,—have the money sent home to her,—then and under those circumstances the plaintiffs in this case would be entitled to recover the sum of $1,000 with interest."—Reilly v. Conway, 121 Mich. 682.

¶ 155. A requested instruction entitling executors of a deceased person to recover money claimed as a gift in the possession of a legatee, if the testator was dead when her attorney paid the money to such person, is properly refused where one of several persons testifies definitely that the testator died about three-fourths of an hour later, which evidence is not contradicted, and where the jury found that the money was paid to the legatee to aid her as directed by the testator.—Reilly v. Conway, 121 Mich. 682.

GILL NETS to GOOD ROADS LAW.

Cross-References.

Gill Nets—
Regulations of use, see Fish § 5.
Girls—
Crimes against health, morals, decency or person, see Crimes, II; Rape; Seduction; Indictment.
Age of consent, see Marriage, II; Rape.
Matters dependent on state of infancy or parentage, see Infants; Parent and Child.
Delinquent girls, see Incompetents and Delinquents.
Custody on granting divorce, see Divorce, IX.
Given Name—
See names.
Giving Credit—
As consideration for promise, see Contracts, V, A.
As consideration of value by bona fide taker, see Negotiable Instruments, XIII; Notice and Record of Title, I.
Effect to discharge surety, guarantor or indorser, see Guaranty, III; Negotiable Instruments, VII; Suretyship, II.
God—
Crime of blaspheming, see Crimes, II; Indictment.
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Freedom of worship, see Constitutional Law, VII.
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Observance of Sunday and Sunday laws, see Sunday.
Gold—
As legal tender or agreed medium of payment, see Payment.

Good Behavior—
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Good Character—
Admissibility of evidence, see Evidence, VII, B; Indictment, VIII, B.
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Good Faith—
See cross-references under Fraud; Bona Fides.
Presumption as to good faith, see Evidence § 49; Fraud, III.
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Duty of fiduciary to principal, see Agency; Estates of Decedents; Guardianship; Trusts.
Duty of corporate officer, see Corporations, XVII.
Duty of relatives dealing in confidence, see Husband and Wife, I; Parent and Child, IV.
Actionableness of untrue statements made in good faith, see Fraud § 6; Libel.
Baseless prosecution in good faith, see Malicious Prosecution.
Illegal arrest in good faith, see False Imprisonment.
As factor in mitigation of damages, see Damages § 159 et seq.
As affecting contemptuousness of act, see Contempt, II.
Right to costs affected by good or bad faith, see Costs.
Good faith as rebutting specific criminal intent, see Indictment, VIII, B, C.
Good Roads Law—
See Highways.

GOOD WILL.

TREATS of that advantage incident to a business which consists in its being a going establishment and having a patronage.

Analysis.

§ 1. In general; sale or transfer.

§ 1. In general; sale or transfer.
Partnership rights in good will, see Partnership, II.
Rights in trade marks and trade names, see Trade Marks.
Validity of agreements incident to sale of good will for restriction on competition, see Contracts § 78.
Issuance of corporate stock for good will, see Corporations § 267.
Statutory provisions as to contracts for good will, see Comp. L. 1915, §§ 15027, 15038, 15095.

¶ 1. A sale of good will in a grain business accompanied with restrictive covenants of the seller not to again engage in such business, is violated where the seller encourages, assists, and advises his son in the establishment and conduct of a competitive business, furnishing him capital and advice and buying grain for him.—C. H. Barrett Co. v. Ainsworth, 156 Mich. 351.

¶ 2. Good will is a property right which can be conveyed with the business to which it is incident.—Durand v. Brown, 236 Fed. 609.

GOODS AND CHATTELS to GRANDCHILDREN.

Cross-References.

Goods and Chattels—
What constitute chattel properties, see Property; Real Property; Estates of Decedents, V; Taxes, II.
Sale, incumbrance, transfer, or succession, see Sales; Gifts; Assignments; Chattel Mortgages; Pledges; Descent; Estates of Decedents; Frauds, Statute of.
Torts and negligence respecting, see Conversion; Trespass; Negligence; and like topics.
Actions for specific recovery, see Replevin; and see Specific Performance.
Measure and elements of damages to personal property, see Damages.
Valuation of chattel properties, see Values.
Payment in chattels, see Payment, I.
Bailments and carriage, see Bailments; Carriers.
Insurance on chattels, see Insurance.

Levy or involuntary transfer, see Attachment; Executions; Garnishment; Eminent Domain.
See further cross-references in topics above mentioned.
Government—
See Constitutional Law; Counties; Municipal Corporations; Townships; Schools; State of Michigan; United States.
Governmental Functions—
Nonliability for injury accruing from exercise of, see Counties § 36; Municipal Corporations, XII.
Governor—
Executive department of government, see Constitutional Law, II.
As officer of state, see State of Michigan; Officers.
Grace—
Days of, on maturing of negotiable instrument, see Negotiable Instruments.
Equitable relief resting in the grace of chancery rather than in right, see Equity; and see specific topics like Injunctions, I; Specific Performance, I; Rescission, VI.
Grade Crossings—
See Highways, V; Railroads, IV, VIII.
Grade of Street—
Establishment and change, see Highways, IV, V; Local Improvements.
Grades—
Of goods sold or warranted, see Sales.
Grading Contracts—
See Building and Construction Contracts; Mechanics' Liens; Public Contracts.
Grain—
See references under Growing Crops.
Elevators and warehouses, see Warehousing.
Sales of grain, see Sales.
Dealings in futures, see Gambling Contracts.
Grammar—
As factor in construction, see Contracts, VI, A; Wills, VI, A; Pleading, II, IX, X.
Grandchildren—
Inheritable rights and successions, see Descent; Wills, VI.
As word of designation in wills, see Wills, VI.
Right to custody and guardianship, see Parent and Child, III; Infants; Guardianship.

GRAND JURY.

TREATS of the calling, composition, organization, and functions of the grand jury.

Analysis.

§ 1. In general; calling and composition.
§ 2. Challenges and objections.
§ 3. Discharge and resummons.
§ 4. Functions and powers.
§ 5. Investigations and reports.
§ 6. Secrecy and privilege of proceedings.

§ 1. In general; calling and composition.

Challenges and objections, see post § 2.
Discharge and resummons, see post § 3.
Validity of statute denying to recorder's court, power to summon, see Constitutional Law § 61, ¶ 301.
General statutory provisions relative to grand juries see Comp. L. 1915, § 15702 et seq., § 15766.

¶ 1. The recorder's court of the city of Detroit has no authority to order the summoning of a grand jury for such court under its charter.—Jasnowski v. Detroit Recorder's Court Judge, 195 Mich. 269.

¶ 2. A formal order signed by the circuit judge and entered on the journal, ordering that a grand jury be drawn is a substantial compliance with How. St. § 9554, which provides that grand juries shall not be drawn unless the judge "shall so direct by writing under his hand and filed with the clerk of said court."—People v. Reigel, 120 Mich. 78.

¶ 3. How. St. § 9554 which dispenses with grand juries unless specially called, and section 7562 which provides for the drawing of juries at least 14 days before the term, do not limit the power of the court in relation to calling grand jurors during the term as provided by section 7578.—People v. Reigel, 120 Mich. 78.

¶ 4. The court has discretion to increase the number of grand jurors after they are

sworn and charged to any number not greater than twenty-three.—People v. Lauder, 82 Mich. 109.

¶ 5. An indictment is not to be abated because one of the grand jurors was an attorney and was then acting as assistant prosecuting attorney in a contempt case against a third person.—People v. Lauder, 82 Mich. 109.

¶ 6. A member of the grand jury may act as its stenographer and receives extra pay from the county for his services.—People v. Lauder, 82 Mich. 109.

¶ 7. The provisions of the Wayne County jury act (Pub. Acts 1887, No. 95, § 23) do not modify the general statutes (How. St. §§ 7562, 9494) in regard to the number of persons required to be sworn in the county to constitute a legal grand jury, and therefore an indictment found and presented by a grand jury in Wayne County composed of less than 23 persons was valid.—People v. Thompson, 122 Mich. 411.

¶ 8. In a criminal prosecution for embezzlement where the accused pleaded in abatement that one of the grand jurors was a "prosecutor or complainant" upon the charge against him, in that such grand juror, before he was called to serve on the grand jury, had minutes of testimony taken by him in bankruptcy proceedings, and as a United States commissioner had made an investigation, including a consultation with the United States District Attorney, concerning the issuing of a federal warrant against accused, but it was not alleged that such grand juror issued any warrant against accused, held the grand juror was neither "prosecutor nor complainant" within the meaning of Comp. L. 1897, § 11881, How 2nd Ed., § 15052.—People v. Lay, 193 Mich. 17.

¶ 9. Members of a grand jury held not to be prosecutors or complainants within Comp. L. 1897, §§ 11881, 11882, How. 2nd Ed., §§ 15052, 15053, limiting the accused to a single ground of challenge that some one summoned to serve upon the grand jury is a prosecutor or complainant against him.—People v. Lay, 193 Mich. 476.

§ 2. Challenges and objections.

Objections allowable on motion to quash indictment, see Indictment, I, D.

¶ 10. Grand jurors drawn and appearing upon summons are presumed to be legally qualified and properly returned; and the court will not interfere to set aside the panel, or any part of it, unless upon cause shown by a person having a right to question its legality.—Thayer v. People, 2 D. 417.

¶ 11. A challenge either to the array or to the poll can only be made by a person who shows that he is under prosecution, and that his case is about to be brought before the jury.—Thayer v. People, 2 D. 417.

§ 3. Discharge and resummons.

¶ 12. Where a grand jury has finished its business, and been dismissed before the adjournment of the court without day, it may be resummoned at any time during the term to inquire into an offense committed subsequent to its discharge; and grand jurors who were originally summoned, but did not appear, may be resummoned, and, on appearing and being sworn and impaneled, may act with their fellows. A grand juror who appears after the jury have been sworn and received the charge of the court may or may not be sworn, in the discretion of the court, where there are enough jurors without him.—Findley v. People, 1 Mich. 234.

§ 4. Functions and powers.

Propriety and relevancy of matter in report, see post § 5.

Finding and filing the indictment, see Indictment, I, A.

¶ 13. A grand jury, as is indicated by the prescribed oath in Comp. L. 1897, § 11876, How. 2nd Ed., § 15047, must have the power and be at liberty to inquire for the whole county.—Jasnowski v. Detroit Recorder's Court Judge, 195 Mich. 269.

¶ 14. Except when followed by an indictment a grand jury is without authority, irrespective of the truth or falsity of the charge, to file with the circuit court a report casting reflections of the gravest character upon the conduct of the prosecuting attorney.—Bennett v. Kalamazoo Circuit Judge, 183 Mich. 200.

¶ 15. Although Comp. L. 1897, § 11885, contemplates that the work of the grand jury will be done during the term to which it is summoned, its continuance into the succeeding term and recognition by the court as a lawful jury, and the reception of indictments found by it, constituted the jury a de facto grand jury while thus holding over.—People v. Morgan, 133 Mich. 550.

§ 5. Investigations and reports.

Scope of matters subject to inquisition, see ante § 4.

Failure to appear as witness with books as contempt, see Contempt, §§ 5, 15.

Right of witness to have counsel, see Constitutional Law § 200.

Keeping records, right of access, and correction or expurgation of matter, see Records.

¶ 16. A report filed with the court by a grand jury which contains reflections of the gravest character upon the conduct of the prosecuting attorney, should be expunged from the records on his motion.—Bennett v. Kalamazoo Circuit Judge, 183 Mich. 200.

§ 6. Secrecy and privilege of proceedings.

Testimony by a grand juror as to evidence received when refreshed in memory by minutes made as secretary of grand jury, see Examination of Witnesses ¶ 128.

Secrecy and privilege of proceedings before grand jury, see Grand Jury § 6.

Privilege of witness against self crimination or immunity from subsequent prosecution on testimony given, see Examination of Witnesses, IV; Witnesses, I; Constitutional Law, IX.

¶ 17. Comp. L. 1897, § 11887, How. 2d Ed., § 15058, providing that "in no case can a member of a grand jury be obliged or allowed to testify or declare in what manner he or any other member of the jury voted on any question before them or what opinions were expressed by any juror in relation to any such question," has no application to such members testifying as to such matters in an action against them for libel in making and filing an unprivileged report.—Bennett v. Stockwell, 197 Mich. 50.

¶ 18. Public policy does not make the disclosure of the grand jury's purpose to the court a bar to the punishment for contempt of a witness, who refuses to produce his books of account before the jury in furtherance of that purpose.—In re Archer, 134 Mich. 408.

GRAND LARCENY to GROWING CROPS.

Cross-References.

Grand Larceny—
See Larceny; Indictment.

Grand Nephews and Nieces—
Inheritance or succession by or through, see Descent; Wills, VI.

Grants—
See Deeds; Public Lands; Franchises.
Rights of grantor and grantee, see specific topics treating of the estate or right passed.
Privity in estate and of parties to grant, see Estoppel, II; Former Adjudication, VI; Evidence, VII, C, 3.

Grass—
See Growing Crops.
On side of highway, who entitled, see Highways, X.
Firing dry grass and liability for spread of fire, see Fires; Railroads, VIII, G.

Grates—
As fixtures, see Fixtures § 6.

Gratuities—
Nature and requisites and validity of gifts, see Gifts.

Gratuitous Acts or Services—
Nonimplication of promise to pay, see Implied Contracts, II; Estates of Decedents, VI.

Gratuitous Promises—
As nude pacts, see Contracts, V.

Gravel Roads—
See Toll Roads.

Graves and Grave Yards—
See Cemeteries; Corpses and Burial.

Great Lakes—
See Navigable Waters.
Judicial notice of, see Evidence § 9; Indictment, VIII, A.
Regulations of commerce, see Commerce.
Jurisdiction of admiralty, see Admiralty § 1.
Limitary extent of jurisdiction of state courts, see Courts § 43.
Limits within which arrest may be made, see Arrest § 24.
Validity of legislation giving jurisdiction of crimes on lake, see Constitutional Law ¶ 884.

Gross Earnings—
See Taxes.
Tax as regulation of commerce, see Commerce § 15.
Basis for rates as regulating commerce, see Commerce § 14.
Statute establishing earnings tax as a contract protected against impairment, see Constitutional Law §§ 171, 172.

Gross Neglect—
See Negligence; and see also specific topics treating of negligence, e. g., Highways, XII, XIII; Carriers; Master and Servant, III; Railroads, VIII; Street Railways, IV.
As ground for divorce, see Divorce § 12.

Gross Sale—
On execution, see Executions § 64.

Grounds for Reversal—
See Appeal, XII, F; XIII; Harmless Error; Indictment, XV, XVI.

Growing Crops—
See generally Agriculture.
Rights of landlord and tenant or vendors and purchasers, see Landlord and Tenant, IV, E, G; Vendors and Purchasers, VIII, IX.
Attachment and execution, see Attachment § 12; Executions § 18.
Mortgage or sale, see Chattel Mortgages; Sales.
Rights of dowress or life tenants and successors, see Dower; Life Estates.
Rights of common tenants, see Tenants in Common.
Torts to crops, see Conversion; Trespass; Waste.
Damages for injuries, see Damages.

GUARANTY.

TREATS of undertakings to answer secondarily for the debt or obligation of another. It excludes undertakings to indemnify against loss or accruing liability, which do not depend necessarily on any principal debt or obligation (see Indemnity, I), and also excludes undertakings of suretyship, wherein the undertaking is primary and the surety is co-obligor with the principal to the creditor (see Suretyship). The necessity for and sufficiency of a writing to evidence a promise of guaranty is treated in Frauds, Statute of. The general law of contracts is treated in Contracts. Secondary liabilities of indorsers and acceptors of commercial paper are treated in Negotiable Instruments. Warranties of things sold or assigned are treated in Sales, VI; Negotiable Instruments; Assignments.

Analysis.

I. Nature, requisites and validity.

§ 1. In general; collateral nature of promise.
§ 2. Sufficiency of contract.
§ 3. Consideration.
§ 4. Legality of principal contract.

II. Construction and operation.

§ 5. In general.
§ 6. Amount, items and extent of guaranty.
§ 7. Limited or single guaranty.
§ 8. Continuing, conditional or optional guaranties.
§ 9. ——Acceptance or election by creditor.
§ 10. ——Notice of acceptance or indebtedness.
§ 11. ——Withdrawal or revocation of guaranty.
§ 12. Contemporaneous and subsequent guaranties.
§ 13. Assignment and transfer of guaranty.

III. Liability, release and discharge of guarantor.

§ 14. Scope, measure and extent of liability.
§ 15. Proceedings to fix liability; demand and notice.
§ 16. ——Action or suit, judgment and execution on principal debt.
§ 17. Release or discharge of guarantor.
§ 18. ——Alterations in or departure from principal contract.
§ 19. ——Extending time to principal.
§ 20. ——Misapplication of proceeds or change of securities.
§ 21. ——Performance or tender of performance by principal.

IV. Remedies and actions among the parties.

§ 22. In general.
§ 23. Pleading.
§ 24. ——Issues and variance.
§ 25. Presumptions and burden of proof.
§ 26. Admissibility of evidence.
§ 27. Weight and sufficiency of evidence.
§ 28. Questions of law and fact; directing verdict.
§ 29. Instructions.
§ 30. Verdict and findings.

I. NATURE, REQUISITES AND VALIDITY.

§ 1. In general; collateral nature of promise.

Construction and operation of contract, see post § 5.
Liability, release and discharge of guarantor, see post § 14.
Nature of indemnity contracts, see Indemnity.
Nature and character of insurance contracts, see Insurance.
Nature of suretyship, see Suretyship.
Guaranties of negotiable instruments, see Negotiable Instruments, IV.
By agent of loans or contracts made by him, see Agency § 94.
Guaranty of repayment of deposit of public funds, see Banking § 25.
Authority of bank cashier to guarantee paper, see Banking § 56.
Individual or official nature of guaranty made by bank officer, see Banking § 60.
Power of national bank to make guaranty of paper, see Banking § 91.
Direct promises and promises for another's benefit, distinguished, see Contracts § 13.
Original and collateral promises to answer for another within statute of frauds, see Frauds, Statute of § 17 et seq.
Public officer as guarantor of deposits made in his official capacity, see Officers.

¶ 1. H. promised W., on behalf of several lumbermen whose logs needed floatage, that if W., who owned a dam, would let go the floods the lumbermen would pay him, and he (H.) would see him paid. Held, that this was not an absolute and original promise to pay, but one by way of guaranty, or a collateral promise to make good the obligation of the lumbermen.—Hall v. Woodin, 35 Mich. 67.

¶ 2. By a contract executed and delivered on the same day as a lease from A to B. (on the back of which lease it was written), C. became "surety for the punctual payment of the rent and performance of the covenants" in the lease, and agreed to pay the rent and damages on default. Held, that C.'s contract was not one of guaranty, but the two instruments formed a single joint obligation.—Preston v. Huntington, 67 Mich. 139.

¶ 3. An agent for sale of property who knowingly receives worthless notes in violation of his agreement with his employer and then turns them over to the principal who is ignorant of their worth, makes himself liable as guarantor of the paper.—Clark v. Roberts, 26 Mich. 506.

§ 2. Sufficiency of contract.

Acceptance and notice of acceptance of guaranty, see post §§ 9, 10.
Alterations in or departure from principal contract as releasing guarantor, see post § 18.
Necessity of alleging that guaranty is in writing, see post § 23.
General law as to requisites and sufficiency of contracts, see Contracts.
Necessity that agreements to answer for another be in writing, see Frauds, Statute of, I, B, and particularly §§ 11, 12.
Sufficiency of guaranty of promissory note, see Negotiable Instruments.

¶ 4. It is not essential to the validity of a guaranty that the consideration be expressed therein.—Jones v. Palmer, 1 D. 379.

¶ 5. School district officers cannot be held as guarantors on an order which they signed in the lower right hand corner while on the left hand side of the order, opposite their signatures, was a printed guaranty with room for signatures underneath.—Bailey v. Thompkins, 127 Mich. 74.

§ 3. Consideration.

Consideration as affecting acceptance or notice of acceptance of guaranty, see post §§ 9, 10.
Consideration as differentiating contemporaneous and subsequent guaranties, see post § 12.
Evidence of consideration, see post § 26.
General law of consideration, see Contracts, V.
Consideration as necessary to contracts of indemnity, see Indemnity.
Consideration supporting insurance contracts, see Insurance, VI.
Consideration for contract of suretyship, see Suretyship, I.

¶ 6. A sufficient legal consideration is essential to a valid guaranty, and thus where a debtor transfers notes of a third person to his creditor guaranteeing payment thereof, a creditor must accept such notes and credit them to the debtor in order to hold him upon his guaranty.—Brown v. Spiegel, 156 Mich. 138.

¶ 7. Where a bank extends credit to a person in reliance on a letter written him by the defendant in which the latter promised to guarantee the payment of certain advances, an indemnifying bond subsequently executed by the defendant to the bank, is based on a sufficient consideration.—State Nat. Bank of Albuquerque v. Wernicke, 185 Mich. 281 (Ostrander, Kuhn and Stone, JJ., dissenting).

§ 4. Legality of principal contract.

Alterations in or departure from principal contract, see post § 18.
General law as to legality of contracts, see Contracts, IV.

¶ 8. A contract guaranteeing payment for goods shipped by a foreign corporation to an agent within the state to be stored by him until sold, is void under § 6 of Act No. 310, Pub. Acts 1907, § 9652, How. St., 2nd Ed., where the corporation failed to obtain a certificate of authority from the state to do

business therein.—E. A. Lange Medical Co. v. Brace, 186 Mich. 453.

¶ 9. Recovery may be had on a contract guaranteeing the payment of money deposited by a county treasurer in a private bank, though depositing county funds in such bank was prohibited by statute and the treasurer guilty of a felony in so doing, the statute being for the protection of the public and not available as a defense by one guaranteeing its payment.—Buhrer v. Baldwin, 137 Mich. 268.

II. CONSTRUCTION AND OPERATION.

§ 5. In general.

See also post ¶ 75.

Collateral nature of promise, see ante § 1.

Liability, release and discharge of guarantor, see post III.

General laws as to interpretation and effect of contracts, see Contracts, VI.

Construction of several contracts as parts of one transaction, see Contracts § 150.

What law governs as dependent on place of performance, see Conflicts of Laws ¶ 45.

Guarantor as "creditor" against unfiled chattel mortgage, see Chattel Mortgages § 45.

¶ 10. Contracts of guaranty are to be construed like other contracts, and the intent of the parties, as collected from the whole instrument and the subject-matter to which it applies, is to govern.—Locke v. McVean, 33 Mich. 473; Morris & Co. v. Lucker, 158 Mich. 518.

¶ 11. It seems that for the purpose of finding out what the contract is the same rules of construction apply as in other mercantile contracts, but when it is ascertained what was agreed then the rules and principles appropriate to the relation apply.—Locke v. McVean, 33 Mich. 473.

¶ 12. A guarantor is not liable beyond the express terms of his contract; but in the case of commercial guaranties drawn by artless persons, unlearned in the law, the terms are not to be construed technically to the disadvantage of the sureties and contrary to their intent.—Columbus Sewer Piper Co. v. Ganser, 58 Mich. 385.

¶ 13. A contract of guaranty should be so construed as to carry into effect the intention of the parties; and such intention must be ascertained from the language of the instrument and the facts and circumstances attending its execution.—Mathews v. Phelps, 61 Mich. 327.

¶ 14. A bond claimed by one party to be a continuing guaranty, and denied by the other to have that effect, was given that effect which best accorded with the intention of the parties as manifested by the terms of the guaranty, taken in connection with the subject-matter to which it related.—Home Sav. Bank v. Hosie, 119 Mich. 116.

¶ 15. One who agrees to be responsible for the payment, to a certain amount, of a bill of merchandise ordered, is not concerned in the question whether all the goods or the precise goods ordered were sent, if the extent of his liability is not increased.—Feustmann v. Gott's Estate, 65 Mich. 592.

§ 6. Amount, items and extent of guaranty.

Liquidated damage clauses, see Damages, VI.

Measure of damages for breach of agent's agreement to exact full payment before delivery of goods and to guaranty payment, see Damages ¶ 341.

¶ 16. A written assurance that "we here agree to pay every man you have in your employ * * * that stays by you until you put in your logs" does not cover persons not employed till after it was received.—McDonald v. Bewick, 43 Mich. 438.

¶ 17. One who agrees in writing to pay to the payees of a note "all the balance due and unpaid" means by the expression that he will pay all the balance due and unpaid after an effort made to collect from the makers and indorsers.—DeCamp v. Schofield, 75 Mich. 449.

¶ 18. Where A. agrees to sell certain goods to be shipped during a specified period, B. agreeing in consideration thereof, and of a guaranty by C. of the fulfillment of the contract on A.'s part, to make certain advances, such guaranty covers loss by reason of the advances.—Sweet v. Newberry, 92 Mich. 515.

¶ 19. A guaranty of "the prompt payment" of certain bonds, "both principal and interest, at the time and times specified in the bonds and in each of them," does not hold the guarantors liable for the payment of the principal of the bonds before their maturity, although the mortgage which secures the bonds and which is of even date with the guaranty by C. of the fulfillment of the conelect to treat the whole amount as due upon default in the interest.—Union Trust Co. v. Detroit Motor Co., 117 Mich. 631.

¶ 20. On a guaranty of an agency contract for sale of sewing machines by which guaranty it was undertaken that the agent should well and truly perform, there was no liability for the agent's nonpayment of notes running for six months after date and drawing interest from four months after date, where the terms of the agency contract called for notes to run for four months without interest but with the privilege of a sixty-day extension, if desired, with interest.—Locke v. McVean, 33 Mich. 473.

¶ 21. One who becomes guarantor for such notes of a specified description as another

shall give in pursuance of a written contract is not liable for notes differing materially from those for which the contract provided. And where the contract, the performance of which is guaranteed, provides for notes at four months without interest, to be renewed, if desired, for sixty days, at eight per cent, the guarantor is not holden for notes running six months, with interest for four months at seven per cent, and thereafter at eight nor for six months' notes with interest at eight per cent after four months; the variance is a substantial one, as affecting a surety's rights.—Locke v. McVean, 33 Mich. 473.

¶ 22. Under a guaranty of "the value of a consignment of jewelry to the extent of $1,000 to be on memoranda for six months and all re-orders to be paid in cash" the guarantor is not liable for the debt of the consignee where there were several successive consignments amounting to $1,700 and the consignee paid more than $1,000 as the goods were sold.—Fogel v. Blitz, 128 Mich. 503.

§ 7. Limited or single guaranty.

Continuing, conditional or optional guaranties, see post § 8.

Evidence to show whether guaranty continuing or limited, see post § 26.

Parol evidence to show whether guaranty is limited or continuing, see Evidence ¶¶ 878, 879.

¶ 23. Where a guaranty contains no express limitation as to either time or amount, and there is nothing in the instrument itself from which it can be inferred that it was the guarantor's intention to leave it open as to both, the guaranty must be understood as referring to a single transaction.—Gard v. Stevens, 12 Mich. 292.

¶ 24. The following was held not to be a continuing guaranty, but to be limited to a single purchase or transaction: "St. Joseph, Sept. 18, 1858. Joseph Gard: Dear Sir—If you will let the bearer have what leather he wants, and charge the same to himself, I will see that you have your pay in a reasonable length of time. J. E. Stevens."—Gard v. Stevens, 12 Mich. 292.

¶ 25. A bond reciting that the principal "has arranged and is about to purchase on credit" certain goods, and declaring it to be void if he shall pay "for all goods purchased or that he may hereafter purchase of [the obligee] according to the terms of purchase," otherwise to be "in full force and effect for the amount of his said indebtedness, not exceeding three thousand dollars," was construed as a commercial guaranty limited to the amount of a single purchase, or at most to what was necessary for the completion of a particular transaction to which the sureties understood the guaranty to relate.—Columbus Sewer Pipe Co. v. Ganser, 58 Mich. 385.

¶ 26. A guaranty of the payment to an employer of moneys collected for him by an employee is properly limited to the amount due at the end of the year's employment provided for in the agreement to which the guaranty refers.—John A. Tolman Co. v. Clements, 98 Mich. 6.

¶ 27. Where a guaranty is limited to a single purchase or transaction the first moneys received by the creditor on the debtor's general account, after a purchase under this guaranty, should be applied upon such purchase.—Gard v. Stevens, 12 Mich. 292.

§ 8. Continuing, conditional or optional guaranties.

See also post ¶ 52.

Limited or single guaranty, see ante § 7.

Bond as continuing guaranty, see ante § 5.

Demand and notice to fix liability, see post § 15.

Evidence as to character of guaranty as continuing or limited, see post § 26.

Parol evidence to show whether guaranty is limited or continuing, see Evidence ¶¶ 878, 879.

¶ 28. A bond was executed by defendant to plaintiff, reciting: That, whereas, P. C. & Co. were then or might thereafter become indebted to plaintiffs in divers sums of money, and might become liable from time to time to pay plaintiffs divers sums of money, to the amount of $3,000, by means of notes, discounts and overdrafts made and indorsed by said P. C. & Co. and for their benefit, and conditioned that if said P. C. & Co. should pay or cause to be paid to plaintiffs all and singular the notes, etc., made by said P. C. & Co., and for their benefit, to the amount of $3,000, and should pay or cause to be paid to plaintiffs all said liability assumed by the said P. C. & Co. to the amount of $3,000, then said obligation to be void, otherwise to remain in full force and effect for three years from January 1, 1837, unless notice to the contrary should sooner be given to the plaintiffs. Held, that the bond was a continuing guaranty and intended to cover successive notes, discounts and overdrafts, made by P. C. & Co. at any time within the three years, as often and whenever the antecedent transactions were discharged.—Farmers' & Mechanics' Bank v. Kercheval, 2 Mich. 504.

¶ 29. A guaranty of payment for goods to be sold "from time to time" to an amount not exceeding a specified sum is continuous until the sums remaining unpaid reach the designated limit, even though the aggregate of purchases far exceeds it. It would be different if the guaranty contemplated a single transaction.—Crittenden v. Fiske, 46 Mich. 70.

¶ 30. When the amount of the guaranty is limited, and the time is not, the contract should be construed as a continuing guaranty.—Mathews v. Phelps, 61 Mich. 327.

¶ 31. An agent was employed by plaintiff to sell cigars upon an agreed commission, the agent to account for all moneys received on such sales, and defendant agreed in writing "to become his surety for the sale of cigars to plaintiff to the extent of $200." Held, that the guaranty was intended to continue so long as the agent sold cigars for plaintiff, or until ended by notice from the surety; and that the surety was liable to plaintiff for the proceeds of the sales, such liability being limited to $200.—Mathews v. Phelps, 61 Mich. 327.

¶ 32. A guaranty of payment indorsed upon a note, in promising the payment of "all costs and expenses paid or incurred in collecting the same," applies only to definite legal costs, and not to uncertain allowances for the creditor's trouble in dunning the maker of the note.—Wetherbee v. Kusterer, 41 Mich. 359.

¶ 33. A guaranty of payment of all moneys collected by one V for account of the guarantees, and of all moneys which they might from time to time advance to V, and of any and all indebtednes due or to become due the guarantees in excess of the amount due said V, "as per the present or any future agreement between them," is a continuing contract, covering changes and modifications in the agreement as originally made between the principal and the guarantees.—John A. Tolman Co. v. Griffin, 111 Mich. 301.

¶ 34. The liability of a continuing guarantor cannot be extended to include an indebtedness growing out of transactions which, as manifested by the situation of the parties and the subject-matter with reference to which the guaranty was given, were entirely foreign to those originally contemplated.—John A. Tolman Co. v. Griffin, 111 Mich. 301.

¶ 35. Where the mortgagee of a stock of goods, then under a writ of replevin, guaranteed that, if he should get possession under his mortgage, certain notes made by the owners of the stock should be paid from its proceeds, it was held that his getting a part only of the proceeds and not enough to satisfy his mortgage did not make him liable upon the guaranty.—Lieberman v. Barman, 36 Mich. 380.

§ 9. ——Acceptance or election by creditor.

Sufficiency of guaranty contract, see § 2.
General law as to offer and acceptance of contracts, see Contracts, III.

¶ 36. A guaranty in blank of a promissory note becomes fixed whenever any one takes the note upon the guarantor's credit.—Nevius v. Lansingburgh Bank, 10 Mich. 547.

¶ 37. Making sales in reliance on a guaranty of payment amounts to an acceptance of it.—Crittenden v. Fiske, 46 Mich. 70.

¶ 38. Where the defendant agreed in writing to guarantee advances made by a bank to a third person, and for that purpose executed a bond prepared by the bank, there was sufficient acceptance of the offer to bind the guarantor.—State Nat. Bank of Albuquerque v. Wernicke, 185 Mich. 281. (Ostrander, Kuhn and Stone, JJ., dissenting.)

¶ 39. If a guaranty is signed by the guarantor without any previous request of the other party, and in his absence, no consideration moving between them except future advances to be made to the principal debtor, the guaranty is, in legal effect, an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract.—Detroit Free Press v. Pattengill, 155 Mich. 272.

§ 10. ——Notice of acceptance or indebtedness.

Nature and sufficiency of guaranty contract, see ante I.

¶ 40. Notice of acceptance of a guaranty by the creditor is not required to be given to the guarantor.—Farmers' & Mechanics' Bank v. Kercheval, 2 Mich. 504.

¶ 41. Where a guaranty of payment is absolute in its terms and waives notice of times or amounts of sales or of defaults or delays in payment, the guarantor is not entitled to notice of its acceptance.—Crittenden v. Fiske, 46 Mich. 70.

¶ 42. Notice of acceptance is essential to bind as guarantors persons who, in response to the request of the principal, sign a guaranty for the payment of goods to be sold him on credit, where the offer of the guaranty to sell the goods was conditional upon his approval of the guarantors after investigation.—De Cremer v. Anderson, 113 Mich. 578.

¶ 43. Notice of acceptance of a contract of guaranty is not necessary to bind the guarantor where the contract recites a consideration, even though such consideration is merely nominal.—Buhrer v. Baldwin, 137 Mich. 263.

¶ 44. Where a writing is not a perfect and conclusive guaranty, but only an offer thereof, notice of acceptance is necessary, and in the absence of such acceptance the relation of guarantor and guaranty is not created.—Brown v. Spiegel, 156 Mich. 138.

§ 11. ——Withdrawal or revocation of guaranty.

¶ 45. An absolute guaranty of payment for future purchases binds neither party until it has been acted on, and until then it may be withdrawn, or delivery of goods may be refused, even though orally promised.—Crittenden v. Fiske, 46 Mich. 70.

¶ 46. There is no revocation of a guaranty where the guarantor writes the creditor

about another guaranty and requests its return because the debtor is not doing business with the creditor and inquires about the guaranty in question, expressing a desire to know all about it and to have it returned if the debtor has settled his account, and the creditor replies, and sends the other guaranty and states that the debtor on the guaranty in question has not settled and requests an acknowledgment, but the guarantor fails to reply, and makes no futher attempt at revocation, although he knows that the debtor is continuing to do business with the creditor.—American Steel & Wire Co. v. Richardson, 191 Mich. 549.

§ 12. Contemporaneous and subsequent guaranties.

Subsequent guaranty of notes as merger of earlier fraud, see Fraud § 86.

¶ 47. Contemporaneous and subsequent guaranties have the same contract force, and differ only as to what considerations sustain them.—Freeman v. Ellison, 37 Mich. 459.

§ 13. Assignment and transfer of guaranty.

Assignability of right, see also Assignments, ¶ 35.

Indorsement of bond as carrying indorsed guaranty, see Bonds § 5.

Misrepresentations as to value or worth of assigned debts or choses in action as fraud, see Frauds §§ 14-17.

Assignment or transfer of guaranteed notes, see Negotiable Instruments.

¶ 48. A general guaranty of payment according to the tenor of the instrument, indorsed upon a bond payable to a specified person or bearer, if not strictly negotiable, is at least transferable by delivery, subject to equities.—Owen v. Potter, 115 Mich. 556.

¶ 49. A general guaranty of payment indorsed on a bond and running to a specified person or bearer is transferable by delivery. —Owen v. Potter, 115 Mich. 556.

III. LIABILITY, RELEASE AND DISCHARGE OF GUARANTOR.

§ 14. Scope, measure and extent of liability.

Collateral nature of guarantor's contract, see ante § 1.

Construction and operation of the guaranty contract, see ante § 5.

Delivery of only part of the goods, as affecting guaranty of payment, see ante § 5.

Limited, conditional, continuing or optional guaranties, see ante §§ 7, 8.

Actions and proceedings to enforce liability of guarantor, see post IV.

Liability of indemnitor, see Indemnity.

Liability of surety, see Suretyship.

Liability of insurance company on policy, see Insurance.

Measure of damages for breach of agreement to pay another's debt, see Damages, § 58.

Effect of death of one of several guarantors on liability under guaranty, see Estates of Decedents, ¶ 446.

Personal liability of guarantor of mortgagor on foreclosure, see Foreclosure § 168.

Responsibility of principal for frauds of agent in procuring guaranty of his own fidelity, see Fraud § 26.

Public officer as guarantor of deposits made by him in his official capacity, see Officers.

¶ 50. In an action for the price of land against one who was a guarantor of payment according to the terms of a contract to purchase it, the liability of the guarantor is for the difference between the value of the land and the price to have been paid, where no deed was ever accepted by the purchaser and the legal title of the land is in the plaintiff.—Stewart v. McLaughlin's Estate, 126 Mich. 1.

¶ 51. Guarantors who in their guaranty have agreed to accept as final and correct a verified statement as kept on plaintiff's regular books of the account between plaintiff and an employee for whom the guaranty was given, cannot impeach an item on account of losses a part of which the employee agreed in his contract with plaintiff to bear.—John A. Tolman Co. v. Clements, 98 Mich. 6.

¶ 52. Guarantors under a continuing guaranty are not precluded from attacking the account required to be kept and rendered for items included therein relating to other business than that covered by the guaranty. —John A. Tolman Co. v. Griffin, 111 Mich. 301.

¶ 53. After making demand upon the district officers for some claimed extras, a contractor threatened to give up his contract to build a school house. An arrangement was made to go on with the work, the contractor to be in charge, but not to handle the money. The contractor and his sureties then joined in a writing, addressed to the architect and school officers, reciting the making of the contract, the giving of the bond, etc., and waiving any and all conditions stipulated in the contract, plans and specifications, with the further stipulation, "we further agree that said contract, plans, and specifications, and bond hereinbefore referred to, are binding and of full force and effect, and shall so remain under any conditions or changes by us herein or heretofore authorized." Held, that the sureties by contract in writing were estopped to deny liability on the bond for goods of material men furnished after the later agreement, or to deny that the contractor was acting in the capacity of contractor.—People ex rel. Reynolds v. Banhagel, 151 Mich. 40.

§ 15. Proceedings to fix liability; demand and notice.

Collateral nature of guarantor's contract, see ante § 1.

Allegations as to proceedings against the principal, see post § 23.
Showing waiver of due diligence in proceeding against principal, see post § 24.
Burden of showing that proper proceedings to fix guarantor's liability have been taken, see post § 25.
Sufficiency of showing of diligence in collecting guaranteed note, see also post § 27.
Conditions precedent to action on warranty of note, see Negotiable Instruments, VII.

¶ 54. No general rule can be laid down in respect to demand and notice in case of guaranties; but where, from the terms of the guaranty, or the facts disclosed in a given case, demand and notice are required, the omission cannot be available as a defense unless the defendant can show that he has been damnified thereby.—Farmers' & Mechanics' Bank v. Kercheval, 2 Mich. 504.

¶ 55. In the case of a continuing guaranty demand of the principal and notice to the guarantor at the close of the period covered by the guaranty was held unnecesary.—Farmers' & Mechanics' Bank v. Kercheval, 2 Mich. 504.

§ 16. ——Action or suit, judgment and execution on principal debt.

¶ 56. The assignor of a note and mortgage covenanted with the assignee that in case the latter should fully prosecute the note to judgment, and foreclose the mortgage, and should not collect a specified sum, with costs, and if upon execution or foreclosure the mortgaged lands should be taken for sale or set-off, then the assignor would pay said sum. The mortgage was foreclosed in chancery; and it was held, in a suit upon the covenant, that the assignor could not set up, in defense, a mere irregularity in the foreclosure.—Barnes v. Baker, 2 Mich. 377.

¶ 57. Decree having been taken for the sum due, and execution awarded for any deficiency after sale of the mortgaged premises, this was held a sufficient compliance with the condition of the covenant that the note should be prosecuted to judgment.—Barnes v. Baker, 2 Mich. 377.

¶ 58. Before the assignee of a note secured by a mortgage could sue the guarantor of collection upon the covenant he must exhaust his remedy against the mortgagor by issuing execution to the county of his residence.—Barnes v. Baker, 2 Mich. 377.

¶ 59. Where the amount of a note guaranteed is such that suit may be brought upon it either in justice's court or the circuit court, the condition of a guaranty of collection is complied with by obtaining judgment in a justice's court and making due endeavor to collect it by execution.—Thomas v. Dodge, 8 Mich. 51.

¶ 60. It is not necessary that a transcript of a justice's judgment upon a guaranteed note should be filed in the circuit court, and execution issued against lands thereon, where it clearly appears that the judgment debtor has no real estate liable to execution.—Thomas v. Dodge, 8 Mich. 51.

¶ 61. Where one guarantees the collection of a note which is secured by a collateral mortgage, and at the same time assigns the mortgage with the note, he is not liable upon his guaranty until resort has been had to the mortgage as well as to the note for collection of the moneys secured.—Barman v. Carhartt, 10 Mich. 338.

¶ 62. A guarantor of the collection of a note cannot be sued until legal proceedings to enforce its collection have been taken against the maker of the note without effect. —Bosman v. Akeley, 39 Mich. 710.

¶ 63. A guaranty of payment "when all legal means to collect * * * shall have been used" without success does not furnish a ground of action unless plaintiff shows that he has fully exhausted his remedy at law by recovery of judgment, issue and return of execution unsatisfied at return day, and, if suit was begun in justice's court, by the filing of a transcript of judgment in the circuit court and issue and return of execution thereon. An offer to show that such proceedings would be fruitless would not be enough.—Schermerhorn v. Conner, 41 Mich. 374.

¶ 64. A guaranty of the collection of a debt secured by mortgage does not bind the guarantor to pay until after foreclosure and failure to obtain payment from the mortgaged premises or otherwise from the debtor.—Johnson v. Shepard, 35 Mich. 115.

¶ 65. Where a declaration upon a guaranty of collection is framed on the basis of a diligent and unsuccessful prosecution of all the principal debtors to judgment and execution, the record of an action against such principal debtors, which, as to two of them, shows no more than the institution of a suit which was afterward stayed, is insufficient to establish a right of recovery.—Aldrich v. Chubb, 35 Mich. 350.

¶ 66. Proof of an action seasonably commenced against principal debtors, and carried on diligently and in good faith against them all to final judgment and execution, but without avail, is sufficient to establish the creditor's right to demand payment from a guarantor of collection.—Aldrich v. Chubb, 35 Mich. 350.

¶ 67. In suing on a guaranty of the collection of a note plaintiff must show, as an indispensable preliminary, that he has been unable, though reasonably diligent, to collect from the maker; and where there are several principal debtors he must show this

as to each and all of them.—Aldrich v. Chubb, 35 Mich. 350.

¶ 68. Under a "guaranty of the within note and mortgage as one contract; will pay deficiency on mortgage sale," defendant's liability as guarantor was fixed as soon as the deficiency arose on the foreclosure, and plaintiff was not bound to exhaust his remedy on the note.—Briggs v. Norris, 67 Mich. 325.

¶ 69. In foreclosing a chattel mortgage of which the collection is guaranteed, the mortgagee need not foreclose against property covered by the mortgage, but to which the mortgagor has no right, and when he has unsuccessfully tried to replevy such property he may proceed against the guarantor.—Briggs v. Norris, 67 Mich. 325.

¶ 70. An agreement by which the assignor of notes and accounts warrants that a certain amount—less than their face—shall be realized thereon, conditioned that vendee shall "use due diligence in their collections," amounts to a guaranty of collection, and requires resort to legal process to collect each account before recourse to the guarantor; and no showing of diligence is sufficient that does not include proof that each account has been put in judgment and execution thereon returned unsatisfied.—Clark v. Kellogg, 96 Mich. 171.

¶ 71. A guarantor of the payment of a mortgage sold by him, who secures the guaranty by a trust deed of land, cannot require the exhaustion of the land covered by the mortgage before resorting to that deeded to secure the payment of the mortgage, when a bill is brought to foreclose the mortgage and enforce the security of the guaranty.—Miller v. McLaughlin, 141 Mich. 425.

§ 17. Release or discharge of guarantor.

Question whether new note was substituted for guaranteed one, for jury, see post § 28.

General law as to modification and discharge of contracts, see Contracts, VIII.

What constitutes mistake in signing instrument, see Mistake.

¶ 72. The guarantor of the payment of a note is not released by the holder's failure to give him notice of its non-payment or to sue the maker, nor, though he had no such notice, is he released by the maker's becoming insolvent some time after the maturity of the note.—Roberts v. Hawkins, 70 Mich. 566.

¶ 73. Re-employment of an agent whose accountability was guaranteed for a fixed time, to the end that he might work out an amount owing at the end of that period and covered by the guaranty, does not release the guarantor.—John A. Tolman Co. v. Clements, 98 Mich. 6.

¶ 74. A guarantor of the payment of bonds secured by a trust mortgage is not released because the property, instead of being subjected to mortgage foreclosure, is sold in bankruptcy proceedings on the petition of the obligees.—Owen v. Potter, 115 Mich. 556.

¶ 75. Where a married woman executed a mortgage as a security for the amount of $1,000 according to the conditions of an agreement between her husband and another for coal and wood to be sold not to exceed $1,000 at any one time, sales to be made from time to time, the undertaking is not that she should become surety for the first $1,000 sold her husband but an undertaking to secure $1,000 of credit, and she is not discharged by the first $1,000 paid by her husband to the mortgagor on account.—Rundle v. Scully, 144 Mich. 62.

¶ 76. Where a person becomes guarantor on a demand note given as collateral for the payment of notes by a then solvent corporation, which continued solvent during the lifetime of the guarantor and for two years after his death, a delay in demanding payment upon the collateral note for a period of five years after the death of the guarantor releases him and his estate from liability.—In re Kelley's Estate, 173 Mich. 492.

¶ 77. Delay in the shipment of goods ordered by a corporation, will not relieve its officers on a guaranty of payment, where the delay was caused by their failure to promptly furnish security at the request of the seller.—Sheldon Axle Co. v. Landman, 186 Mich. 61.

§ 18. ——Alterations in or departure from principal contract.

Legality of principal contract, see ante § 4.

¶ 78. Guarantors of collection are released by any dealings between the creditor and debtor substantially changing their contract relations before the guarantor's liability is finally settled.—Johnson v. Shepard, 35 Mich. 115.

¶ 79. A guarantor upon a contract of agency cannot be held, if after signing a draft of the agreement to be submitted to the principal, the latter so alters it as to enlarge the agent's liability, as by requiring him to become responsible for more property or less salable property than at first contemplated.—Osborne v. Van Houten, 45 Mich. 444.

¶ 80. Where a guaranty covered advances agreed to be made for goods to be delivered thereafter, it was held that the giving of acceptances due at the time stated in the contract guaranteed did not constitute such a departure from the contract as released the guarantor, even though such acceptances were given before the time specified for the first advancement.—Sweet v. Newberry, 92 Mich. 515.

¶ 81. Where the performance of a contract by A. to sell and ship a certain number of barrel hoops to B. has been guaranteed by C. so that C. becomes liable for advances made upon hoops that are not delivered, and where such contract provides for the payment of interest on advances until their repayment "by shipment of hoops or otherwise," held, that B.'s acceptance of a note for a part of the advances maturing after the time when by the terms of the contract full payment for the advances should have been made by shipment of hoops, which note was discounted and not held by B. at that date, is equivalent, as between B. and C., to a payment on the advances of the amount of the note, and to that extent but no further it discharges the guarantor.—Sweet v. Newberry, 92 Mich. 515.

¶ 82. One who is jointly liable with the lessees for the payment of rent under a lease, if the lessee defaults, is not discharged by an agreement to which he is not a party, to reduce the rent, subsequently entered into by the lessors with the lessees.—Preston v. Huntington, 67 Mich. 139.

¶ 83. Those who have guaranteed the payment of the principal and interest of bonds "at the time specified in the bonds," are not released from liability, either as to matured interest or as to the principal when due, by the election of the bondholders' representative, under a provision in the mortgage securing the bonds, to declare the principal immediately due for default in interest; such election being ineffectual as to the guarantors, and not varying their contract.—Union Trust Co. v. Detroit Motor Co., 117 Mich. 631.

¶ 84. The bond of a public contractor, conditioned to pay if the principal does not, for material and labor entering into the construction of the contract work, is not rendered inoperative as to sureties by an alteration in the contract as to the time or manner of paying the contractor.—People ex rel. Reynolds v. Banhagel, 151 Mich. 40.

§ 19. ——Extending time to principal.

¶ 85. If the creditor gives time to the principal without the consent of the guarantor the latter is discharged.—Farmers' & Mechanics' Bank v. Kercheval, 2 Mich. 504.

¶ 86. If one of several principals gives his own obligation for the original debt, and time is given him without the guarantor's assent, the latter is discharged.—Farmers' & Mechanics' Bank v. Kercheval, 2 Mich. 504.

¶ 87. Where a guarantor obligated himself to pay all the liabilities, up to a sum certain, of the principal, for advances by way of notes, etc., if the principal should fail to pay the same, such obligation "to remain in full force and virtue for the space of three years from the first day of January, 1837," and, for the notes so constituting the indebtedness guaranteed, new notes were taken within the three years, falling due after the three years, it was held that such credit to the principal beyond the time limited in the bond discharged the surety.—Farmers' & Mechanics' Bank v. Kercheval, 2 Mich. 504.

¶ 88. The guarantor is equally discharged though the renewal notes be signed by and binding upon one only of several principals constituting a partnership.—Farmers' & Mechanics' Bank v. Kercheval, 2 Mich. 504.

¶ 89. Where a debtor wrote to his guarantor saying that the creditor would extend the time if he received a payment on the debt, and asking the guarantor to make it, which he did, it amounts to a consent and the guarantor could not set it up as an extension without his consent.—Briggs v. Norris, 67 Mich. 325.

¶ 90. An extension of time by the payee of a note must, to operate as a release of a surety or guarantor, be more than a mere agreement to indulge or forbear. It must present the essentials of a binding contract, reasonably definite as to time and for a valid consideration, and payment of interest in advance is a sufficient consideration.—In re Kelley's Estate, 173 Mich. 492.

¶ 91. Where one becomes guarantor on a demand note given as continuing security and collateral for the payment of other existing short-time paper, which paper is from time to time renewed, the death of such guarantor known to the holder is notice to the holder of revocation and terminates the progressive element of the guaranty as to him and his estate, and it becomes the duty of the holder to grant no further extensions of the paper for which such note is collateral, and further extensions release the deceased guarantor and his estate.—In re Kelley's Estate, 173 Mich. 492.

¶ 92. Where one became guarantor on a demand note given as continuing security and collateral for the payment of other existing short-time paper, the bank before renewing the paper should exercise sufficient diligence to ascertain if the guarantor is alive.—In re Kelley's Estate, 173 Mich. 492.

§ 20. ——Misapplication of proceeds or change of securities.

¶ 93. Accommodation guarantors of a note payable to a bank, who sign the note with the understanding that other notes of an equal or greater amount shall be deposited with the bank as collateral security, and that, when paid, the proceeds shall be applied on the note guaranteed by them, are released from liability where the bank, without their consent, accepts in place of the notes originally deposited as collateral new notes executed by only one of two makers, and extends the time of payment of the same.—First Nat. Bank v. Walker, 115 Mich. 484.

¶ 94. One Butler purchased of defendant personal property and gave to the latter a chattel mortgage to secure a note given to defendant in payment therefor. Defendant with Butler's consent removed a portion of the mortgaged property and appropriated the same. In a foreclosure suit, the court credited on the note the value of the property removed. Held, that complainant, who guaranteed the payment of a portion of the sum due on the note, was not released by said removal of the property.—Latham v. Savage, 166 Mich. 300.

¶ 95. The fact that a guaranty of future advances is used to satisfy an existing indebtedness held not to discharge the guarantor.—State Nat. Bank of Albuquerque v. Wernicke, 185 Mich. 281. (Ostrander, Kuhn and Stone, JJ., dissenting.)

¶ 96. Where a guaranty of advances was given without any representations by the obligee as to the debtor's existing liabilities, and the guarantor made no inquiries with respect thereto, the fact that the guaranty was applied to an existing indebtedness does not amount to fraud sufficient to discharge the guarantor.—State Nat. Bank of Albuquerque v. Wernicke, 185 Mich. 281. (Ostrander, Kuhn and Stone, JJ., dissenting.)

¶ 97. Where A.'s contract to sell and ship a certain number of barrel hoops to B. has been guaranteed by C., the fact that the first hoops shipped were by agreement between A. and B. applied in payment of an old debt of A. to B. does not violate the contract performance of which has been guaranteed by C.; for that contract relates to no specific hoops, and A.'s duty to ship the full amount provided for in such contract is not changed by the agreement making such application.—Sweet v. Newberry, 92 Mich. 515.

§ 21. ——Performance or tender of performance by principal.

Evidence as to payments made on guaranteed contract, see post § 26.

¶ 98. The guaranty by a former owner of the collection of a note purchased when overdue is discharged by the refusal of the purchaser to receive the money when offered to him by the makers.—Sears v. Van Dusen, 25 Mich. 351.

¶ 99. Where a county treasurer gave a check to his successor in office for an amount due the county from a bank in which he had deposited the funds and the successor redeposits it, the transaction does not amount to a payment of the amount deposited so as to relieve a guarantor of its payment.—Buhrer v. Baldwin, 137 Mich. 268.

IV. REMEDIES AND ACTIONS AMONG THE PARTIES.

Guarantors of mortgagor as parties defendant in equity foreclosure, see Foreclosure, § 67, ¶¶ 252-254.

Right of guarantors of mortgagor who did not object in foreclosure to be heard before execution issues on contingent decree against them, see Foreclosure ¶ 742.

§ 22. In general.

Proceedings to fix guarantors liability, see ante § 15.

Right of guaranteed creditor to maintain creditors' suit against corporate guarantor, see Corporations § 200.

Action on guaranty of bank deposit of county funds running to treasurer, see Counties § 56.

Actions on guaranteed notes, see Negotiable Instruments.

Effect of discontinuance as to guarantor in suit on note, see Negotiable Instruments.

Foreclosure of trusts created to secure guaranty of payment of mortgage, see Trusts.

Actions upon vendor's guaranty of the character and productivity of land, see Vendor and Purchaser.

¶ 100. One who is sued as a guarantor of notes is not entitled to have them returned to him as a condition precedent to judgment against him, where he took them as agent in payment for goods sold and in so doing violated instructions not to take any but collectible paper in payment.—Clark v. Roberts, 26 Mich. 506.

§ 23. Pleading.

General law of pleading, see Pleading.

¶ 101. A declaration on a guaranty within the purview of the statute of frauds need not aver that it was in writing, or that the undertaking guaranteed was made with the formalities required by that statute.—Dayton v. Williams, 2 D. 31.

¶ 102. A declaration on a guaranty of the collection of a note is demurrable if it does not state that legal proceedings have been taken to enforce collection without effect.—Bosman v. Akeley, 39 Mich. 710.

¶ 103. That the averment in a declaration on a guaranty of notice to the defendant of nonperformance by his principal omits to state when or where the notice was given is no ground for arresting judgment, but only of special demurrer.—Dayton v. Williams, 2 D. 31.

§ 24. ——Issues and variance.

¶ 104. A claim based upon defendant's alleged original liability as principal debtor will not sustain a recovery against him as guarantor.—Lyon v. Chamberlain, 41 Mich. 119.

¶ 105. When a declaration upon a guaranty of collection avers that plaintiff used due diligence, it in effect avers that plaintiff pursued the course imposed on him by law to charge the guarantor, and an alleged sub-

sequent waiver by defendant, excusing plaintiff's failure to use such diligence, cannot be shown unless counted upon.—Clark v. Kellogg, 96 Mich. 171.

§ 25. Presumptions and burden of proof.

Necessity of showing that remedies against principal have been exhausted, see ante §§ 15, 16.

General law as to presumptions and burden of proof, see Evidence, II.

Presumptions as to guaranty of note, see Negotiable Instruments.

¶ 106. Where suit is brought upon a guaranty of a promissory note the presumption that the plaintiff is the promisee will prevail in his favor, at least until rebutted by showing that the guaranty had previously been operative in other hands.—Nevius v. Lansingburgh Bank, 10 Mich. 547.

¶ 107. Where a declaration upon a guaranty of collection avers the guarantor's liability to have been fixed by the prosecution of all the principal debtors to judgment and execution, without obtaining satisfaction, the plaintiff is bound to maintain this allegation by proof of the facts alleged; and the record of an action which, as to two of the debtors, shows no more than the institution of a suit which was afterwards stayed, is insufficient. —Aldrich v. Chubb, 35 Mich. 350.

§ 26. Admissibility of evidence.

Evidence of facts and circumstances attending execution of the guaranty, see also ante § 5.

Evidence variant from the pleadings, see ante § 24.

Best and secondary evidence of principal contract in action on guaranty, see Evidence ¶ 655.

Parol evidence to show whether guaranty is limited or continuing, see Evidence ¶¶ 878, 879.

Parol evidence to show true consideration, see Evidence § 161.

Parol to show that absolute notes and mortgage were merely by way of guaranty, see also Evidence § 181, ¶ 1079.

¶ 108. The actual consideration for a guaranty being averred in the declaration, it may be proved by parol, notwithstanding the guaranty is expressed to be "for value received." —Jones v. Palmer, 1 D. 379.

¶ 109. In an action on a written guaranty to pay an attorney for services rendered the guarantor's son, evidence is admissible to show that a payment made by a third person, and which was not shown by the plaintiff's bill of particulars, was not in payment of the plaintiff.—Barkworth v. Campbell, 183 Mich. 34.

¶ 110. Although the indemnitor is not notified of the former suit, a judgment against the indemnitee is prima facie evidence of the amount of damages for which the indemnitor is liable.—Clark v. Clune, 172 Mich. 323.

¶ 111. Where it is doubtful whether a mercantile guaranty was meant to be continuing or limited, it is proper to show by a surety what was said, when it was executed, as to the time it should run, if such showing does not contradict its terms but aids in its interpretation.—Columbus Sewer Pipe Co. v. Ganser, 58 Mich. 385.

¶ 112. The sureties on a commercial guaranty limited to a single transaction should be allowed to show what credit was to be given and what were the terms of the purchase as understood by them at the time the bond was given.—Columbus Sewer Pipe Co. v. Ganser, 58 Mich. 385.

¶ 113. In an action on a written guaranty to pay for goods sold by plaintiff to a third party, the original order for the goods need not be produced to identify what goods were sold and delivered to the vendee; that may be shown by other evidence.—Feustmann v. Gott's Estate, 65 Mich. 592.

§ 27. Weight and sufficiency of evidence.

See also post § 122.

Statements on employers' books as conclusive upon guarantors of employee, see ante § 14.

Sufficiency of proceedings to fix guarantor's liability, see ante § 15.

¶ 114. A showing of diligence in collecting the amount of guaranteed notes from the person primarily liable is not sufficient unless it includes proof that each account has been put in judgment and execution thereon returned unsatisfied.—Clark v. Kellogg, 96 Mich. 171.

¶ 115. In an action against a guarantor of the payment of the agreed price for land, which purchaser did not accept and which plaintiff has title to, failure to prove the value of the land entitles defendant guarantor to verdict where there was no tender of deed before suit and consequently no basis for recovery.—Stewart v. McLaughlin's Estate, 126 Mich. 1.

¶ 116. Where the original order and other correspondence show defendant to be simply a guarantor of payment for, and not a purchaser of goods, but the plaintiff's agent testifies that in a telephone conversation at the time of the transaction the defendant agreed to be the buyer, the question is one for the jury, and the court will not disturb a verdict based on the testimony of plaintiff's agent, making defendant primarily liable.—Saginaw Milling Co. v. Mower, 154 Mich. 620.

¶ 117. Where defendant guarantees plaintiff partner that the other partner will pay

all demands against the partnership and afterwards a judgment is obtained against the partnership which plaintiff pays, proof of the judgment against plaintiff establishes a prima facie case against defendant on the guaranty without proof that plaintiff notified defendant of the pendency of the suit in which the judgment was secured.—Clark v. Clune, 172 Mich. 323.

¶ 118. A finding that goods ordered by a corporation were received and accepted by it with the knowledge of the defendants, its officers, who guaranteed payment therefor, held sustained by the evidence.—Sheldon Axle Co. v. Landman, 186 Mich. 61.

¶ 119. Where the original order and other correspondence shows defendant to be simply a guarantor of payment for, and not a purchaser of goods, but the plaintiff's agent testifies that in a telephone conversation at the time of the transaction the defendant agreed to be the buyer, the former evidence is not conclusive, but may be modified by the testimony as to the telephone conversation.—Saginaw Milling Co. v. Mower, 154 Mich. 620.

¶ 120. Where complainant signs a guaranty on a $3,000 note, agreeing to be responsible for the payment of any deficiency up to the amount of $1,500, and so signs after another guarantor has agreed to be responsible for a like amount, the trial court under conflicting testimony is justified in finding that complainant agreed to be bound with respect to the second $1,500 and not merely with respect to the first $1,500.—Latham v. Savage, 166 Mich. 300.

§ 28. Questions of law and fact; directing verdict.

See also ante § 116.

General law as to questions of law and fact, see Trial, VI.

Of price by factor as jury question, see Brokers § 44, ¶ 213.

¶ 121. In a suit against the guarantors of a promissory note, where the testimony is conflicting as to whether or not a new note was substituted for the original one, thus releasing the guarantors, the question should be submitted to the jury.—R. L. Polk Printing Co. v. Smedley, 155 Mich. 242.

¶ 122. In a suit on a guaranty to recover the cost of reconstructing a sidewalk which was defectively laid by defendants, a statement of account showing the cost of said reconstruction was referred to by a witness and he testified independently of the account that the cost was a certain sum. Defendants made no suggestion that the proof was insufficient. Held, a verdict directed for plaintiff for the said certain sum would not be reversed as being based on insufficient proof of the reasonableness of the cost of reconstruction.—A. M. Campau Realty Co. v. Lenhardt, 164 Mich. 83.

§ 29. Instructions.

General law as to instructions, see Instructions.

¶ 123. Conflicting testimony was given as to whether defendant promised to pay for goods sold in the first instance, or simply guaranteed payment. The court charged in substance that in the first case the defendant would be liable as purchaser, but in the second he would be only a collateral promisor and not liable, since he made no guaranty in writing. Held, that all the instructions taken together presented this charge, and were correct.—Saginaw Milling Co. v. Mower, 154 Mich. 620.

§ 30. Verdict and findings.

¶ 124. In a suit on a guaranty of collection a finding that shows an apparent exhaustion of legal remedies, but does not describe or identify the note or show that the plaintiff is still a holder, amounts to a mistrial.—Gray v. Pike, 38 Mich. 650.

GUARDIANS AD LITEM AND NEXT FRIENDS.

TREATS of guardians appointed for the purpose of a specific litigation to defend the infant or other incompetent defendant and of next friends (sometimes called guardians ad litem) who carry on litigation for persons non sui juris. It excludes special guardianships pending the appointment or disqualification of the general guardian (see Guardianship) and also excludes the functions and power of the general guardian to sue or defend for the ward (see Guardianship, IV).

Analysis.

I. Necessity and occasion.
§ 1. In general.
§ 2. Infant parties or coparties.
§ 3. Insane, incompetent or weak-minded litigants.

II. Qualifications and appointment.

§ 4. In general.
§ 5. Persons qualified and eligible for appointment.
§ 6. Procedure for appointment.
§ 7. Appointment during pendency of action.
§ 8. Furnishing security to ward.
§ 9. Presumptions and evidence of appointment, and conclusiveness of same.

III. Functions, rights and liabilities.

§ 10. In general.
§ 11. Admissions, waivers or relinquishments.
§ 12. Liability for costs and expenses.

IV. Procedure by or against.

§ 13. In general.

I. NECESSITY AND OCCASION.

§ 1. In general.

Guardianship in general, see Guardianship.
Jurisdiction and necessity or occasion for appointment of general guardians, see Guardianship, I.
Actions and suits by general guardian, see Guardianship, IV.
Parties to actions generally, see Parties.
Special guardians, see Guardianship § 4.
Foreign guardians, see Guardianship § 5.
Effect of disabilities on statute of limitations, see Limitations of Actions, III.
Necessity and occasion for appointment of guardian ad litem, see Jud. Act, chap. XII, § 30; Comp. L. 1915, § 12381.
Necessity and occasion for appointment of next friend to bring action on behalf of infant or person under disability, see Jud. Act, chap. XII, § 28; Comp. L. 1915, § 12379.
Authority of general guardian to defend suit brought against his ward, see Jud. Act, chap. XII, § 30; Comp. L. 1915, § 12381.
Authority of general guardian to appear for and represent ward in suits and proceedings when no other person is appointed guardian ad litem or next friend, see Jud. Act, chap. LVIII, § 20; Comp. L. 1915, § 13969.
Effect of statutory provisions for guardianship in probate court on power of other courts to appoint guardians ad litem and next friends, see Jud. Act, chap. LVIII, § 21; Comp. L. 1915, § 13970.
Appointment of guardians in ejectment and actions relating to real property, see Jud. Act, chap. XXXIII, § 8; Comp. L. 1915, § 13365.
Appointment of guardian ad litem in suit against infant, insane or incompetent person to enforce lien for inheritance tax, see Comp. L. 1915, § 14526.
Appointment of guardian ad litem in condemnation proceedings against infant or person under disability, see Comp. L. 1915, §§ 350, 359, 3141.
Appointment of guardian ad litem in proceedings relative to accounting of testamentary and other trustees, see Jud. Act, chap. LXI, § 37; Comp. L. 1915, § 14088.
Appointment of guardian ad litem in proceedings relative to sale or mortgage of trust property by testamentary or other trustees, see Jud. Act, chap. LXI, § 17; Comp. L. 1915, § 14068.
Appointment of guardian ad litem for any minor, insane or incompetent person holding property to be taken for road purposes, see Pub. Acts 1917, No. 305, § 13.

¶ 1. When an infant is denied admission to the public schools his father may apply for mandamus; a guardian ad litem is unnecessary.—People ex rel. Workman v. Detroit Board of Education, 18 Mich. 400.

¶ 2. A married woman's bill against her husband must be filed by her next friend.—Peltier v. Peltier, H. 19.

§ 2. Infant parties or coparties.

Actions by and against infants, see Infants, VII.
Disabilities and control of minors, see Infants; Parent and Child.
Right of father to sue in his own name on behalf of his child, see Parties.
Judicial protection of infant litigants, see Infants, VII.
Conclusiveness and validity of judgment against minor where no guardian ad litem was appointed, see Judgments, VII.
Objection on writ of error that plaintiffs, being infants, should have acted through next friend, see Appeal ¶ 360.

¶ 3. The prochein ami for an infant plaintiff must be appointed by the court. If the suit is commenced by declaration without such appointment, it will be dismissed on motion.—Haines v. Oatman, 2 D. 430.

¶ 4. Before suit is instituted in behalf of parties, all of whom are infants, a next friend must be appointed for them, that defendant may have some one responsible to him for costs.—Sick v. Michigan Aid Ass'n, 49 Mich. 50.

¶ 5. A guardian ad litem should be appointed to protect interests of infant party in partition.—Prince v. Clark, 81 Mich. 167.

¶ 5a. Where infants are sued they are to be defended by a guardian ad litem and not by a general guardian.—Bearinger v. Pelton, 78 Mich. 109.

¶ 6. Where suit was brought on a policy of insurance taken out for the benefit of a wife and minor children, and these beneficiaries sued as coplaintiffs, the fact that the mother was not designated as next friend was held no ground for abatement. Her appointment as next friend would have been a mere formality.—Sick v. Michigan Aid Ass'n, 49 Mich. 50.

§ 3. Insane, incompetent or weak-minded litigants.

Actions by or against insane persons, see Insane Persons, V.
Actions by or against incompetents, see Incompetents.
Status and custody of insane persons, see Insane Persons, II.
Disability in general of incompetents, drunkards, drug addicts and spendthrifts, see Incompetents.
Sufficiency of evidence to establish insanity, see Insane Persons, I.
Sufficiency of evidence to establish incompetency, see Incompetents.
Appointment of guardian ad litem in proceedings to determine sanity of persons alleged to be insane, see Comp. L. 1915, § 1325.
Appointment of guardian ad litem for feebleminded or epileptic persons on hearing for admission to state home, see Comp. L. 1915, § 1547.

¶ 7. A weak-minded old man not under guardianship may file a bill by solicitor and counsel to set aside for fraud a conveyance made by himself.—McDaniel v. McCoy, 68 Mich. 332.

II. QUALIFICATIONS AND APPOINTMENT.

§ 4. In general.

Persons qualified and eligible, see post § 5.
Procedure for appointment, see post § 6.
Appointment during pendency of action, see post § 7.
Furnishing security, see post § 8.
Evidence of appointment and conclusiveness of same, see post § 9.
Functions, rights and liabilities of person appointed, see post, III.
Appointment to avoid undue continuances, see Continuances ¶ 18.
Appointment and tenure of general guardian, see Guardianship, II.

¶ 8. The practice of appointing next friends to prosecute actions for infants was of statutory origin, and was apparently provided to avoid the difficulty of obtaining the application of the infant for the appointment of a guardian.—Baker v. Pere Marquette R. Co., 142 Mich. 497.

¶ 9. A next friend need not be appointed by the court; it is only necessary that the court should recognize his representative capacity and not dissent.—Sick v. Michigan Aid Ass'n, 49 Mich. 50.

§ 5. Persons qualified and eligible for appointment.

¶ 10. Any proper person may present himself and be accepted as next friend if there is nothing against it.—Sick v. Michigan Aid Ass'n, 49 Mich. 50.

¶ 11. Where the interests of an infant defendant are identical with those of the complainants, and his codefendant is charged in the bill with defrauding said infant as well as the complainants, the codefendant should not be appointed as guardian ad litem for the infant.—Damouth v. Klock, 29 Mich. 289.

¶ 12. In appointing a guardian ad litem for an insane person, the court should appoint the general guardian, or some person who can be relied upon to actively protect the insane person's interest, and not the register of the court or other person who would be naturally expected to make a merely perfunctory defense.—Erwin v. Fay, 165 Mich. 503 (reported sub nom. Love v. Merrill).

¶ 13. On appeal from an order confirming the sale of land, it appeared that certain infants petitioned under Comp. Laws 1897, § 534, for appointment of a next friend, that an order of sale was granted and the land sold. The person nominated was father of three and was stepfather of the fourth, the appellant. It did not appear that he was either guardian or near relative of appellant. Held, that the sale as to the appellant was ordered and made without authority.—In re Flynn's Estate, 171 Mich. 136.

¶ 14. One who has procured a quitclaim of interest which heir of a deceased minor may have cannot sue as next friend at expense of surviving minors, he being directly interested in result of suit.—Crittenden v. Canfield, 87 Mich. 152.

¶ 15. How. St., § 8124, providing that, before any process shall be issued in the name

of an infant who is sole plaintiff, a "competent and responsible" person shall be appointed as next friend for the infant in such suit, who shall be "responsible for the costs," does not mean that the person so appointed must be financially responsible to pay the costs, but only that he shall be liable to respond therefor the same as though he were the party in interest; it being necessary to construe said section in connection with How. St., § 8989, under which, as amended, it is discretionary with the court to order security for costs in such cases.—Rabidon v. Muskegon Circuit Judge, 110 Mich. 297.

§ 6. Procedure for appointment.

See also ante ¶ 9.

Appointment during pendency of action, see post § 7.

Liability for costs and expenses as incident of appointment, see post § 12.

Appointment of next friend to bring action, see Jud. Act, chap. XII, § 29; Comp. L. 1915, § 12380.

Procedure for appointment of guardian ad litem, see Jud. Act, chap. XII, § 30; Comp. L. 1915, § 12381.

Right of infant over fourteen years of age to nominate his guardian, see Jud. Act, chap. XII, § 30; Comp. L. 1915, § 12381.

Appointment of next friend or guardian ad litem in justice court actions, see Jud. Act, chap. LXVII, §§ 22-26; Comp. L. 1915, §§ 14199-14203.

Appointment of guardian ad litem to represent unborn, unascertained or legally incompetent persons in accounting of trustee in probate, see Jud. Act, chap. LXI, § 37; Comp. L. 1915, § 14088.

¶ 16. The appointment of next friend is sufficient, if made in writing by the complainant, accompanied by the written consent of the next friend, and the appointment and consent annexed to the bill.—Markham v. Markham, 4 Mich. 305.

¶ 17. Proceedings for the appointment of a guardian ad litem of an infant defendant were valid where personal service of subpoena was made upon the infant defendant and his mother who was his natural guardian and thereafter no application for the appointment of a guardian ad litem was made by or for the infant defendant within the statutory period after the return day of the process and where upon the petition of the plaintiff an order of appointment was made by the court, which became absolute after certified copies thereof had been duly served personally upon the defendant infant and his mother and also upon their counsel and no appearance to ask for the appointment of a guardian was made by or on behalf of the infant defendant within the statutory period of ten days after such service.—Peck v. Kent Circuit Judge, 98 Mich. 639.

¶ 18. It is improper in a bill for divorce against an insane wife to permit the husband complainant to select the guardian ad litem for the wife.—Frieseke v. Frieseke, 138 Mich. 458.

¶ 19. Complainant in a foreclosure suit had a subpoena issued against the defendant, who was mentally incompetent. The sheriff in his return stated that he was unable to serve the subpoena because of the defendant's concealment within the state. Complainant filed an affidavit stating the substance of the sheriff's return, and stating his desire to make application for an order of publication in accordance with sections 485-487, Comp. Laws 1897, and also stating his desire to give notice to said defendant and to her guardian that if she or they did not procure the appointment of a guardian ad litem for said defendant, to appear in the cause within twenty days after the time fixed in the order of publication for her appearance, complainant would apply to the court for a guardian ad litem for her without further notice. The order of publication entered provided that a copy of said order, together with the notice to have said guardian ad litem appointed, should be served on defendant's guardian within twenty days from the date of the order. The order and notice were personally served on the guardian. Held, the aforesaid proceedings gave the court jurisdiction of the person and property of the defendant so as to support its foreclosure decree.—Erwin v. Fay, 165 Mich. 503 (reported sub nom. Love v. Merrill).

¶ 20. Where in a foreclosure suit against an insane person, the court has obtained jurisdiction of the person and subject-matter, and has caused the order of publication to be served upon the daughter of the defendant as general guardian, thereby affording her an opportunity and making it her duty to appear and procure the appointment of a guardian ad litem, the appointment of the register as such guardian ad litem does not deprive the court of jurisdiction to render the decree and cannot be contested upon an application for a writ of assistance.—Erwin v. Fay, 165 Mich. 503 (reported sub nom. Love v. Merrill).

§ 7. Appointment during pendency of action.

Amendment on error to substitute name of infant as party, see Appeal § 523.

Appointment during pendency of action, see Jud. Act, chap. XII, § 31; Comp. L. 1915, § 12382.

¶ 21. It is not error for the circuit court, on the trial of an appeal from a justice's judgment in favor of a mother and her daughter, to appoint the mother next friend of the daughter, whose infancy is for the first time brought to the attention of the court, no objection having been raised in the court below.—McDonald v. Weir, 76 Mich. 243.

¶ 22. An appointment by a justice of the peace of a next friend for an infant plain-

tiff upon plaintiff's motion after issue of process is valid.—Dillon v. Howe, 98 Mich. 168.

¶ 23. A declaration in the name of a guardian may be amended after plea by making the ward the plaintiff, suing by her next friend, the guardian aforesaid.—Morford v. Dieffenbacker, 54 Mich. 593.

¶ 24. Where suit was brought on a policy of insurance taken out for the benefit of a wife and minor children and these beneficiaries sued as coplaintiffs, the failure to have the mother designated as next friend would be cured by a verdict, and after verdict the court should have allowed an amendment instead of turning the minors out of court.—Sick v. Michigan Aid Ass'n, 49 Mich. 50.

¶ 25. Upon an appeal from an action of the probate court on an administration account, the circuit court would have authority, if deemed necessary, to appoint a new guardian ad litem.—Walker v. Hull, 35 Mich. 488.

¶ 26. Failure to appoint a guardian ad litem for infant legatees, on application made in their behalf to the circuit court for leave to appeal from an order of the probate court allowing the executor's account, is a mere irregularity, which may be cured by the appointment of such guardian in the circuit court after an appeal from its decision on the first-mentioned appeal.—In re Sanborn's Estate, 109 Mich. 191.

¶ 27. Authority given by an infant to an agent to enforce his claim under the Log Lien Law is not void because no next friend has been appointed, since the agent is, so far as the infant is concerned, his next friend, and the court may at any time during the proceedings formally approve the selection.—Craig v. Brown, 171 Mich. 256.

§ 8. Furnishing security to ward.

Authority of next friend to receive judgment money paid in settlement of action brought in infant's name, see also post ¶ 34.

Necessity that general guardian give security to guardian ad litem for his compensation before receiving guardianship funds, see post ¶ 35.

Bond to be furnished by next friend, see Jud. Act, chap. XII, § 29; Comp. L. 1915, § 12380.

Necessity for guardian ad litem and next friend to furnish security to ward before receiving any money or property belonging to ward, see 1916 C. C. Rule 63.

§ 9. Presumptions and evidence of appointment, and conclusiveness of same.

¶ 28. A petition for the appointment of a guardian ad litem, purporting to have been signed by the infants, and calendar entries showing that on the day it was filed the order prayed for was made, and an answer signed by the guardian ad litem as such, and a decree referring to the answer of the infant defendants, naming them, by their guardian ad litem, sufficiently evidence the making of the order of appointment, and it will be presumed that the necessary proofs were before the court when the order was made.—Stevenson v. Kurtz, 98 Mich. 493.

¶ 29. A cause in which the plaintiff has appeared by his next friend having been appealed by the defendant from the judgment of a justice of the peace to the circuit court, and no question having been made in the appeal papers as to the regularity of such appearance, it must be assumed for all further purposes in the appellate court that the appointment of the next friend and his appearance before the justice were regular.—Kearney v. Doyle, 22 Mich. 294.

¶ 30. Fraud in the foreclosure of a mortgage against infant defendants is not inferable from the fact that their step-mother, who is a sister of the complainant, acted as their guardian ad litem.—Stevenson v. Kurtz, 98 Mich. 493.

¶ 31. Where the purchaser at a sale knows that she is purchasing real estate from a next friend, she is presumed to have knowledge of the proceedings.—In re Flynn's Estate, 171 Mich. 136.

¶ 32. A ward is concluded by the failure of his general guardian to appeal from the appointment of a guardian ad litem.—Landon v. Comet, 62 Mich. 80.

III. FUNCTIONS, RIGHTS AND LIABILITIES.

§ 10. In general.

Authority of general guardian to represent ward in actions, see Guardianship § 59.

Powers, duties and liabilities of general guardians, see Guardianship, III.

Next friend of infant as interpreter of infant testifying as witness, see Examination of Witnesses § 19.

Remissness of guardian ad litem of insane wife in divorce suit as ground for rehearing, see Divorce ¶¶ 341, 342.

¶ 33. Guardians ad litem cannot bind infant litigants except in strict accordance with the rules framed for their protection.—Sheahan v. Wayne Circuit Judge, 42 Mich. 69.

¶ 34. The next friend of an infant who has recovered a judgment in the infant's name has authority to receive payment therefor and to satisfy the judgment under Comp. L. 1897, § 10458.—Baker v. Pere Marquette R. Co., 142 Mich. 497.

¶ 35. A court should not give up control of a fund belonging to infant litigants without securing the rights of their guardians ad

litem or his solicitor by requiring that proper security be given before such fund is turned over to the general guardian.—Sheahan v. Wayne Circuit Judge, 42 Mich. 69.

¶ 36. It seems that the guardian ad litem of an infant litigant or his solicitor has a lien upon the infant's funds in court.—Sheahan v. Wayne Circuit Judge, 42 Mich. 69.

§ 11. Admissions, waivers or relinquishments.

Admissions by guardian as binding on ward, see Evidence § 426.

¶ 37. An infant is not bound by any attempted relinquishment of its rights by its next friend.—Burt v. McBain, 29 Mich. 260.

¶ 38. The guardian ad litem of an infant defendant cannot bind her by his admissions against her.—Cooper v. Mayhew, 40 Mich. 528.

¶ 39. The next friend of an infant plaintiff cannot bind her by an accord and satisfaction in pursuance of which a slander suit is discontinued, so as to prevent her from bringing another suit on the same cause of action, since only parties to the action can make such contracts binding.—Burt v. McBain, 29 Mich. 260.

¶ 40. A guardian ad litem of an infant defendant cannot admit away any of the infant's rights in his answer in a chancery suit, and if, upon the hearing or upon a proper showing, it appears that any such admission has been made, an amendment will be at once granted to correct it.—Peck v. Kent Circuit Judge, 98 Mich. 639.

¶ 41. A decree in foreclosure against minor defendants rendered upon stipulation with their guardian ad litem waiving irregularities, notices and time to make answer, and allowing decree to be taken at once without answer, is void for want of jurisdiction.—Taylor v. McConnell, 53 Mich. 587.

¶ 42. Decree cannot be granted against an infant upon the admissions of his guardian ad litem.—Thayer v. Lane, W. 200; Ballentine v. Clark, 38 Mich. 395; Chandler v. McKinney, 6 Mich. 217.

§ 12. Liability for costs and expenses.

See also ante ¶ 4.

Necessity for person appointed to be financially responsible and able to pay costs, see ante ¶ 15.

Costs against next friend who has personal interest in suit, see Costs ¶ 124.

Inefficacy of tender of settlement to cast costs on next friend, see Costs § 33.

When guardian ad litem is liable for costs, see Jud. Act, chap. XII, § 30; Comp. L. 1915, § 12381.

Responsibility of next friend for costs, see Jud. Act, chap. XII, § 28; Comp. L. 1915, § 12379.

Liability of guardian ad litem for costs in justice court, see Jud. Act, chap. LXVII, § 26; Comp. L. 1915, § 14203.

Liability of next friend for costs in justice court, see Jud. Act, chap. LXVII, § 23; Comp. L. 1915, § 14200.

IV. PROCEDURE BY OR AGAINST.

§ 13. In general.

Misdescription of next friend as ground for abatement, see Abatement ¶ 10.

Concurrent actions by infant through next friend and by next friend as individual for same cause, see Abatement ¶ 39.

Time for answer on behalf of infant as affected by supposed invalidity of appointment of guardian ad litem, see Equity ¶¶ 351, 352.

Actions or suits by or against general guardians, see Guardianship, IV.

Action on benefit contract by husband for himself and as next friend for his children, see Fraternal Associations § 69.

Judgment against father as next friend as bar to his personal action for injuries to plaintiff son, see Former Adjudication § 58.

¶ 43. It is irregular practice for a guardian ad litem of an infant defendant in foreclosure to join in an answer with other defendants.—Wood v. Truax, 39 Mich. 628.

¶ 44. A bill to restrain the sale of land on execution by one who obtained a judgment as guardian is not demurrable on the ground that the ward is not made a party, under a guardian ad litem, where it does not show that the ward is interested.—Wight v. Roethlisberger, 116 Mich. 241.

GUARDIANSHIP.

TREATS of the relation of guardian and ward and its incidental rights, liabilities, powers, custody, and disabilities, whether the guardianship by judicial appointment, natural relationship or otherwise. It excludes the relation of parent and child and its incidents (see Parent and Child), the general law of Infants, the general law of Trusts, and Guardian ad Litem, all of which see. The status of persons as sane or insane and the commitment of such persons when found insane or incompetent is treated in Insane Persons.

Analysis.

I. Nature, necessity and occasion, and jurisdiction.

§ 1. In general.
§ 2. Minor without competent parent.
§ 3. Insanity and mental incompetency.
§ 4. Special guardians.
§ 5. Foreign guardians.
§ 6. Jurisdiction of probate and chancery courts.
§ 7. Jurisdictional residence or property in state.
§ 8. Place or county for guardianship.

II. The person, appointment and tenure of the guardian.

§ 9. Natural or constructive guardians without appointment.
§ 10. Persons qualified or eligible for appointment.
§ 11. Testamentary nomination.
§ 12. Persons entitled to petition or nominate.
§ 13. Petition and procedure on appointment.
§ 14. ——Notice and persons to be notified.
§ 15. ——Hearing, issues and evidence.
§ 16. ——Findings and order of appointment.
§ 17. Appointment of guardian for incompetent or insane.
§ 18. Appointment of special guardian.
§ 19. Procedure on appeal in circuit court and appointment de novo.
§ 20. Bond on qualifying for letters.
§ 21. Letters, record and evidence of appointment.
§ 22. Termination of guardianship and discharge.
§ 23. Notice and procedure for discharge from guardianship.

III. Powers, duties and liabilities.

A. Respecting Ward's Property and Debts.

§ 24. In general.
§ 25. Natural, constructive or de facto guardians.
§ 26. Testamentary guardian.
§ 27. Special guardian.
§ 28. Status, title and authority of guardian.
§ 29. ——Collection and reduction of estate to possession.
§ 30. ——Compromising claims and making settlements.
§ 31. ——Redeeming and removing incumbrances.
§ 32. ——Contract powers and dealings for estate.
§ 33. ——Disposal of or charge on properties.
§ 34. ——Keeping and investment of funds.
§ 35. Claims against estate and allowance and enforcement of them.
§ 36. Sale or disposal of realty by guardian.

§ 37. ——Estate of insane ward.
§ 38. ——Interests and estate salable.
§ 39. ——Petition for sale, notice, hearing, and license.
§ 40. Notice of sale.
§ 41. ——Affidavit and proof of publication and posting.
§ 42. Guardian's oath on making sale.
§ 43. Guardian's sale bond or security.
§ 44. Conduct of sale and rights and liabilities of bidders.
§ 45. Report, confirmation and deed.
§ 46. Rights and titles of purchasers, defects and irregularities.
§ 47. ——Statutory force and effect of deed.
§ 48. ——Guardian as purchaser.
§ 49. ——Right to crops on lands sold.
§ 50. Annulment or other relief from invalid sale.
§ 51. Mortgaging ward's estate.
§ 52. Necessity for further security before receiving award in action.
§ 53. Recovery of money paid out.
§ 54. Leases of ward's lands.
§ 55. Rights and powers of successors.

B. Respecting Ward's Person, Education and Support.

§ 56. In general.
§ 57. Powers of natural guardians.
§ 58. Support and education of ward.

IV. Actions, suits and proceedings.

§ 59. Authority to represent ward.
§ 60. Name in which to sue or defend.
§ 61. Remedies and forms of action.
§ 62. Defenses and set-offs.
§ 63. Consents and admissions.
§ 64. Costs.

V. Accounting, settlement and compensation.

§ 65. Nature and scope.
§ 66. Right and duty in general.
§ 67. Time for accounting, delay and laches.
§ 68. Accounting suits in equity.
§ 69. Method of stating and items to be charged or credited.
§ 70. ——Allowance for support and education of ward.
§ 71. ——Charging guardian for services of ward.
§ 72. ——Losses or depreciation.
§ 73. ——Disbursements and costs of litigation.
§ 74. ——Interest.
§ 75. ——Expenditures of de facto guardians.
§ 76. Compensation of guardian.
§ 77. Mistakes, amendments and corrections.
§ 78. Hearing and procedure on settlement and distribution of estate.
§ 79. Burden of proof, presumptions, and evidence.

VI. Rights and dealings between guardian and ward.

§ 80. In general; presumptions and policy of law.

VII. Bonds and actions on same.

§ 81. Obligation and breach of and liability on bonds.
§ 82. ——On bonds for sale of real property.
§ 83. Liability of sureties.
§ 84. ——Notice and procedure on discharge of sureties.
§ 85. Actions and procedure on bonds.
§ 86. ——Applications for leave to sue.
§ 87. Defenses, objections and estoppels.
§ 88. Presumptions and evidence.

I. NATURE, NECESSITY AND OCCASION, AND JURISDICTION.

§ 1. In general.

Minority, see post § 2.
Insanity and mental incompetency, see post § 3.
Special guardians, see post § 4.
Foreign guardians, see post § 5.
Guardians and next friends appointed in specific litigation to represent persons not sui juris, see Guardians ad Litem.
Relation of parent and child and its incidents, see Parent and Child.
Adoption of children, see Adoption.
Apprenticeship, see Apprentices.
Statutory instances in which guardian may be appointed by probate court, see Jud. Act, chap. LVIII, § 1; Comp. L. 1915, § 13950.
Spendthrift guardianship, see Jud. Act, chap. LVIII, §§ 15-18; Comp. L. 1915, §§ 13964-13967.

¶ 1. Persons who can be safely trusted with taking care of themselves are seldom, if ever, liable to guardianship. Nor is one incompetent because so sick or crippled as to be compelled to leave his affairs in the hands of servants or agents.—Storick's Case, 64 Mich. 685.

¶ 2. The probate court has no power to appoint a guardian for the person or estate of a mentally competent person not a minor, even though all her relatives and friends should request it, and she desire and consent to it.—North v. Joslin, 59 Mich. 624.

§ 2. Minor without competent parent.

Status and disability of infants in general, see Infants, I.
Waifs and abandoned children, see Incompetents.
Wardship of courts over children of divorced parents, see Divorce § 112.
Disposal of custody of children on granting divorce, see Divorce, IX.
Statutory provision for appointment of guardian for minors, see Jud. Act, chap. LVIII, § 1, ¶¶ 1, 2; Comp. L. 1915, § 13950, ¶¶ 1, 2.
Authority of probate court to declare parents incompetent or unsuitable, see Jud. Act, chap. LVIII, § 6; Comp. L. 1915, § 13955.

¶ 3. Primarily, the court is the guardian of all orphan children, and will give the proper directions as to their care and support until a guardian is appointed; and thereafter it will see that the duties of the trust are properly executed.—In re Stockman, 71 Mich. 180.

§ 3. Insanity and mental incompetency.

See also post ¶¶ 42, 46.
Sufficiency of findings as to mental incompetency, set post ¶¶ 63, 64.
Appointment of guardian for incompetent or insane, see post § 17.
Conclusiveness of probate adjudication as to insanity, see Probate Courts, III.
Sufficiency of evidence to establish insanity, see Insane Persons, I.
Sufficiency of evidence to establish incompetency, see Incompetents.
Existence and ascertainment of insanity, see Insane Persons, I.
Statutory provision for appointment of guardian for insane or mentally incompetent persons, see Jud. Act, chap. LVIII, § 1, ¶ 4; Comp. L. 1915, § 13950, ¶ 4.

¶ 4. How. St., §§ 6314, 6315, expressly confine their operation to a person non compos mentis, and whose mind has become affected by old age or other causes, so as to lose its normal condition. The statute does not refer to persons who are sane, but not perhaps as wise or intelligent as some other persons.—Storick's Case, 64 Mich. 685.

¶ 5. To warrant the appointment of a guardian for an incompetent person, there must be an adjudication of record that such person is mentally incompetent to take care of herself and manage her property.—North v. Joslin, 59 Mich. 624.

¶ 6. Measures for appointment of a guardian (How. St. § 6314) were recommended in the case of a weak-minded old man, who cannot give his age exactly, but says it is sixty-odd years, where he attempted to convey by deed his homestead without any consideration.—Raynett v. Baluss, 54 Mich. 469.

§ 4. Special guardians.

Appointment of special guardian, see post § 18.

Powers, duties and liabilities of special guardian, see post § 27.
Special guardian, see Jud. Act. chap. LVIII, § 12; Comp. L. 1915, § 13961.

¶ 7. In a proceeding under Comp. Laws 1897, § 8710, providing for the appointment of a guardian for incompetent persons, the question of appointing a special guardian pending the application for the appointment of a general guardian, or pending any appeal or litigation with relation to such appointment, is addressed to the sound discretion of the court and is determined by the apparent condition of the ward or of his estate, or both.—Wagner v. Wayne Probate Judge, 151 Mich. 74.

§ 5. Foreign guardians.

Guardian for nonresident ward having property in state, see post § 7.
Recognition of foreign guardians, see Conflict of Laws § 38.
Foreign guardians, see Jud. Act, chap. LIX, §§ 34, 35; Comp. L. 1915, §§ 14020, 14021.
Bond of foreign guardian acting within this state, see Jud. Act, chap. LVIII, § 28; Comp. L. 1915, § 13977.
Removal from state of property of nonresident ward, see Jud. Act, chap. LVII, § 35; Comp. L. 1915, § 13984.

§ 6. Jurisdiction of probate and chancery courts.

Jurisdictional residence or property in state, see post § 7.
Place or county for guardianship, see post § 8.
Appointment of guardian, see post §§ 13-18.
Discharge from guardianship, see post § 23.
Presumption of probate court to make appointment, see also post ¶ 61.
Probate jurisdiction to appoint guardians for insane or incompetent persons, see also post ¶ 71.
Jurisdiction of circuit court on appeal from probate court in matter of guardianship appointment, see also post ¶ 76.
Estoppel to object on appeal to probate court's jurisdiction by submission of claim to it, see also Court § 83, ¶ 298.

¶ 8. The jurisdiction of the probate court embraces not only the appointment of and control over guardians, but the care and protection of the estate of the wards.—In re Estate of Andrews, 92 Mich, 449.

¶ 9. The power of appointing guardians for infants—vested by statute in the probate courts—was formerly vested in the court of chancery, and must be considered as having been transferred with such of its incidents as can be properly exercised in the new tribunal.—Taff v. Hosmer, 14 Mich. 249.

¶ 10. The code of 1827, p. 57, § 1, defined and limited to the cases therein specified the jurisdiction of the probate court over the appointment of guardians for minors conferred in general terms by said code, p. 55, § 1.—Palmer v. Oakley, 2 D. 433.

¶ 11. Under How. St., § 6322, the probate court has some supervisory control over the acts of a guardian in paying his ward's debts, and the approval of the court to a payment may be asked by any person interested in having the question of such payment passed upon.—State v. Dunbar's Estate, 99 Mich. 99.

¶ 12. On the death of a spendthrift's guardian the probate court has power to appoint a successor.—Norton v. Ohrns, 67 Mich. 612.

¶ 13. Chancery has no jurisdiction of a charge of fraud in a guardian's appointment; the matter pertains to the probate court.—Kellogg v. Aldrich, 39 Mich. 576.

¶ 14. The probate court is the proper forum in which to determine the fact of mental incapacity of a person for whose estate an application is made for the appointment of a guardian.—In re Phillips, 154 Mich. 139.

¶ 15. Under Comp. Laws 1897, c. 33, §§ 646-701, and Comp. Laws 1897 c. 234, §§ 8697-8748, the probate court has exclusive jurisdiction of the settlement of the estates of mentally incompetent persons under guardianship, except where its remedies are inadequate; such jurisdiction is not affected by the provision of Comp. Laws 1897, § 651, as added by Laws 1871, No. 39, that the jurisdiction conferred shall not be construed to deprive the circuit court in chancery of concurrent jurisdiction, as such proviso was not intended to confer upon a court of chancery the powers originally exercised by that court, but merely to declare the existing law, and remove any doubt as to the power of the court to exercise inherent equity powers where the remedies in the probate court were inadequate.—Nolan v. Garrison, 156 Mich. 397.

§ 7. Jurisdictional residence or property in state.

Cause of action for death of parent by wrongful act as property of child sustaining guardianship within state, see Conflict of Laws ¶ 99.

¶ 16. Where it appears that one is incompetent to handle his own affairs, and has coming to him an estate which is likely to be lost or squandered unless put in the hands of a competent person, has no friends or relatives within the state, and is a nonresident of the state, the probate court by virtue of Comp. L. 1897, § 8729, may appoint a guardian of the estate of such nonresident incompetent.—Griffin v. Lenawee Probate Judge, 148 Mich. 516.

§ 8. Place or county for guardianship.

¶ 17. Where a person has left his domicile with no intention of returning, and is killed before he establishes another, the legal character of the old domicile does not necessarily control in matters of policy, and determine the place where a guardian for the decedent's infant child should be appointed.—Rice's Case, 42 Mich. 528.

¶ 18. Where a grandfather had the custody of an infant child for years with the father's express consent in the domicile of the child's origin, and the father went to another county where he died after three months' domicile, the domicile of the child continued to be that of the grandfather, and he could legally be appointed guardian of the child.—Hering v. Mosher, 144 Mich. 152.

¶ 18a. Where it is necessary to make a minor a party to probate proceedings, under section 8708, Comp. Laws 1897, the court of one county may appoint a guardian for a minor of another county.—Brown v. Hannah, 152 Mich. 88.

II. THE PERSON, APPOINTMENT AND TENURE OF THE GUARDIAN.

§ 9. Natural or constructive guardians without appointment.

Persons qualified or eligible for appointment, see post § 10.
Testamentary nomination, see post § 11.
Persons entitled to petition or nominate, see post § 12.
Petition and procedure on appointment, see post §§ 13-19.
Powers, duties and liabilities of natural or constructive guardians, see post §§ 25, 57.
Relation of parent and child and its incidents, see Parent and Child.
Custody, protection and support of Infants, see Infants, II.
Right of father and mother to custody of minors, see Jud. Act, chap. LVIII, § 6; Comp. L. 1915, § 13955.

¶ 19. Guardianship in socage does not exist in Michigan.—Kinney v. Harrett, 46 Mich. 87.

¶ 20. A father is the natural guardian of his child, charged with his nurture and education.—People ex rel. Workman v. Detroit Board of Education, 18 Mich. 400.

¶ 21. The mother is the natural guardian of infants whose father is dead.—Sick v. Michigan Aid Ass'n, 49 Mich. 50; Monaghan v. Agricultural Fire Ins. Co., 53 Mich. 238.

¶ 22. An equitable wardship arises where a son takes charge of his father's affairs in the belief that the latter is incompetent to manage them, and the father passively submits.—Jacox v. Jacox, 40 Mich. 473.

¶ 23. A son whose parents have turned over their property to him on the consideration that he will support them stands as their guardian and is bound to gain no advantage in dealing with them.—Bowe v. Bowe, 42 Mich. 195.

§ 10. Persons qualified or eligible for appointment.

Testamentary nomination, see post § 11.
Persons entitled to petition or nominate, see post § 12.
As to business qualifications, see also post ¶ 249.
As to residence qualification, see ante § 8, ¶ 18.
Capacity of trust company to act as guardian, see Comp. L. 1915, § 8052.

¶ 24. Who shall or shall not be appointed guardian of an infant is within the discretion of the court; relatives are usually selected, and those nearest of kin are usually preferred when otherwise competent, the controlling purpose being the interest of the ward.—In re Stockman, 71 Mich. 180.

¶ 25. Under the statute no one but the parents is entitled of right to the guardianship of a minor.—Taff v. Hosmer, 14 Mich. 249.

¶ 26. The laws of this state contemplate the appointment of a guardian who shall have custody of the ward's estate whoever has custody of his person, and they do not provide for corporation guardianships.—Rice's Case, 42 Mich. 528.

¶ 27. A married woman is now a competent guardian.—Goss v. Stone, 63 Mich. 319.

¶ 28. Both at the common law and under the code of 1827 a married woman was competent to be a guardian with the assent of her husband, but not without such assent.—Palmer v. Oakley, 2 D. 433.

¶ 29. Letters granted to a married woman without her husband's assent would be voidable merely, not void. And his assent might be presumed from his joining with her in the bond which the statute required the guardian to give before making sale of the ward's real estate.—Palmer v. Oakley, 2 D. 433.

§ 11. Testamentary nomination.

Powers and duties of testamentary guardians, see post § 26.
Construction and interpretation of wills as to testamentary nominations, see Wills, VI, F.
Right of testators to control guardianship by testamentary provision, see Wills, I.
Testamentary nomination, see Jud. Act, chap. LVIII, § 10; Comp. L. 1915, § 13959.

¶ 30. Guardians for infants may be appointed by the parent's last will instead of by the court, and in such case the court will

recognize their authority and their control of the ward only so long as it is right and proper, and for the ward's best interest.—In re Stockman, 71 Mich. 180.

¶ 31. The refusal to appoint a testamentary guardian is in the sound discretion of the probate court.—Ohrns v. Woodward, 134 Mich. 596.

¶ 32. The probate court may refuse to appoint a testamentary guardian because of mutual distrust between the mother and said proposed guardian, both of whom are named as guardians in the will.—Ohrns v. Woodward, 134 Mich. 596.

¶ 33. The right of the mother to oppose the appointment of a testamentary guardian for her children under Comp. L. 1897, § 8706, is not waived by her consent to the probate of the will.—Ohrns v. Woodward, 134 Mich. 596.

¶ 34. A testamentary guardian is appointed by statutory right and such a guardian must comply with the statutory limitations intended to safeguard the ward by filing a bond or applying for letters before he can bind the ward by a release of mortgage.—Olmstead v. Taylor, 126 Mich. 316.

¶ 35. Laws 1877, Act No. 7, How. St. § 6311, provides that, where a wife survives her husband, his appointment, by will, of a guardian for minor children shall not be operative until approved by the judge of probate after giving opportunity to the mother to show cause in opposition to it. Held, that this provision is not meant to allow an appointment to be defeated by the death of the mother before probate unless some good reason exists. The objection to the appointment is to be made in the probate court when the will comes up for probate; and if the wife has not otherwise objected, and if no affirmative objection is made, the appointment must stand with the rest of the will.—Carpenter v. Harris, 51 Mich. 228.

¶ 36. The father's testamentary appointment of a guardian cannot deprive a mother of the right to the custody of her child.—Goss v. Stone, 63 Mich. 319.

¶ 37. Under Comp. L. 1857, relating to appointment of guardians, no one could complain of a father's exercise of his testamentary power to appoint a guardian for his infant children, nor could that power be reviewed; but the next of kin may dispute the fact of any choice having been made, and therefore may be proper parties to oppose the probate of a will appointing a guardian on the ground that it is not a valid instrument.—Taff v. Hosmer, 14 Mich. 249.

§ 12. Persons entitled to petition or nominate.

Nomination of guardian by minor over fourteen years of age, see Jud. Act, chap. LVIII, § 3; Comp. L. 1915, § 13952.

When probate judge may nominate guardian for minor over fourteen years of age, see Jud. Act, chap. LVIII, § 4; Comp. L. 1915, § 13953.

Nomination of guardian by judge of probate if minor is under fourteen years of age, see Jud. Act, chap. LVIII, § 3; Comp. L. 1915, § 13952.

Persons entitled to petition for appointment of guardian, see Jud. Act, chap. LVIII, § 2; Comp. L. 1915, § 13951.

¶ 38. The brother-in-law of an alleged incompetent is a proper person to petition for the appointment of a general or special guardian, under Comp. Laws 1897, § 8709.—Wagner v. Wayne Probate Judge, 151 Mich. 74.

¶ 39. Where a mere intermeddler applies for the appointment of a guardian for an alleged incompetent, under Comp. Laws 1897, § 8710, the application will be looked upon with disfavor, and a legal remedy may be found.—Wagner v. Wayne Probate Judge, 151 Mich. 74.

¶ 40. In the use of the terms "relations or friends" in the statute providing for applications for the appointment of guardians for incompetents, it was not the intent of the legislature to employ two different words with equivalent legal meanings, but to designate a class of persons other than relatives who might institute guardianship proceedings in the case of alleged insane and incompetent persons, and the words will be given the generally accepted meaning.—Wagner v. Wayne Probate Judge, 151 Mich. 74.

§ 13. Petition and procedure on appointment.

Notice and persons to be notified, see post § 14.

Hearing, issues and evidence, see post § 15.

Findings and order of appointment, see post § 16.

Appointment of guardian for incompetent or insane, see post § 17.

Appointment of special guardian, see post § 18.

Procedure on appeal in circuit court and appointment de novo, see post § 19.

Record and evidence of appointment, see post § 21.

Petition for appointment, see Jud. Act, chap. LVIII, § 2; Comp. L. 1915, § 13951.

By whom minor's nomination for guardian may be certified, see Pub. Act, 1917, No. 60 amending Jud. Act, chap. LVIII, § 5; Comp. L. 1915, § 13954.

Authority to appoint guardian for spendthrift, see Jud. Act, chap. LVIII, § 1, ¶ 3; Comp. L. 1915, § 13950, ¶ 3.

¶ 41. A petition under How. St., §§ 6314, 6315, cannot give jurisdiction unless it fol-

lows the words of the statute or uses language and states facts fully equivalent.—Storick's Case, 64 Mich. 685.

¶ 42. Under How. St., § 6314, a petition stating that petitioner's husband is unable to provide a comfortable and suitable maintenance for his family, that he is not of sufficient ability to manage his personal affairs, and that he is in the habit of making foolish bargains and squanders what he earns, does not confer upon the probate court jurisdiction to appoint a guardian.—Partello v. Holton, 79 Mich. 372.

¶ 43. It is a sufficient averment of the mental incompetency of a person whom it is sought to place under guardianship to state in the petition for the appointment of the guardian that such appointment is necessary because, by reason of extreme old age and other causes, such person "is now mentally incompetent to have the charge and management of his property and has been mentally incompetent for some time past."—Norton v. Sherman, 58 Mich. 549.

¶ 44. A petition under How. St., § 6314, for the appointment of a guardian for a person mentally incompetent, should show what persons will be affected by the proposed action; and this includes the incompetent's presumptive heirs and distributees. If he is married and his wife is living, that fact should appear in the petition.—In re Bansett, 68 Mich. 348.

¶ 45. A petition under How. St., § 6314 sufficiently raises the issue of incompetency when it states that the said B. "is mentally incompetent to have the care and management of his property, though it is followed by unnecessary specifications of such incompetency.—In re Bassett, 68 Mich. 348.

¶ 46. In a petition under Comp. L. 1871, § 4822; How. St., § 6314 for the appointment of a guardian for a person incompetent to manage his own affairs, an allegation that "said A. B. is incompetent to have the care, charge and management of his property; he is old and infirm," is insufficient, as it does not necessarily allege that he is "mentally incompetent." An allegation that A. B. was so addicted to the use of intoxicating drinks as to be liable to become the victim of designing persons, and that through intoxication and foolish speculation he had wasted his estate, though proper in a petition under Comp. L. 1871, § 4825; How. St., § 6317 for the appointment of a guardian for a spendthrift, is mere surplusage in a petition based on mental incompetency.—In re Brown's Estate, 45 Mich. 326.

¶ 47. A petition for the appointment of a guardian for an alleged incompetent person, in order to confer jurisdiction, must show who, if any, the persons are who will be affected by the action sought to be taken, and this will include the presumptive heirs at law.—In re Myers, 73 Mich. 401; In re Bassett, 68 Mich. 348.

¶ 48. A petition for the appointment of a guardian for an alleged incompetent person under sec. 8709, Comp. Laws 1897, need not state the cause of such mental incompetency.—In re Miller's Estate, 173 Mich. 467.

§ 14. ——Notice and persons to be notified.

Notice for discharge from guardianship, see post § 23.

Notice of hearing on petition, see Jud. Act, chap. LVIII, § 2; Comp. L. 1915, § 13951.

¶ 49. The notice required by How. St., § 6314 is essential to give the probate court jurisdiction to appoint a guardian for an insane or incompetent person; it must be in writing, must be given under the order of the probate judge, and must be personally served. It is not enough that the person may have learned of the pendency of the proceedings, or that he appears at the hearing.—North v. Joslin, 59 Mich. 624.

¶ 50. A guardian may be appointed for a minor under fourteen without notice, and if notice is given for a certain day, an appointment made on a previous day is not invalid.—Kelley v. Edwards, 38 Mich. 210.

¶ 51. The probate court has no power to appoint a guardian for a minor over fourteen and within the territory without first citing him to appear and choose his own guardian. And an ex parte application, representing the minor to be under fourteen confers no jurisdiction to appoint without citation, if, in fact, the minor was over that age.—Palmer v. Oakley, 2 D. 433.

¶ 52. On an application for the appointment of a guardian for an alleged incompetent person, a brother of his who holds a mortgage belonging to him under an unrevoked power of attorney is entitled to notice.—Partello v. Holton, 79 Mich. 372.

¶ 53. The incompetent person's presumptive heirs at law must have notice of application for appointment of a guardian.—In re Myers, 73 Mich. 401.

¶ 54. Notice to nonresident heirs of an alleged incompetent person of an application for an appointment of a guardian is not absolutely necessary to the jurisdiction of the court where a majority of the heirs are residents of this state and are duly notified.—Munger v. Kalamazoo Probate Judge, 86 Mich. 363.

¶ 55. Under How. St., § 6798, which authorizes a judge of probate in the absence of a statute directing the manner of giving notice of proceedings in probate court, where notice is required by law, or is deemed by

him necessary to be given, to order it to be given in such manner and for such length of time as he shall deem reasonable, a valid notice may be given by publication to nonresident heirs of an application for an appointment of a guardian for an alleged incompetent person.—Munger v. Kalamazoo Probate Judge, 86 Mich. 363.

¶ 56. The probate court is not deprived of jurisdiction in proceedings for the appointment of a guardian for an incompetent person because of the failure to serve notice upon the guardian of a minor heir when the record fails to show such guardian's name and place of residence, and when it appears that such minor was personally served with notice and was old enough to understand what the notice was.—Munger v. Kalamazoo Probate Judge, 86 Mich. 363.

¶ 57. Compiled L. 1897, § 8709, relative to the appointment of a guardian for incompetent persons, providing that the citation shall be served on the alleged incompetent "not less than fourteen days before the time so appointed," includes the day of hearing as one of the fourteen days' notice.—In re Miller's Estate, 173 Mich. 467.

¶ 58. In a proceeding for the appointment of a guardian for an incompetent, Rule 5 of the Probate Court requiring service of the citation on the next of kin "at least fourteen days before the day set for hearing," has reference to fourteen full days' notice.—In re Miller's Estate, 173 Mich. 467.

§ 15. ——Hearing, issues and evidence.

Statutory provision for hearing on petition, see Jud. Act, chap. LVIII, § 2; Comp. L. 1915, § 13951.

¶ 59. On a hearing on a petition for appointment of a guardian for an incompetent woman it is a material inquiry as to whether the woman was married, under Comp. L. 1897, § 8736, which makes specific provision for married women incompetents.—Burgess v. Stribling, 134 Mich. 33.

¶ 60. On a petition for the appointment of a guardian for an incompetent person, an objection to improper service of notice in order to be available, must be made before the probate court on the hearing.—In re Miller's Estate, 173 Mich. 467.

¶ 61. In the absence of a showing in an application for the appointment of a guardian for an insane person, that no evidence of service other than that to the effect that the return of the officer with the admission of service by the wife and children of the alleged insane person was introduced, the regularity of the service and the jurisdiction of the probate court to make the appointment was assumed.—Reason v. Jones, 119 Mich. 672.

§ 16. ——Findings and order of appointment.

Appeals from probate decrees and orders, see Probate Courts, III.

Decree appointing guardian for incompetent married woman, a res adjudicata of the validity of her marriage, see Former Adjudication § 80.

Review of judgment or decree of circuit on appeal from probate, see Appeal § 30.

¶ 62. The law makes no provision for a finding of facts and law by the probate court in proceedings for the appointment of guardians.—In re Phillips, 154 Mich. 139.

¶ 63. In a proceeding for the appointment of a guardian for an incompetent, a finding by a jury that the respondent "is mentally incompetent to have the charge and management of his property" is sufficient, though the further question of his inability to take care of himself has not been submitted to the jury, especially if such inability has been found by the judge (How. St., § 6315).—Norton v. Sherman, 58 Mich. 549.

¶ 64. On proceedings for the appointment of a guardian finding that a person is "mentally incapable" is equivalent to a finding that he is "mentally incompetent" within the meaning of How. St., § 6314, relating to insane persons, the terms are synonymous.—In re Leonard's Estate, 95 Mich. 295.

¶ 65. A decree of the probate court, appointing a guardian, appeared upon its face to have been made upon an application representing the minor to be under fourteen and did not show any citation to the minor. Held to be valid on its face, though showing no formal finding of the fact that the minor was under fourteen; but held, further, that it might be impeached in a collateral action, by showing that the minor was, at the time, over fourteen.—Palmer v. Oakley, 2 D. 433.

¶ 66. Guardianship of an incompetent extends both to the person and the estate of the ward (How. St., § 6316); and an order appointing A. guardian of B., without mentioning B.'s estate, is unauthorized by statute.—In re Bassett, 68 Mich. 348.

¶ 67. To warrant appointment of guardian for incompetent, the order appearing of record should state that the ward is mentally incompetent to take care of himself and manage his property.—In re Bassett, 68 Mich. 348.

¶ 68. A recital in an order appointing a guardian that the person for whom the guardian is appointed "is mentally incompetent to have charge and management of his property and person, and that a guardian should be appointed for the reason that he is mentally incompetent to have the charge and management of his person and estate," sufficiently adjudicates the facts.—Munger v. Kalamazoo Probate Judge, 86 Mich. 363.

¶ 69. The omission, in the order of appointment, of the name of the person appointed guardian of an incompetent person is a mere clerical error which the probate court can correct at any time.—Munger v. Kalamazoo Probate Judge, 86 Mich. 363.

§ 17. Appointment of guardian for incompetent or insane.

Existence and ascertainment of insanity, see Insane Persons, I.

Conclusiveness of probate court adjudication of incompetency, or insanity, see Probate Courts, III.

Custody and commitment of insane persons, see Insane Persons, II.

Guardianship for mentally incompetent, see Jud. Act. chap. LVIII, § 1, ¶ 4; Comp. L. 1915, § 13950, ¶ 4.

¶ 70. The power of appointment of a guardian for an incompetent person by the probate court is derived from the statute, and, in order to obtain jurisdiction, the statute must be strictly pursued.—Partello v. Holton, 79 Mich. 372.

¶ 71. The probate court derives its jurisdiction to appoint guardians for insane and incompetent persons entirely from How. St.. §§ 6314, 6315, and in order to obtain jurisdiction in such cases the provisions of the statute must be strictly pursued.—North v. Joslin, 59 Mich. 624.

§ 18. Appointment of special guardian.

Necessity and occasion for special guardian, see ante § 4.

Powers, duties and liabilities of special guardian, see post § 27.

¶ 72. A proceeding for the appointment of a special guardian for an incompetent, under Comp. Laws 1897, § 8710, is an auxiliary proceeding.—Wagner v. Wayne Probate Judge, 151 Mich. 74.

¶ 73. The appointment of a special guardian pending an appeal for the appointment of a general guardian, under Comp. Laws 1897, § 8710, is not premature, because the appeal from the order appointing the general guardian has not been perfected.—Wagner v. Wayne Probate Judge, 151 Mich. 74.

¶ 74. A proper showing for the appointment of a special guardian for an incompetent, under Comp. Laws 1897, § 8710, may be made by the proofs produced at the hearing upon the original application.—Wagner v. Wayne Probate Judge, 151 Mich. 74.

§ 19. Procedure on appeal in circuit court and appointment de novo.

Certiorari to review circuit judgment on appeal from appointment, see Certiorari § 14.

Conclusiveness of probate orders, findings and adjudications on appeal in circuit court, see Probate Courts, III.

¶ 75. Where, on appeal from a probate order appointing a guardian, the circuit judge makes a new appointment, he is bound to ascertain, as far as possible, the wishes of deceased parents, and all other facts bearing on the selection of a proper custodian; he should hear the next of kin, if they desire, and should regard the family relation and its mutual rights and duties, preferring relations to strangers.—Goss v. Stone, 63 Mich. 319.

¶ 76. On appeal the circuit court is the proper forum in which to determine the fact of mental incapacity of a person for whose estate an application is made for the appointment of a guardian.—In re Phillips, 154 Mich. 139.

§ 20. Bond on qualifying for letters.

Obligation and breach of bonds and liability and actions on same, see post, VII.

Guardian's bond on sale of real estate, see post § 43.

Further security on receipt of award in action, see post § 52.

Necessity for natural guardian to furnish security before exercising control of minor's estate, see post ¶ 97.

Guardianship bonds, see Jud. Act, chap. LVIII, § 13; Comp. L. 1915, § 13961.

Bond of testamentary guardian, see Jud. Act, chap. LVIII, § 11; Comp. L. 1915, § 13960.

¶ 77. Before the court of chancery will order money to be paid to a guardian it must be satisfied that he has given sufficient security for the performance of his trust and that he has not abused it.—Westbrook v. Comstock, W. 314.

¶ 78. The failure to give bonds by a person appointed guardian of minors does not of itself vacate his appointment.—Carpenter v. Harris, 51 Mich. 223.

¶ 79. The word "shall," as used in Comp. L. 1897, § 8704, providing that a guardian shall give bond is construed as mandatory.—Olmstead v. Taylor, 126 Mich. 316.

¶ 80. A married woman may now give bond as guardian if the appointment puts property under her control.—Goss v. Stone, 63 Mich. 319.

¶ 81. If the guardian was a married woman, and united with sureties in executing the bond, it seems that the bond was good, notwithstanding her incompetency.—Palmer v. Oakley, 2 D. 433.

¶ 82. It is not necessary that the guardianship bond, required by code of 1827 (p. 59, § 5), should be executed by the guardian; it was sufficient if a bond, with sufficient sureties, was given.—Palmer v. Oakley, 2 D. 433.

§ 21. Letters, record and evidence of appointment.

Necessity for proof of appointment in suit to foreclose mortgage assigned to guardian, see post ¶ 212.

¶ 83. A letter of guardianship is in the nature of a certificate or commission, and, unless some statute prevents, may be evidence of the appointment without reciting the mode and particulars of the nomination; all reasonable presumptions of its regularity must be indulged.—Burrows v. Bailey, 34 Mich. 64.

¶ 84. A letter of guardianship was held admissible in evidence, where title by guardian's sale was involved, even though it did not show in terms that his wards, who were minor heirs over fourteen years old, had nominated him or had any opportunity to do so. But it would be better to show it.—Burrows v. Bailey, 34 Mich. 64.

¶ 85. The record of the appointment of a guardian showing that the appointment was by consent of the ward, when introduced in evidence in another cause, is not open to contradiction by parol.—Lynch v. Kirby, 36 Mich. 238.

§ 22. Termination of guardianship and discharge.

Notice and procedure for discharge from guardianship, see post § 23.

Notice and procedure on discharge of sureties, see post § 84.

Proper mode of reviewing judgment of the circuit on discharge of guardian of incompetent, see Appeal § 3, ¶ 31.

Retroactive operation of statute providing that marriage should not affect guardianship as to property, see Statutes, VI.

Termination of guardianship of female ward as minor by her marriage, see Jud. Act, chap. LVIII, § 26; Comp. L. 1915, § 13975.

Removal of guardian, see Jud. Act, chap. LVIII, § 25; Comp. L. 1915, § 13974.

Resignation of guardian, see Jud. Act, chap. LVIII, § 25; Comp. L. 1915, § 13974.

¶ 86. Guardianship ends when the ward becomes of age or ceases to be incompetent; the guardian can then do no further act as such.—Tate v. Stevenson, 55 Mich. 320.

¶ 87. Termination of guardianship is equivalent to the discharge of the guardian. —Tate v. Stevenson, 55 Mich. 320.

¶ 88. The relation of guardian and ward usually exists for merely temporary purposes, and it is plain that when these purposes are fulfilled the trust must terminate.—In re Munck's Estate (Lyster's Appeal), 54 Mich. 325.

¶ 89. When a guardian is legally discharged, he has no longer the management of the trust estate. In re Munck's Estate (Lyter's Appeal), 54 Mich. 325.

¶ 90. A guardian is "discharged," within How. St. § 6332, providing that no action shall be maintained against the sureties on a guardian's bond unless commenced within four years from the time the guardian is discharged, whenever the guardianship is in any manner effectually determined and brought to a close, whether by the removal, resignation, or death of the guardian, the marriage of a female guardian, the arrival of a minor ward at the age of twenty-one years, or otherwise.—Perkins v. Cheney, 114 Mich. 567.

§ 23. Notice and procedure for discharge from guardianship.

Mandamus as remedy to compel vacation of order denying application for discharge where notice of hearing was not served on all relatives of incompetent, see Mandamus, II.

¶ 91. The ward of a de facto guardian may invoke the aid of the court which made the appointment in procuring a cancellation of the letters of guardianship for the irregularity in their issuance.—In re Cameron's Estate (Appeal of Smith), 157 Mich. 398.

¶ 92. Notice of the application of an incompetent person, under How. St. § 6329, for his discharge from guardianship on the ground that he has regained competency, must be given to the applicant's next of kin or presumptive heirs.—Storms v. Allegan Circuit Judge, 99 Mich. 144.

III. POWERS, DUTIES AND LIABILITIES.

A. RESPECTING WARD'S PROPERTY AND DEBTS.

§ 24. In general.

Natural, constructive or de facto guardians, see post § 25.

Testamentary guardians, see post § 26.

Special guardians, see post § 27.

Status, title and authority of guardians, see post §§ 28-34.

Enforcement and allowance of claims, see post § 35.

Sale or disposal of real estate, see post §§ 36-50.

Mortgaging ward's estate, see post § 51.

Leases of ward's lands, see post § 54.

Rights and powers of successors, see post § 55.

Respecting ward's person education and support, see post III, B.

Liability on bonds, see post VII.

Items to be charged against guardian on his account, see post §§ 69-75.

Liability of guardian for losses or depreciation, see post § 72.

Powers, duties and liabilities of infants, see Infants.

Powers, duties and liabilities of insane or mentally incompetent persons, see Insane Persons.
Actionable fraud in causing guardian to be remiss, see Fraud ¶ 180.
Powers and duties of guardian over estate of minor ward, see Jud. Act, chap. LVIII, § 8; Comp. L. 1915, § 13957.
Authority of guardian to act for injured minor or incompetent in proceedings under Workmen's Compensation Law, see Comp. L. 1915, § 5444.
Liability of representative to ward for legacy paid to guardian, see Estates of Decedents ¶ 1167.

¶ 93. The general powers of a guardian considered.—Palmer v. Oakley, 2 D. 433.

¶ 94. A guardian has such an interest as entitles him to petition for the probate of a will in his ward's favor.—Morford v. Dieffenbacker, 54 Mich. 593.

¶ 95. Guardianship over several minors is not a joint relation, but involves duties that are several.—Tate v. Stevenson, 55 Mich. 320.

¶ 96. Guardianship of a minor's person does not carry with it the control or possession of the ward's real estate.—Atwood v. Frost, 57 Mich. 229.

§ 25. Natural, constructive or de facto guardians.

Tenure of natural or constructive guardians, see ante § 9.
Duty of de facto guardian to account, see post ¶ 237.
Custody, protection and support for infants, see Infants, II.
Relation of parent and child and its incidents, see Parent and Child.

¶ 97. A natural guardian cannot be given control of the estate of a ward except by judicial proceedings and after giving security for responsible care.—Power v. Harlow, 57 Mich. 107.

¶ 98. A natural guardian has no power to admit away the rights of the ward whose person is in his custody. So, a mother cannot release her child's right of action for an injury by the admission that it had been warned to avoid the danger.—Power v. Harlow, 57 Mich. 107.

¶ 99. If there is no guardian for the estate of minor children, the mother, being a widow, has authority to apply in their behalf for insurance and to pay the premium. —Monaghan v. Agricultural Fire Ins. Co. of Watertown, N. Y., 53 Mich. 238.

¶ 100. A de facto guardian will be held subject to all the duties and liabilities of a guardian.—In re Cameron's Estate (Appeal of Smith), 158 Mich. 174.

§ 26. Testamentary guardian.

Appointment of testamentary guardians, see ante § 11.

¶ 101. The powers of a testamentary guardian are the same as those of a guardian appointed by the court, and are allowed to be exercised or withheld for the same reasons.—In re Stockman, 71 Mich. 180.

§ 27. Special guardian.

See also post ¶ 163.
Necessity and occasion for special guardian, see ante § 4.
Appointment of special guardian, see ante § 18.
Duties of special guardians, see Jud. Act, chap. LVIII, § 12; Comp. L. 1915, § 13961.

¶ 102. An appointment of a special guardian, being but ancillary to a general guardianship, falls with it when the record of the general guardianship is fatally deficient.—In re Bassett, 68 Mich. 348.

¶ 103. The special guardian of a mentally incompetent person may grant leases of his lands, but such leases will not continue of their own force beyond the life-time of the ward; and if the guardian is paid rent for a longer period and the heir refuses to ratify the lease, the lessee may recover back such rent from the estate.—Campau v. Shaw, 15 Mich. 226.

§ 28. Status, title and authority of guardian.

Collection and reduction of estate to possession, see post § 29.
Compromising claims and making settlements, see post § 30.
Redeeming and removing incumbrances, see post § 31.
Contract powers and dealing for estate, see post § 32.
Disposal of or charge on properties, see post § 33.
Keeping and investment of funds, see post § 34.
Rights and dealings between ward and guardian, see post VI.
Right of guardian to secure personal advantage from use of ward's property, see post ¶ 275.
Amicable partition of lands of infants and incompetents, see Partition.

¶ 104. A guardian's power over his ward's real estate is limited to leasing it and to the reception of rents and profits, and he is not authorized to sign a petition for a local improvement which requires the signatures of a majority of the resident stockholders.—Aplin, Auditor-General v. Fisher, 84 Mich. 128.

§ 29. ——Collection and reduction of estate to possession.

Power of guardian for nuture to bring ejectment for ward's lands, see post ¶ 220.

Authority of guardian to sue at law for property of ward, see also post ¶ 218.
Guardian's authority to collect and receive debts due ward, see Jud. Act, chap. LVIII, § 20; Comp. L. 1915, § 13969.

¶ 105. The guardian of an incompetent is entitled to the income of the trust fund upon his appointment.—Nolan v. Garrison, 156 Mich. 397.

¶ 106. A guardian has the right to collect and receive money due to his ward on a bond and mortgage, in the exercise of his discretion as guardian.—Livingston v. Jones, H. 165.

¶ 107. Money belonging to infant litigants in foreclosure cannot be ordered paid to the solicitors of their general guardian, as they are strangers to the infants and have no claim on nor power to represent them.—Sheahan v. Wayne Circuit Judge, 42 Mich. 69.

¶ 108. Since he is not a party to the contract and the money does not belong to the ward, a guardian cannot maintain an action against the purchaser of land as for money due to an incompetent ward where the ward had no interest in the land, but the purchaser had retained in his hands, to be paid to a proper person, the amount of a debt due the incompetent from the vendor, and which the vendor had agreed to pay the ward out of the proceeds of a sale.—Hidden v. Chappel, 48 Mich. 527.

§ 30. ——Compromising claims and making settlements.

Enforcement and allowance of claims against estate of guardian, see post § 35.
Rescission of guardian's settlement of life insurance policy for less than its face where guardian sought to secure money for his own use and company had knowledge of fraud, see Rescission and Cancellation.

¶ 109. Infant and incompetent wards are not concluded by an agreement between their guardian and the executor of their father's estate, it being the guardian's duty not to settle with the executor without a true account, and without obtaining for the wards, if possible, all that is due them.—Sanborn v. St. Clair Circuit Judge, 94 Mich. 519.

¶ 110. Where money was directed to be paid into court, under a decree, for an infant, and his guardian accepted a deed of lands in lieu thereof, held, that it was not binding on the infant, and that the guardian had no right to receive the money, much less land in lieu of it.—Westbrook v. Comstock, W. 314.

§ 31. ——Redeeming and removing incumbrances.

Right of guardian to redeem lands of his ward from foreclosure sale, see Foreclosure ¶ 778.

¶ 111. A guardian has a right to redeem the lands of his ward from a mortgage sale.—Marvin v. Schilling, 12 Mich. 356.

¶ 112. Where one who claims as assignee of the locator of certain state land is also the guardian of the latter's heirs, and as assignee has redeemed the land from one who purchased it when it became forfeited to the state, the redemption will be sustained as made by the guardian, even though the assignment turns out to be a forgery.—Johnston v. Knapp, 35 Mich. 307.

¶ 113. One who has advanced money to a guardian for redeeming the infant's lands from foreclosure, volunteering thereto, can at the most have no greater requittal than the refunding of the money; he cannot appropriate the land as compensation if refundment is not made.—Tong v. Marvin, 26 Mich. 35.

§ 32. ——Contract powers and dealings for estate.

Presumption against fairness of contract made by guardian with ward, see post ¶¶ 274, 277.
Contracts of infants, see Infants, IV.
Contracts for insane persons, see Insane Persons, IV.
Employment of counsel by guardian to prosecute bastardy proceedings, see Bastards ¶ 13a.
Management of estate, see Jud. Act, chap. LVIII, § 22; Comp. L. 1915, § 13971.
Specific performance by guardian of contract to convey real estate made by person subsequently becoming insane, incompetent or spendthrift, see Jud. Act, chap. LX, §§ 13, 14; Comp. L. 1915, §§ 14050, 14051.

¶ 114. A guardian cannot bind his ward by contracting with an attorney for services for the estate.—Lothrop v. Duffield, 134 Mich. 485.

¶ 115. A guardian of an insane person cannot, by contract, bind the estate of the ward for services of an attorney in procuring the release of the ward from the hospital for the criminally insane so as to subject the estate of the ward to a claim for such services, except where authority has been obtained from the probate court in accordance with law.—Nelson v. Sackett's Estate, 194 Mich. 450.

¶ 116. Where a promisor who has power to recall a promise at any time becomes mentally incompetent and a guardian of his person and estate is appointed, such guardian may likewise recall and revoke the promise.—Buhler v. Trombly, 139 Mich. 557.

¶ 117. Where a guardian as such made a mortgage, and upon its foreclosure there was a deficiency, held, that the ward could not be bound unless she had made a distinct

promise to complainant based on a sufficient consideration to pay, since the guardian could not charge her.—Wood v. Truax, 39 Mich. 628.

§ 33. ——Disposal of or charge on properties.

Disposal of personalty by guradian, see Jud. Act, chap. LVIII, § 24; Comp. L. 1915, § 13978.

¶ 118. A guardian has a right to sell and assign a bond and mortgage due to his ward as a matter in the exercise of his discretion. —Livingston v. Jones, H. 165.

¶ 119. An executrix, who is also guardian of the testator's infant children and who has in her hands sufficient personal property for their support and maintenance, cannot, by the purchase of necessaries for them, charge their real estate with the indebtedness thereby incurred.—Roscoe v. McDonald, 101 Mich. 318.

§ 34. ——Keeping and investment of funds.

Liability for losses or depreciation on accounting, see post § 72.

Investments of proceeds of private sale of real property for benefit of ward, see Jud. Act, chap. LIX, § 44; Comp. L. 1915, § 14030.

¶ 120. A guardian may properly retain enough of the money of his ward to secure the means of making all necessary outlays; and in investing he may wait until he can find safe investments in sums of reasonable amount, looking not merely to the value of the security, but to the promptness of the borrower.—Gott v. Culp, 45 Mich. 265.

¶ 121. A guardian cannot be censured for honestly investing his ward's money in public securities or at the best legal interest which he finds readily obtainable. He represents the ward in taking securities and he may turn them.—Gott v. Culp, 45 Mich. 265.

¶ 122. Where a guardian of minor children held a mortgage belonging to the children and negotiated a loan as agent of a third person to the mortgagors, said loan to be applied in paying the mortgage, and took as security another mortgage on the same premises, which latter mortgage made no reference to the guardian's mortgage, the guardian had neither express or implied authority to postpone his security to the latter mortgage, a fact the mortgagee was bound to know.—Covey v. Leslie, 144 Mich. 165.

§ 35. Claims against estate and allowance and enforcement of them.

Authority of guardian to compromise or make settlement of claims against ward's estate, see ante § 80.

Guardian's authority and duty to pay debts of ward, see Jud. Act, chap. LVIII, § 19; Comp. L. 1915, § 13968.

¶ 123. How. St., § 6322, which provides for the payment, by the guardian of a minor or of any other person, upon the approval of the judge of probate, of all just debts due from the ward, and all expenses incurred by any county in his care, support, or maintenance, was intended to give to the probate court some supervisory control over the acts of the guardian in paying debts of his ward, and such approval can be asked for by any person interested in having the question of such payment passed upon by the probate judge.—State v. Dunbar's Estate, 99 Mich. 99.

¶ 124. A court of chancery, in the exercise of its auxiliary jurisdiction over the estates of incompetent persons under guardianship, has no greater power than the probate court to allow a preference of one claim over those of other creditors.—Nolan v. Garrison, 156 Mich. 397.

¶ 125. The way to compel a guardian to pay a claim, adjudged as valid, against his ward is by action, not by mandamus.—Smith v. Burton, 48 Mich. 643.

¶ 126. The probate court has no right to entertain a claim against a ward's estate, filed in the name of a creditor who has performed services by agreement with the guardian.—Lothrop v. Duffield, 134 Mich. 485.

¶ 127. Guardianship of an incompetent person cannot, after he has been released therefrom, be revived merely to enable a claim that had been previously filed to be prosecuted against the estate, or to be secured by the guardian's bond.—Lyster's Appeal, 54 Mich. 325.

§ 36. Sale or disposal of realty by guardian.

Estate of insane ward, see post § 37.

Interests and estate salable, see post § 38.

Petition for sale, notice, hearing, and license, see post § 39.

Notice of sale, see post §§ 40, 41.

Guardian's oath and bond, see post §§ 42, 43.

Conduct of sale and report, confirmation and deed, see post §§ 44, 45.

Rights of purchasers and irregularities in title, see post §§ 46-49.

Relief from invalid sale, see post § 50.

Conveyances of infants, see Infants, III.

Disaffirmance of conveyance by infant on attaining his majority, see Infants, III.

Sale of real estate of person under guardianship, see Jud. Act, chap. LIX, § 2; Comp. L. 1915, § 13988.

Extension of credit on sale of real estate by guardian, see Jud. Act, chap. LIX, § 26; Comp. L. 1915, § 14012.

Private sale of real estate by guardian, see Jud. Act, chap. LIX, §§ 42-44; Comp. L. 1915, §§ 14028-14030.

Liability of guardian for fraud in sale of real property, see Jud. Act, chap. LIX, § 41; Comp. L. 1915, § 14027.

Liability of guardian for misconduct of sale of real property, see Jud. Act, chap. LIX, § 40; Comp. L. 1915, § 14026.

Appointment of guardian by chancery court on application for authority to convey equitable interest in real property belonging to infant, insane person or incompetent, see Jud. Act, chap. XIX, § 42; Comp. L. 1915, § 12696.

Proceedings in chancery court relating to conveyance of equitable interests in lands of minors, insane or incompetents, see Jud. Act, chap. XIX, §§ 39-54; Comp. L. 1915, §§ 12693-12708.

¶ 128. A guardian of minor heirs has no authority to make a contract for the sale of land belonging to his wards without a license from the probate or other proper court.—Wolf v. Holton, 104 Mich. 107.

¶ 129. The guardian should not make an absolute sale of the real estate of the ward, and then apply to the court to authorize him to do what he has already bound himself to do; and the court will not ratify such agreements. The proper course is to obtain leave of the court in the first instance.—In re Dorr's Petition, W. 145.

¶ 130. Under How. St. § 6727, no conveyance of a ward's real estate could be made, or sale completed, by a guardian, until reported to the court, and sanctioned in each case; although under the petition, the power granted the guardian was a general power to sell.—Jenness v. Smith, 58 Mich. 280.

§ 37. ——Estate of insane ward.

Conveyances of property of insane persons, see Insane Persons, IV.

¶ 131. Under the statutes of Michigan, a guardian can only dispose of the real estate of his incompetent ward through proceedings in and authority granted by the probate court.—King v. Sipley, 166 Mich. 258.

¶ 132. A guardian has no authority to ratify the conveyances of his incompetent ward, either directly or indirectly.—King v. Sipley, 166 Mich. 258.

¶ 133. A guardian may not ratify a conveyance of his incompetent ward by a suit based upon the theory that title has passed to the grantee, who is liable to respond in damages because of inadequacy of consideration, since to permit such a course would enable the guardian to do indirectly what he cannot do directly, and would open up an easy way for disposing of the real estate of incompetent persons.—King v. Sipley, 166 Mich. 258.

§ 38. ——Interests and estates salable.

Sale of interest in contract for purchase of land, see Jud. Act, chap. LIX, § 28; Comp. L. 1915, § 14014.

¶ 134. Contingent estates held by minors may be sold by their guardians under the direction of the court of chancery.—Hovey v. Nellis, 98 Mich. 374.

§ 39. ——Petition for sale, notice, hearing, and license.

Petitioning and procuring sale of lands to pay ancestor's debts as fraud on ward, see Fraud ¶ 577.

Petition for sale of realty and proceedings thereon, see Jud. Act, chap. LIX, §§ 3-13, Comp. L. 1915, §§ 13989-13999.

Time for which license to sell is valid, see Jud. Act, chap. LIX, § 16; Comp. L. 1915, § 14002.

¶ 135. The foundation of jurisdiction in the probate court to make an order allowing a guardian to sell his ward's real estate is a petition specifying the purpose for which such sale is required; and the filing of such petition sufficiently appears from a finding of the circuit judge to that effect.—Schlee v. Darrow's Estate, 65 Mich. 362.

¶ 136. In a petition under the act of February 28, 1840, it was necessary to set forth fully all the facts and circumstances rendering a sale or other disposition of the minor's property necessary, that the court might judge of the propriety of the proposed sale.—In re Dorr's Petition, W. 145.

¶ 137. A petition by the guardian of a minor to the probate court for license to sell the lands of his ward, stating that a part only of the land was under improvement, and the rest unproductive, and that it was necessary a portion of the land should be used to pay certain debts incurred in behalf of the ward, and that, in the opinion of the petitioner, it would be for the interest of the minor to have the land sold and the proceeds, after paying the debts, put out at interest, is sufficient.—Nichols v. Lee, 10 Mich. 526.

¶ 138. Where a petition by a guardian for leave to sell real estate of his wards represents that the whole property of the wards consists of their interest in two certain parcels of land; that over $100 is due and owing towards one parcel; that the other is burdened by a mortgage of $50; that the income of the property is inadequate to pay the debts, interest and taxes, and to maintain, support and educate the wards, it is held sufficient under How. St. §§ 6062 and 6080 to give the probate court jurisdiction to grant a license to sell.—Lynch v. Kirby, 36 Mich. 238.

¶ 139. The petition of a guardian for leave to sell the real estate of his ward, either to pay debts or for the support and education of the ward, or for the purpose of investing the proceeds at interest, is required to state the purpose for which the sale is asked, and to set forth the condi-

tion of the estate and the necessity or propriety of the sale; otherwise the probate court gets no jurisdiction to grant a license to sell.—Ryder v. Flanders, 30 Mich. 336.

¶ 140. The fact that some of the statements, in a guardian's petition for leave to sell real estate of his ward, were untrue, could have no bearing upon the question whether the allegations of the petition were sufficient to give jurisdiction.—Lynch v. Kirby, 36 Mich. 238.

¶ 141. A guardian's petition to the probate court for license to sell the real estate of his ward is not fatally defective for not being sworn to; and, as it is not required by statute to be signed, it is sufficient if it describes the guardian and he presents it in person.—Ellsworth v. Hall, 48 Mich. 407.

¶ 142. A guardian's sale is not to be avoided for want of verification of the petition for license to sell.—Pfirrman v. Wattles, 86 Mich. 254.

¶ 143. The fact that the proof of publication of notice of the order for hearing of application for leave to sell real estate was filed on the 5th of April, while the order confirming the sale was made on the 4th, on which date the affidavit of publication is verified, is unimportant.—Schlee v. Darrow's Estate, 65 Mich. 362.

§ 40. Notice of sale.

Affidavit and proof of notice, see post § 41.
Notice of sale of real estate, see Jud. Act, chap. LIX, § 18; Comp. L. 1915, § 14004.
Adjournment of sale and notice of adjournment, see Jud. Act, chap. LIX, §§ 19, 20; Comp. L. 1915, §§ 14005, 14006.

¶ 144. Comp. L. 1871, § 4560 (How. St. § 6040), requires notice of a guardian's sale of land to be published in a newspaper printed in the county where the land lies. Held, that an affidavit that it was published in a paper published and circulating in the county, taken in connection with an order of the probate court naming the paper and describing it as printed in the county, is sufficient; and that a publication in a paper printed in the county but not circulating there would not be a compliance.—Dexter v. Cranston, 41 Mich. 448.

¶ 145. Comp. L. 1871, § 4560 (How. St. § 6040) requires notice of a guardian's sale to be published "six weeks successively next before such sale." Held, that each week begins to run on the day of publication, and that if fully six weeks' notice has been given and there is a fraction of a week left before the day of sale, it is not necessary that the notice should be published on the last recurrence of publication day immediately before sale; e. g., where notice of a sale to be held March 4 was first published January 12, it was not necessary to insert it after February 23.—Dexter v. Cranston, 41 Mich. 448.

¶ 146. Publication of a notice of sale in a paper mainly published in the German language, though the notice itself is published in English, is not a proper publication (How. St. § 7251); but it was held not to vitiate a bona fide sale legally made in all other respects collaterally attacked after seventeen years, where there was no evidence showing a want of bidders or any inadequacy of price.—Schaale v. Wasey, 70 Mich. 414.

§ 41. ——Affidavit and proof of publication and posting.

Affidavit of notice of sale, see Jud. Act, chap. LIX, § 21; Comp. L. 1915, § 14007.

¶ 147. Where a statute requires an affidavit of publication of notice of guardian's sale to be made by "the foreman of the printer of the newspaper" in which the notice appears, the objection that it purports to be made by an affiant who describes himself as a foreman of the paper, naming it, is of no force.—Dexter v. Cranston, 41 Mich. 448.

¶ 148. Where notice of a guardian's sale of land was ordered to be posted in three of the most public places in the township, and the proof of notice specified the places where it was actually posted, but did not state that they were the most public places, it was held that the notice and proof together were a sufficient statement of the fact.—Dexter v. Cranston, 41 Mich. 448.

¶ 149. An affidavit of publication of notice of a guardian's sale, made by the "bookkeeper" of the newspaper, if couched in affirmative language, and therefore presumably upon knowledge, is sufficient under How. St. § 6067, though it is not a compliance with How. St. § 7498, which provides that the printer, foreman or clerk of the newspaper may make such proof.—Schlee v. Darrow's Estate, 65 Mich. 362.

¶ 150. Sufficient publication of notice of a guardian's sale may be shown by other evidence than the affidavit thereof, which is for the purpose of a permanent record.—Persinger v. Jubb, 52 Mich. 304.

¶ 151. How. St. § 6040 requires notices of a guardian's sale of real estate to be posted in the ward where the property is situated; but after a lapse of nearly twenty years the court cannot go outside of the record to ascertain whether the statute was complied with.—Schlee v. Darrow's Estate, 65 Mich. 362.

¶ 152. Want of an affidavit of the posting of notice of a guardian's sale is not fatal if the fact is shown in the sworn report of the sale and is recited in the order confirming it.—Persinger v. Jubb, 52 Mich. 304.

§ 42. Guardian's oath on making sale.

Oaths of guardians on sale of real estate, see Jud. Act, chap. LIX, § 14; Comp. L. 1915, § 14000.

¶ 153. The guardian, being imperatively required by Comp. L. 1857, § 3107, to take and subscribe a prescribed oath "before fixing on the time and place of sale" under a license to sell the real estate of his ward, an oath taken only a few days before the sale and after the giving of the notice of the sale was unauthorized and extrajudicial.—Ryder v. Flanders, 30 Mich. 336.

¶ 154. An oath dated and subscribed on the same day as the sale by a guardian under license of court, and recited in the report of sale as taken and subscribed before sale, is presumed to have been made before the sale.—Schaale v. Wasey, 70 Mich. 414.

¶ 155. The oath required in connection with a guardian's sale would be inappropriate to a new guardian, where the one who made the sale has died.—Lynch v. Kirby, 36 Mich. 238.

¶ 156. A guardian's oath is not defective for being entitled "In the matter of the estate of Henry McVay et al., minors," since this identifies the estate, which is the purpose of the title.—Persinger v. Jubb, 52 Mich. 304.

§ 43. Guardian's sale bond or security.

Obligation and breach of and liability on sale bonds, see post § 82.

Actions on bonds, see post § 85.

Bond on qualifying for letters, see ante § 20.

Further bond required on sale of real estate, see Jud. Act, chap. LIX, § 15; Comp. L. 1915, § 14001.

Bond of guardian appointed by chancery court for conveyance of equitable interests in land, see Jud. Act, chap. XIX, § 48; Comp. L. 1915, § 12697.

Necessity for general guardian furnishing further security before receiving proceeds of sale, see 1916 C. C. Rule 63.

¶ 157. A bond before sale is indispensable to the validity of the sale, whether formally required by the court or not; its absence makes the sale fatally defective even as against a bona fide purchaser.—Stewart v. Bailey, 28 Mich. 251; Ryder v. Flanders, 30 Mich. 336.

¶ 158. Where a guardian's bond on sale of land was dated November 25, 1868, but the filing upon the same in the probate court was dated as approved and filed November 25, 1869, license having been issued and bond ordered November 24, 1868, such date of filing and approval was held to be a mere clerical error.—Schaale v. Wasey, 70 Mich. 414.

¶ 159. The probate judge's approval of the bond given by a guardian before selling his ward's real estate sufficiently appears by the recital of the fact in the order confirming the sale.—Persinger v. Jubb, 52 Mich. 304.

§ 44. Conduct of sale and rights and liabilities of bidders.

Time and place of sale of real property, see Jud. Act, chap. LIX, § 24; Comp. L. 1915, § 14010.

¶ 160. A party claiming to be the highest bidder at a guardian's sale, in order to entitle himself to the rights of a purchaser must tender payment and performance within a reasonable time.—People ex rel. Monroe v. Wayne Circuit Judge, 19 Mich. 296.

¶ 161. A purchaser at a guardian's sale made subject to a mortgage need not give bond to discharge the mortgage where he is the owner of the mortgage at the time of purchase.—Lynch v. Kirby, 36 Mich. 238.

¶ 162. Guardians' sales under Comp. L. 1857, chap. 102, How. St., chap. 230, are to be conducted as provided by Comp. L. 1857, chap. 101, How. St., chap. 229, and the confirmation of the report of sale is essential.—People ex rel. Monroe v. Wayne Circuit Judge, 19 Mich. 296.

¶ 163. A special guardian licensed to sell an infant's land can sell only at the price and terms fixed by the order of sale, and purchasers are presumed to have knowledge of the proceedings, and will be compelled to pay the money they have agreed to pay.—In re Axtell's Petition, 95 Mich. 244.

§ 45. Report, confirmation and deed.

Necessity for confirmation of sale report, see also ante ¶ 162.

Married woman's conveyances as guardian, see Husband and Wife § 136.

Confirmation of sale of real property, see Jud. Act, chap. LIX, §§ 22, 23; Comp. L. 1915, §§ 14008, 14009.

Return of sale proceedings by guardian, see Jud. Act, chap. LIX, § 27; Comp. L. 1915, § 14013.

Vacation of sale of real estate where a higher bid may be obtained, see Jud. Act, chap. LIX, § 27; Comp. L. 1915, § 14013.

¶ 164. A guardian's deeds upon sales of land that were not reported to or confirmed by the court are void, and void guardians' deeds cannot be confirmed as such.—Jenness v. Smith, 58 Mich. 280; Winslow v. Jenness, 64 Mich. 84.

¶ 165. A guardian's report of the sale, for a round sum, of two parcels of land, one belonging to each of two wards, is not necessarily to be construed as showing that both were sold together for one sum or to impeach the judge's performance of his duty in

satisfying himself as to the facts before confirming the sale.—Persinger v. Jubb, 52 Mich. 304.

¶ 166. Where a widow who is guardian of her three minor children sells real estate which is a part of her husband's estate, under order of the court and does not report the sale to the court nor have it confirmed as provided by sec. 542, Comp. L. 1897, the title of the wards is not conveyed.—Hunt v. Stevens, 174 Mich. 501.

¶ 167. Thirty days after a sale and fifteen days after the deed was executed and delivered, a guardian wrote a letter asking the court to date back his confirmation to September 10th, a date two days after the date of sale. A slip of paper in the files stated the confirmation to have been given September 10th. Held, the confirmation was invalid as being fraudulently procured.—Houlihan v. Fogarty, 162 Mich. 492.

¶ 168. A guardianship sale is void and will be set aside where it is not confirmed by the court.—Hunt v. Stevens, 174 Mich. 501.

¶ 169. Where a guardian, after receiving license to sell, making sale and reporting it to the court, and after the court has confirmed the sale and ordered conveyance, dies, and his successor is appointed and qualifies, the latter may properly be directed and required to complete the transaction by deeding and receiving the purchase price. The act of conveyance is rather official than personal, and more a function of the place than a matter appropriated to any individual.—Lynch v. Kirby, 86 Mich. 238.

¶ 170. A married woman who is a guardian can convey the real estate of the ward without the husband joining in the deed.—Palmer v. Oakley, 2 D. 433.

§ 46. Rights and titles of purchasers, defects and irregularities.

Statutory force and effect of deed, see post § 47.
Guardian as purchaser, see post § 48.
Right to crops on land, see post § 49.
Confirmation fraudulently secured as defect in title of purchaser, see also ante ¶ 167.
Want of confirmation as defect in title of purchaser, see also ante ¶¶ 164, 166, 168.
Irregularities in dates of order for publication of notice of sale and order of confirmation, see also ante ¶ 143.
Failure to verify petition as irregularity, see also ante ¶¶ 141, 142.
Bar or estoppel of infants to repudiate guardian's sale by receipt of purchase money after becoming of age, see Infants.
Inurement of title acquired at guardian's sale to benefit of taker's earlier grantee, see Estoppel ¶ 59.
Detriment or change sufficient to support estoppel to question sale, see Estoppel § 31.
Effect of irregularities in sale proceedings on validity of guardianship sale, see Jud. Act, chap. LIX, §§ 38, 39; Comp. L. 1915, §§ 14024, 14025.
Bond of purchaser on sale of contract for purchase of land, see Jud. Act, chap. LIX, §§ 29, 30; Comp. L. 1915, §§ 14015, 14016.

¶ 171. Noncompliance by a guardian with the requirements of the statute relative to the notice to be given of the sale of real estate of the ward under license of the probate court, will not affect the title of a bona fide purchaser.—Palmer v. Oakley, 2 D. 433.

¶ 172. One claiming adversely to the title of the ward cannot contest the validity of a sale of lands made by the guardian on the ground that the petition for license to sell was defective.—Marvin v. Schilling, 12 Mich. 356.

¶ 173. One claiming adversely to the ward cannot contest it on the ground that the sale was a fraud upon the ward. The ward, or any one claiming under him, has a right to inquire into anything wrong in the proceedings; but a third person cannot drag the ward's rights into court in a litigation between himself and the purchaser.—Marvin v. Schilling, 12 Mich. 356.

¶ 174. Where proceedings for a sale were initiated without any jurisdictional defect, mere errors or irregularities cannot prejudice the rights of purchasers.—Kelley v. Edwards, 38 Mich. 210.

¶ 175. Where a guardian, whose appointment has been fraudulently secured, redeems the lands of his ward from a mortgage foreclosure, and on that pretext obtains from the probate court a license to sell them, and they are bought by the person who secured for the guardian his appointment and advanced the money for the redemption, it is no justification for this purchaser, in proceedings instituted for the fraud, that if he had not advanced the redemption money the land would have been lost to the infant owner, especially when it does not appear that either the infant or her friends knew of the foreclosure proceedings or the necessity for redemption.—Tong v. Marvin, 26 Mich. 35.

¶ 176. Where the approval of the superintendents of the poor is necessary before a license of sale can be secured for the sale of an incompetent ward's land under sec. 9118, Compiled Laws 1897, a sale to one of those officers is illegal.—In re Miller's Estate, 173 Mich. 467.

¶ 177. Where a probate court has acquired jurisdiction to license the sale of real estate by a foreign guardian under How. St. § 6067, the validity of the sale cannot be collaterally attacked by persons who do not represent the

minors and when no one having a right to represent them has complained.—Pfirrman v. Wattles, 86 Mich. 254.

¶ 178. Under How. St., § 6076 the sufficiency of the petition for sale cannot be collaterally attacked provided the guardian was licensed to sell by the probate court having jurisdiction.—Schaale v. Wasey, 70 Mich. 414.

¶ 179. Under sec. 9165, Comp. L. 1897 a deed cannot be attacked collaterally because of clerical errors in the description, when properly executed by a guardian authorized by the probate court.—Arnold v. Brechtel, 174 Mich. 147.

§ 47. ——Statutory force and effect of deed.

Statutory force and effect of guardian's deed, see Jud. Act, chap. LIX, §§ 38, 39; Comp. L. 1915, §§ 14024, 14025.

¶ 180. How. St. § 6102, providing that title under guardian's sale shall be incontestable provided certain facts appear, is a statute of repose, has become a rule of property, and its validity cannot now be questioned.—Goodall v. Henkel, 60 Mich. 382.

¶ 181. A guardian's sale cannot be avoided for irregularity in the proceedings if the guardian was licensed to make it by a probate court of competent jurisdiction, Comp. L. 1871, § 4622, subd. 1 (How. St. § 6102), —Dexter v. Cranston, 41 Mich. 448.

¶ 182. A guardian's sale is not invalidated by the fact that the guardian has not signed the report of sale; the defect may be supplied by seasonable amendment under the order of the probate court, Comp. L. 1871, § 4622 (How. St. § 6102).—Ellsworth v. Hall, 48 Mich. 407.

¶ 183. Under How. St. § 6102, to establish the validity of a guardian's sale of land as against a party claiming under the ward it is not necessary to show the making and filing of the petition for the sale, the filing and recording of the license and oath, or the confirmation of the sale.—Blanchard v. De Graff, 60 Mich. 107.

¶ 184. A guardian's sale of real estate duly and regularly confirmed will not be held void as against a bona fide purchaser because the petition for sale did not set out the circumstances of the estate, or because the guardian's oath before sale was not subscribed, or because he failed to give bond before sale where none was required.—Fender v. Powers, 67 Mich. 433.

¶ 185. Under section 9129, Comp. Laws 1897, purchasers in good faith at a guardian's sale are not protected except when all the essential requirements of the statute have been complied with.—Houlihan v. Fogarty, 162 Mich. 492.

¶ 186. In making a sale of real estate a guardian failed to give a sale bond as required by statute. The record showed no taking or filing of the oath required. The notice of sale described the land erroneously, the mistake being corrected later by the guardian, and it did not state the time or place of sale or that the land would be sold to the highest bidder. The purchaser made his bid outside of the county, and was not present on the day of sale. Held, these defects were not mere harmless irregularities, but invalidated the sale.—Houlihan v. Fogarty, 162 Mich. 492.

¶ 187. One Fogarty was appointed both administrator of an estate and guardian of the children of the deceased. He made a sale of real estate. In the deed he described himself as guardian and acknowledged the deed as such guardian. In the notice of sale he described himself and signed as guardian. He signed the attempted report of sale as acting in the same capacity, and as guardian filed an account of the proceeds realized from the sale. Held, the evidence clearly established that he was acting as guardian, and not as administrator and where no license to him as guardian ever issued the sale is invalid.—Houlihan v. Fogarty, 162 Mich. 492.

¶ 188. In the absence of proof to the contrary it must be presumed that the hearing on an application to the probate court for the sale of a ward's lands was properly continued.—Schlee v. Darrow's Estate, 65 Mich. 362.

§ 48. ——Guardian as purchaser.

Rights and dealings between guardian and ward generally, see post VI.

Guardian as purchaser, see Jud. Act, chap. LIX, § 25; Comp. L. 1915, § 14011.

¶ 189. One Fogarty as guardian sold land to one Dinneen. Six months thereafter, while still guardian, he bought a one-fourth interest in the same at the price paid by Dinneen. Held, Fogarty's purchase was void. —Houlihan v. Fogarty, 162 Mich. 492.

¶ 190. Where a guardian conveyed his ward's land after a probate sale of the same, and on the same day took a reconveyance from the purchaser for the same consideration to himself individually, it was held that no title passed by the transaction, there being collusion between the parties.—Winter v. Truax, 87 Mich. 324.

§ 49. ——Right to crops on lands sold.

¶ 191. A guardian of minor heirs gave a person permission to put in a crop on their land and to keep two-thirds of it when harvested. Held, that the guardian had a legal right to make this arrangement; and that upon the sale of the land under a probate license to one who had notice of it, the cropper's rights were not affected. And a

removal of the crop by the purchaser, after the cropper had cut it, was a conversion.—Weldon v. Lytle, 53 Mich. 1.

§ 50. Annulment or other relief from invalid sale.

¶ 192. Guardianship proceedings in form under Comp. L. 1897, chap. 244 (§ 9166) culminating in a sale of land of an insane person, will be set aside as a fraud in the view of equity, where the whole proceeding and the sale was colorable and a fiction to carry into execution a voidable contract of sale by the insane person to sell such land and the appraisal for such sale was made as of the time of the contract and below the value of the land in order to have it correspond with the contract price, and no effort to obtain any higher price was made; and the fact that no profit was made by the parties or any bad faith practiced will not affect the validity of the transaction.—DeVries v. Crofoot, 148 Mich. 183.

¶ 193. As to a third person who purchased under a voidable guardian's sale, taking title from the purchaser at such sale, where there is no question of the sufficiency of the record of sale but the attack is for fraud extraneous thereto, the sale was sustained because it was possible to do equity by holding the purchaser as a trustee of the land for the insane ward and accountable to him for the money received from the third person less credits for what was paid to the guardian and for the value of added improvements but with interest on the net balance and costs.—DeVries v. Crofoot, 148 Mich. 183.

¶ 193a. A guardianship sale, made in good faith by the guardian and the purchaser but not confirmed by the court as required by statute, will be declared void and the cloud removed from the title of the wards only on condition that the wards repay to the purchaser the purchase price with interest and taxes.—Hunt v. Stevens, 174 Mich. 501.

§ 51. Mortgaging ward's estate.

Mortgaging ward's estate, see Jud. Act, chap. LIX, §§ 49-51; Comp. L. 1915, §§ 14035-14037.

¶ 194. A guardian's mortgage on his ward's property is void if the probate court, in permitting it to be made, has not fixed its amount, rate of interest and duration (Comp. L. 1871, § 4626, How. St., § 6106).—Edwards v. Taliafero, 34 Mich. 13.

¶ 195. The mere addition of the title "guardian" to the mortgagor's name does not invalidate the mortgage where it is manifestly not given as a guardian's mortgage.—Brayton v. Merithew, 56 Mich. 166.

§ 52. Necessity for further security before receiving award in action.

Obligation and breach of bonds and liability and actions on same, see post, VII.

Bond on qualifying for letters, see ante § 20.

Necessity for furnishing security to guardian ad litem for compensation before receiving guardianship funds, see Guardian ad Litem ¶ 35.

Necessity for general guardian furnishing further security before receiving money or property awarded ward in suit or proceeding, see 1916 C. C. Rule 63.

¶ 196. The new security required by chancery rule 94 before money belonging to infant litigants can be turned over to general guardians calls for a responsible showing, and cannot rest on loose oral statements.—Sheahan v. Wayne Circuit Judge, 42 Mich. 69.

§ 53. Recovery of money paid out.

¶ 197. A guardian who has paid over the proceeds of the ward's estate to a suitable person to aid such person in supporting the ward cannot repudiate his contract and maintain an action at law against him to recover back the amount so paid after it has been reasonably expended for that purpose.—Chubb v. Bradley, 58 Mich. 268.

¶ 198. Whether a guardian who has paid over the proceeds of the ward's estate to a suitable person in supporting the ward, can maintain an action at law against him to recover back the amount so paid, in case of fraud or an unreasonable disproportion between the support and the funds, quære.—Chubb v. Bradley, 58 Mich. 268.

§ 54. Leases of ward's lands.

¶ 199. A lease was given by the guardian of a mentally incompetent person for a term of years, and rent for eighteen months was paid in advance. Before the eighteen months had elapsed the ward died. The lessee applied to his heirs to affirm the lease, but they declined to execute an instrument for the purpose, though they were silent as to any intention to disaffirm. Held, that the lessee might treat their action as a refusal to affirm, and recover from the estate the rent paid for the period after the death.—Campau v. Shaw, 15 Mich. 226.

§ 55. Rights and powers of successors.

See also ante ¶ 169.

Jurisdiction of probate court to appoint successor on death of guardian, see ante ¶ 12.

Bond by retiring guardian to successor to pay back converted moneys, see also Bonds ¶ 38.

¶ 200. Where a mortgage was executed to a guardian for his ward's benefit, on the death of such guardian his successor, duly appointed by the probate court, can file a bill to foreclose.—Norton v. Ohrns, 67 Mich. 612.

B. RESPECTING WARD'S PERSON, EDUCATION AND SUPPORT.

§ 56. In general.

Powers of natural guardian, see post § 57.
Support and education of ward, see post § 58.
Possession or control of property as incident to guardianship of ward's person, see ante ¶ 96.
Crime of abandoning or neglecting child, see Crimes § 88.
When guardian to have custody of ward, see Jud. Act, chap. LVIII, § 7; Comp. L. 1915, § 13956.
Powers and duties of guardian over person and education of minor ward, see Jud. Act, chap. LVIII, § 8; Comp. L. 1915, § 13957.
Authority of guardian to apprentice minor ward, see Comp. L. 1915, § 11493.
Duty of guardian to educate minor ward, see Pub. Acts 1917, No. 179, § 1, amending Comp. L. 1915, § 5979.
Necessity of consent of guardian for marriage of minor female ward, see Pub. Acts 1917, No. 195, amending Comp. L. 1915, § 1137.

¶ 201. Guardianship of a minor's estate gives no right to the custody of its person.—Matter of Heather Children, 50 Mich. 261.

§ 57. Powers of natural guardians.

Tenure of natural or constructive guardians, see ante § 9.
Powers of equitable or de facto guardian, see also post ¶ 209.
Custody, protection and support of infants, see Infants, II.
Relation of parent and child and its incidents, see Parent and Child.

¶ 202. A natural guardian has the custody of the ward's person only.—Power v. Harlow, 57 Mich. 107.

§ 58. Support and education of ward.

Allowance in account for support and education, see post § 70.
Support and education of minor ward out of estate where father is living, see Jud. Act, chap. LVIII, § 9; Comp. L. 1915, § 13958.

¶ 203. A guardian's discretion in respect to the boarding and schooling of a ward stands on a similar footing with a parent's. He is not bound to prefer mere economy of cost to the welfare and comfort of the ward. —Gott v. Culp, 45 Mich 265.

¶ 204. A guardian's discretion in his expenditures for the clothing of a female ward cannot usually be reviewed if they are not out of proportion to her social position and are made in good faith and do not exceed the ward's means.—Gott v. Culp, 45 Mich. 265.

¶ 205. A guardian whose ward's estate is sufficient to furnish an income that will, with economy, maintain and educate her suitably, should not exceed the income without adequate reason, though if circumstances justify it he may look at future and probable resources as well as at the present and actual income, and though it would be prudent to obtain leave to draw upon the principal, it is not absolutely necessary if the draft is one that ought to be made.—Gott v. Culp, 45 Mich. 265.

¶ 206. The proceeds of real estate belonging to a ward may be used by the guardian, within proper bounds, to enable the ward to be suitably brought up and educated; and such money may be turned over to the ward's adopted parents, to aid them in its support, if necessary.—Chubb v. Bradley, 58 Mich. 268.

¶ 207. One who assumes to act as guardian of the minor son and heir of his deceased partner, whose executor he is, should look after his ward's habits and education, should secure for him the best advantages for business instruction, and should give him such insight into his father's estate and such instruction in relation thereto as will qualify him to manage it successfully.—Perrin v. Lepper, 72 Mich. 454.

¶ 208. A guardian may be allowed to resort to the principal as well as the income of his ward's estate, if required for the ward's welfare.—In re Ward's Estate, 73 Mich. 220.

¶ 209. The oldest son of intestate, being the only child of age, who was appointed guardian of his brothers and sisters, and who took possession of their persons and estates, and reared them, but never qualified, being unable to furnish a bond, was their equitable guardian and as such was entitled to a reasonable allowance from the estate for their support and maintenance.—Alexander v. Hillebrand, 140 Mich. 490.

IV. ACTIONS, SUITS AND PROCEEDINGS.

§ 59. Authority to represent ward.

Name in which to sue or defend, see post § 60.
Remedies and forms of action, see post § 61.
Defenses and set-offs, see post § 62.
Consents and admissions, see post § 63.
Costs, see post § 64.
Actions to enforce claims against estate, see ante § 35.
Actions on bonds, see post §§ 85-88.
Propriety of appointing general guardian as guardian ad litem, see Guardian ad Litem ¶ 12.
Actions by and against infants, see Infants. VII.
Actions by or against insane persons, see Insane Persons, V.

Failure of general guardian to appeal from appointment of guardian ad litem as concluding rights of ward, see Guardian ad Litem ¶ 32.

Protection of the rights of infant heirs by action or summary proceedings by dowress as guardian, see Dower § 48.

Authority of general guardian to appear for and represent ward in suits and proceedings, see Jud. Act, chap. LVIII, § 20; Comp. L. 1915, § 13969.

Authority of general guardian to institute or defend actions in justice court on behalf of his ward, see Jud. Act, chap. LXVII, §§ 22, 24; Comp. L. 1915, §§ 14199, 14201.

Authority of general guardian to bring action on behalf of infant or person under disability, see Jud. Act, chap. XII, § 28; Comp. L. 1915, § 12379.

¶ 210. Under How. St. § 6323, the general guardian of a minor heir may act for her in the matter of a sale of her ancestor's realty for purposes of distribution, without a guardian ad litem being appointed prior to such sale.—Wheelock v. Lake, 117 Mich. 11.

¶ 211. Under How. St., § 6316, conferring upon a general guardian of an incompetent the management of his estate, and section 6323 providing that such guardian shall appear for and represent his ward in all legal suits and proceedings where no other person is appointed for that purpose as guardian or next friend; the power conferred was broad enough to entitle such general guardian to recover property which his ward was incompetent to convey.—Reason v. Jones, 119 Mich. 672.

¶ 212. Proof of guardianship is not necessary to authorize the guardian to bring suit to foreclose a mortgage assigned to him by name as guardian.—Vary v. Chatterton, 50 Mich. 541.

¶ 213. In assumpsit against an incompetent adult under guardianship in which the defendant himself is served, the appearance of the guardian, who was an attorney and conducted the defense, is assumed to be with the approval of the court without the appointment of a guardian ad litem.—Stoner v. Riggs, 128 Mich. 129.

¶ 214. Solicitors of general guardians cannot bind the rights of infant wards in litigation.—Sheahan v. Wayne Circuit Judge, 42 Mich. 69.

¶ 214a. Infants when sued are to be defended by guardian ad litem, not by general guardian.—Bearinger v. Pelton, 78 Mich. 109.

§ 60. Name in which to sue or defend.

Suing or defending in guardianship and in personal capacity in same action, see Parties.

¶ 215. Plaintiff, describing himself as guardian of certain minors, sued defendant railway for negligently injuring an automobile belonging to the minors and in plaintiff's possession. Defendant made no plea in abatement, but pleaded the general issue. At the close of the case defendant moved for a directed verdict on the ground that plaintiff was not the proper party plaintiff. Held, that under Comp. Laws 1897, § 8718, a judgment for plaintiff under these pleadings should not be disturbed on the ground raised.—Newton v. Detroit United Ry., 163 Mich. 373.

¶ 216. The guardian of an infant cannot bring ejectment in his own name for the ward's land; the action must be brought in the ward's name.—Kinney v. Harrett, 46 Mich. 87.

¶ 217. A spendthrift's guardian may sue in his own name as guardian to recover debts due his ward.—Norton v. Ohrns, 67 Mich. 612.

§ 61. Remedies and forms of action.

Equitable relief to set aside default judgment taken against insane person where no notice of action or judgment was given to guardian, see Judgment, VI.

¶ 218. The guardian may sue at law for such part of the proceeds of the personal estate of a decedent as belongs to his ward but remains in the hands of decedent's widow by reason of a family settlement to which the ward's mother was a party; hence a bill will not lie in equity.—Cole v. McFall, 48 Mich. 227.

¶ 219. Equity will not entertain a bill of a guardian on the ground that the construction of an instrument is desired for instruction of the guardian, where the real purpose of the bill is to decide a controversy between the ward, the ward's contractual vendee of realty, and his lessee's assignee.—Detroit Trust Co. v. Hunrath, 168 Mich. 180.

¶ 220. Guardians for nurture cannot bring ejectment for their wards' lands.—Kinney v. Harrett, 46 Mich. 87.

¶ 221. Dictum that the guardian's interest in the real estate is sufficient to enable him to maintain trespass.—Palmer v. Oakley, 2 D. 433.

¶ 222. Dictum, that as the guardian stands to his ward in loco parentis he may maintain an action on the case for seduction.—Palmer v. Oakley, 2 D. 433.

¶ 223. A guardian suing in ejectment for the benefit of wards claiming by descent makes a prima facie case by proving paper title to the ward's ancestor, descent to the ward, and the plaintiff's title as guardian to sue for possession.—Harrett v. Kinney, 44 Mich. 457.

§ 62. Defenses and set-offs.

Defenses in actions on bond, see post § 87.
Torts of infants, see Infants, V.

¶ 224. In defense to an action purporting to be brought by a guardian it may be shown that the guardianship has ceased; and if the plea does not set up such a defense an amendment which would permit such a showing should be allowed.—Chubb v. Bradley, 58 Mich. 268.

§ 63. Consents and admissions.

Authority of natural guardian to admit away rights of ward, see ante ¶ 98.
Authority of guardian to bind infant defendant by admission in annulment suit, see Marriage, IV.
Effect on ward's rights in suit to recover taxes paid under protest of guardian's failure to object to assessment, see Taxes, VIII.

¶ 225. A general guardian cannot bind infant defendants by a consent decree.—Bearinger v. Pelton, 78 Mich. 109.

§ 64. Costs.

Allowance of costs of litigation on account, see post § 73.

¶ 226. Costs of both courts were imposed on the guardian of an incompetent, to be paid by him personally, where it appeared that a bill filed by him as guardian was unjustifiable.—Sikes v. Crissman, 35 Mich. 96.

V. ACCOUNTING, SETTLEMENT AND COMPENSATION.

§ 65. Nature and scope.

Right and duty in general, see post § 66.
Time for accounting, laches and delay, see post § 67.
Accounting suits in equity, see post § 68.
Method of stating and items to be charged or credited, see post §§ 69-75.
Compensation of guardian, see post § 76.
Mistakes, amendments and corrections, see post § 77.
Hearing and procedure on settlement and distribution of estate, see post § 78.
Evidence and presumptions, see post § 79.
Accounting of guardianship by representative of deceased guardian, see Estates of Decedents ¶ 1064.
Accounts of joint guardians, see Jud. Act, chap. LVIII, § 31; Comp. L. 1915, § 13980.

¶ 227. A guardian's accounting is not a legal but is an equitable proceeding, involving not merely the ordinary items of debit and credit, but considerations as to the propriety of charges and investments, and the allowance of compensation, with which a jury cannot meddle. It cannot become a common law controversy on removal from the probate court.—Gott v. Culp, 45 Mich. 265.

¶ 228. A guardian's accounting is an equitable and not a legal proceeding, involving not merely the ordinary items of debit and credit, but considerations as to the propriety of the actions of the guardian and as to the allowance of his compensation, and with these things a jury cannot meddle, but disputed matters of fact may be submitted on proper issues to a jury to determine definitely such specific facts as will, when found, aid the court in determining questions which belong to its equitable discretion.—In re Bristol, 199 Mich. 453.

§ 66. Right and duty in general.

Necessity for accounting before ward may bring suit on bond, see post ¶ 288.

¶ 229. A guardian of a person formerly insane may settle with his ward after he has recovered his reason, and they are not obliged to have their accounts passed through the probate court.—Hooper v. Hooper, 26 Mich. 435; Tate v. Stevenson, 55 Mich. 320.

¶ 230. Laws 1873, Act No. 95 requires a guardian to account on citation, but contemplates that he shall do so without; but the failure to do so, if not injurious, is not necessarily a cause of forfeiture.—Gott v. Culp, 45 Mich. 265.

¶ 231. Under How. St., § 6760, the probate court has power to cite the administrator of a deceased guardian to render an accounting of the guardianship.—Tudhope v. Potts, 91 Mich. 490.

§ 67. Time for accounting, delay and laches.

Want of notice as excusing delay in suing guardian for default or accounting, see also Equity § 55.

¶ 232. A guardian must be ready to account as soon as his trust ends.—Tate v. Stevenson, 55 Mich. 320.

¶ 233. Undue haste in the settlement of a guardian's accounts is not favored.—Powell v. Powell, 52 Mich. 432.

¶ 234. Laches does not appear in suing a guardian for accounting of pension moneys received in 1873, he dying in 1876, and the ward being ignorant thereof until 1897, when claim was made and an administrator of the guardian appointed for the first time in 1899, whereupon suit was brought. [Official reporter states suit was brought in 1900.]—Murphy v. Cady, 145 Mich. 33.

¶ 235. A ward is interested in fact in the settlement of his guardian's estate, and is a party thereto in law, and is bound, on becoming of age, to prosecute his rights with legal diligence. The probate records of the estate are open to inspection, and are notice to all persons interested.—Robert v. Morrin's Estate, 27 Mich. 306.

§ 68. Accounting suits in equity.

Amendment of trust bill by ward to convert it into bill for accounting, see Equity ¶ 550.

Accounting to chancery court for conveyance of equitable interests in land, see Jud. Act, chap. XIX, § 51; Comp. L. 1915, § 12705.

¶ 236. Accounting in equity is proper against a guardian for failure to account, where there is also a claim against him for damges for neglecting to get in all of the ward's estate.—Dodson v. McKelvey, 93 Mich. 263.

¶ 237. The ward of a de facto guardian may invoke the aid of the court which made the appointment in procuring an accounting of such guardian's administration, without admitting the regularity of the appointment. —In re Cameron's Estate (Appeal of Smith), 157 Mich. 398.

§ 69. Method of stating and items to be charged or credited.

Allowance for support and education of ward, see post § 70.

Charging guardian for services of ward, see post § 71.

Losses or depreciation, see post § 72.

Disbursements and costs of litigation, see post § 73.

Interest, see post § 74.

Expenditures of de facto guardians, see post § 75.

Review of discretion as to allowances in circuit, see Appeal § 418.

Making appraisal of estate, see Jud. Act, chap. LVIII, § 14; Comp. L. 1915, § 13963.

¶ 238. Where a testator's daughter has been made residuary legatee, to be paid on becoming 18 years of age, or on her marriage if at an earlier age, provided anything should remain after paying for her care and tuition, and the testator's brother is appointed guardian by the court, but before the appointment makes expenditures out of his own means for the care and education of the legatee, for which expenditures the executor settles with him after the appointment, the payment in settlement does not have to be accounted for by the guardian as part of the ward's estate.—Perkins v. Tooley, 74 Mich. 220.

¶ 239. If a guardian can include in the final settlement of his account a debt to him incurred by his ward before his guardianship began, he cannot do so where the debt had become barred by the statute of limitations before that period.—Bondie v. Bourassa, 46 Mich. 321.

¶ 240. A guardian who has kept no account of the expense of clothing and maintaining his ward, not having been called upon by the probate court to render annual accounts, may nevertheless be allowed a reasonable sum for such expenditures, if acting in good faith.—Tudhope v. Avery, 106 Mich. 149.

¶ 241. Under Comp. L. 1897, § 8705, authorizing a guardian to pay the ward's expense of maintenance and education out of income or principal of his property as shall be judged reasonable and shall be directed by the probate court, it is not necessary to obtain an order of the probate court before expenditures are made to permit of their allowance in the final report.—In re Hoga's Estate, 134 Mich. 361.

§ 70. ——Allowance for support and education of ward.

Allowance for expenditures made before authority therefor was secured from court, see also ante ¶ 241.

Allowance where no account or record kept of expenditures for support of ward, see also ante ¶ 240.

Power of guardian respecting support and education of ward, see ante § 58.

¶ 242. A guardian who takes his infant ward into his family and cares for her as one of his family for eight years and until her marriage is entitled to a reasonable allowance for her support and maintenance.—Jacobia v. Terry, 92 Mich. 275.

¶ 243. The guardian of an infant ward living in his family can charge her for board and clothing, though she be his niece, and the fact that another member of the family would have boarded her for nothing makes no difference, if the guardian, in the exercise of his best judgment for the ward's own good, has decided that she had better live in his family.—Moyer v. Fletcher, 56 Mich. 508.

¶ 244. A guardian was allowed $25 per year for twelve and one-half years, for clothing, and making of same, for a child who was seven years of age when taken by the guardian, as a just remuneration in the absence of any itemized account of such expenditures.—In re Livernois' Estate, 78 Mich. 330.

¶ 245. Where a step-father is guardian of his step-daughter and receives the income of her estate, it cannot be assumed, without some indication, that he means to charge himself with her whole support, even though she lives in his family.—In re Ward's Estate, 73 Mich. 220.

¶ 246. A parent should not be allowed as guardian a yearly sum for child's care and support while in receipt of child's services when at home or of its wages when working away from home.—In re Livernois' Estate, 78 Mich. 330.

¶ 247. An allowance of $12 per week for 68 weeks for board and care of an incompetent ward 75 years of age who was af-

flicted with senile dementia, was unable to take care of himself, and had very offensive habits and $68 for shaving him and driving and riding with him around the country was sustained.—Aull v. Peterson, 200 Mich. 99.

§ 71. ——Charging guardian for services of ward.

¶ 248. An infant ward living in the family of her guardian, and cared for as a member of it, is not entitled to pay for household services.—Moyer v. Fletcher, 56 Mich. 508.

§ 72. ——Losses or depreciation.

Liability of guardian generally, see ante, III.
Legal interest as measure of damage for loss due to neglect in matter of investment, see also post ¶ 254.

¶ 249. A guardian is not held responsible ex post facto on the ground, merely, that some other person might have done better; he cannot on an average be expected to be thoroughly versed in law or business, and honesty, kindness and a very ordinary skill in money matters are the most that can generally be required.—Gott v. Culp, 45 Mich. 265.

¶ 250. A guardian is not liable for the loss of funds deposited by him in a savings bank at 4 per cent interest for a little over six months when the bank failed, where the evidence showed that he had sufficient reason for not investing the money elsewhere and the savings bank was considered solvent.—In re Grammel's Estate, 120 Mich. 487.

¶ 251. When a guardian, without an order of the probate court, invests the proceeds of his wards' property in lands, for their benefit, the cestuis que trustent on reaching their majority can repudiate the investment and hold him or his estate for the moneys invested, or they can follow the moneys into the lands purchased and claim the lands as against any subsequent purchaser who had notice that they were purchased with trust-money. But they cannot do both, and the election of either remedy precludes the other.—Rowley v. Towsley, 53 Mich. 329.

§ 73. ——Disbursements and costs of litigation.

Costs in actions, suits and proceedings, see ante § 64.
Allowance to guardian of amount of his reasonable expenses incurred in execution of his trust, see Jud. Act, chap. LVIII, § 30; Comp. L. 1915, § 13979.

¶ 252. Costs of appeals taken by a ward in reference to the guardian's accounting may be allowed to the guardian from the funds due the ward upon final judgment in favor of the guardian.—Moyer v. Fletcher, 56 Mich. 508.

§ 74. ——Interest.

Burden of proof to charge guardian with rate of interest higher than legal rate, see post ¶ 269.
Right to interest in general and computation of interest, see Interest.

¶ 253. A guardian is chargeable with interest upon a ward's money in his hands.—Jacobia v. Terry, 92 Mich. 275.

¶ 254. A guardian intrusted with the investment of a ward's money should not be held for interest not actually received unless his delay to invest has been unreasonable; and he cannot be held for neglect beyond legal interest.—Gott v. Culp, 45 Mich. 265.

¶ 255. As a general rule, interest should not be compounded against a guardian. If he receives more than ordinary interest he should account for it.—In re Ward's Estate, 73 Mich. 220.

¶ 256. Items of interest struck out of both sides of a guardian's account where receipts and disbursements were nearly contemporaneous and stood in open account.—In re Livernois' Estate, 78 Mich. 330.

¶ 257. A guardian is to be charged legal interest only on funds of his ward in his keeping, unless there has been an agreement for a higher rate; and the fact that such funds have been lent occasionally at ten per cent makes no difference where the guardian, though honest, is not accustomed to business and has innocently confused the ward's funds with his own and kept no accounts.—Moyer v. Fletcher, 56 Mich. 508.

¶ 258. A guardian must keep an account of receipts and disbursements as such, and if he fails to account for receipts he may properly be charged interest on the funds in his hands. If he is guilty of gross misconduct or fraud in his management, interest against him may sometimes be made to run with annual or semi-annual rests. And if he cannot show what amount of interest he has received on the ward's funds, he should be charged with legal interest on them from the time when they ought to have been invested.—Moyer v. Fletcher, 56 Mich. 508.

§ 75. ——Expenditures of de facto guardians.

See also ante ¶ 209.
Duty of de facto guardian to account, see ante ¶ 237.

¶ 259. A de facto guardian taking possession of real estate is not to be considered as a lessee from year to year, but is entitled to an equitable credit for expenditures which were made for the ward, and which would have been allowed had the guardian been a legal one.—In re Cameron's Estate (Appeal of Smith), 158 Mich. 174.

¶ 260. A de facto guardian expended money in building fences, hoghouses, corncribs, and in digging wells. Her ward was life tenant and she one of the remainder-men. The farm was in a run-down condition. Held, the expenditure was good husbandry, and the guardian was entitled to the allowance of these items on her account.—In re Cameron's Estate (Appeal of Smith), 158 Mich. 174.

¶ 261. A de facto guardian expended money for cultivating and carrying on the farm of her ward, and spent a small amount for household purposes. Held, these items were proper, and should be allowed on her account.—In re Cameron's Estate (Appeal of Smith), 158 Mich. 174.

¶ 262. A de facto guardian of a life tenant insured a barn and its contents belonging to the estate. The guardian was one of the remainder-men. The barn burned, and sufficient of the insurance money was applied by the guardian to pay the loss of the grain. With the surplus the guardian rebuilt the barn. Held, she was entitled to credit on her account for the money expended in rebuilding.—In re Cameron's Estate (Appeal of Smith), 158 Mich. 174.

¶ 263. A guardian de facto lodged her two children on the farm of her ward and boarded them out of its produce. Held, this expense should be charged against her account.—In re Cameron's Estate (Appeal of Smith), 158 Mich. 174.

¶ 264. A de facto guardian employed her husband at thirty dollars a month to manage and work upon the farm of her ward, and charged ten dollars a month for her own services in caring for her ward, her brother, who was sick and deficient. Held, these items were proper, and should be allowed on her account.—In re Cameron's Estate (Appeal of Smith), 158 Mich. 174.

§ 76. Compensation of guardian.

Right to compensation as question for court, see also ante ¶¶ 227, 228.

Compensation of guardians, see Jud. Act, chap. LVIII, § 30; Comp. L. 1915, § 13979.

¶ 265. A guardian's duties are personal and honorary, and the position is not to be given or assumed with a view of profit, but he is entitled to such reasonable compensation as the circumstances warrant, such as the size and character of the estate, the amount and kind of his services, the duration of the trust, the obligation to maintain an oversight of the person, etc.—Gott v. Culp, 45 Mich. 265.

¶ 266. A guardian's compensation for the care of his ward is not an item of account, but is a matter for the consideration of the court which passes the accounts, and is not in any case to be determined by a jury.—Gott v. Culp, 45 Mich. 265.

§ 77. Mistakes, amendments and corrections.

¶ 267. If a guardian in inventorying his ward's assets in good faith includes the money of another, which he is afterwards compelled to pay over to the owner, the probate court can permit him to correct his inventory.—Martin v. Sheridan, 46 Mich. 93.

§ 78. Hearing and procedure on settlement and distribution of estate.

Evidence and presumptions, see post § 79.

Necessity of notice of hearing to bind sureties on bond as to amount due, see also post ¶ 284a.

Appeals from probate orders and decrees, see Probate Courts, III.

Review of judgment of the circuit on appeal from probate, see Appeal § 80.

Debt owing as guardian as preferences in bankruptcy distribution, see Bankruptcy ¶ 70.

Conclusiveness of form or basis of account as presented in probate court on appeal in circuit court, see Probate Courts, III.

¶ 268. Where an order for the distribution of assets in a guardian's hands was made without notice of hearing, the probate court, at a subsequent hearing properly noticed, can confirm and make it valid.—Landon v. Comet, 62 Mich. 80.

§ 79. Burden of proof, presumptions and evidence.

Presumptions and evidence in actions on bonds, see post § 88.

Admissibility of book entries by guardian's clerk to show settlement, see Evidence ¶ 2682.

¶ 269. The burden of proof that a guardian has received a higher interest than the legal rate upon his ward's money is on those who represent the ward's interests on an accounting; and they must identify the instances in which such interest has been received.—Moyer v. Fletcher, 56 Mich. 508.

¶ 270. Evidence that a minor was an admitted member of the same family as one who was afterwards made his guardian, and was provided for as such during a period for which the guardian afterwards sought to charge him for board and clothing, is admissible in a proceeding for the settlement of the guardian's accounts.—Bondie v. Bourassa, 46 Mich. 321.

¶ 271. A receipt by a ward for property held by his guardian is no more conclusive than any other receipt; and while it justifies the guardian's discharge, neither the receipt nor the discharge precludes the ward from showing that under a mutual arrangement the guardian has not actually accounted for part of the property.—Powell v. Powell, 52 Mich. 432.

¶ 272. Testimony that a guardian of an incompetent person had access to his ward's

papers; that they had never been found in any other person's hands; that he had attempted to make it appear that a third person had written to him claiming to own certain notes given by him to his ward when the latter was competent; that these letters were in a feigned hand, and were written or caused to be written by the appellant; that they became a part of the files in the case; and that he defaced certain postmarks stamped upon the envelopes, which were claimed to support the theory that the letters were written by him or by his procurement, is enough to justify a finding on settlement of his account that he should be charged with the sum due on such notes. If he was guilty of an attempt to suppress testimony by altering a public record, the testimony should be construed strongly against him.—Murray v. Lepper, 99 Mich. 135.

¶ 273. In a suit for an accounting by a ward, receipt of pension moneys belonging to the ward is sufficiently proved by an exemplified copy of the pension vouchers, under U. S. Rev. St., § 882, suppported by an allegation in the guardian's plea of laches that he was guardian and had received pension moneys.—Murphy v. Cady, 145 Mich. 33.

VI. RIGHTS AND DEALINGS BETWEEN GUARDIAN AND WARD.

§ 80. In general; presumptions and policy of law.

Guardian as purchaser on sale of real estate, see ante § 48.

Several character of duties involved in guardianship over more than one ward, see ante ¶ 95.

Ratification of infants' acts by them after attaining majority, see Infants.

Evidence to impeach for duress bond to secure repayment of converted money to ward, see Duress ¶ 54.

Admissibility of parol to contradict receipt by ward, see Evidence § 190.

Status and disabilities of infants in general, see Infants, I.

Contract between wife and guardian of her minor husband, see Comp. L. 1915, § 11467.

¶ 274. A presumption arises against the justice of any bargain made by one in the position of a guardian with a ward incompetent to manage his affairs, and the guardian has the burden of showing that the transaction was fair and for the other's interest.—Jacox v. Jacox, 40 Mich. 473.

¶ 275. Guardians can reap no personal benefit from the use of the ward's funds, any more than other trustees.—Moyer v. Fletcher, 56 Mich. 508.

¶ 276. Where in an action by children and grandchildren to set aside a deed of the father and grandfather on the ground of incompetency, there were a number of witnesses on each side so that their opinions were evenly balanced, and the relation between the grantor and grantee is very largely in the nature of guardian and ward, and in view of the grantor's condition it becomes the grantee's duty to properly care for him and his property, it is the duty of the grantee to show entirely clean hands in the transaction.—Hemphill v. Holford, 88 Mich. 293.

¶ 277. Where as between vendor and purchaser the circumstances disclose that the person under the infirmity was for the time being in place of ward of the other party, or was in a state of submission to the judgment of the other, a presumption arises adverse to the justice of the bargain and the bargainee will be required to show that no advantage was taken, and that in itself the arrangement was not only suitable, fair and conscientious, but one expedient under the circumstances and conducive to the interests of the other.—Noban v. Shoup, 171 Mich. 191.

¶ 278. The rule prohibiting guardians from profiting out of the estate of the ward applies in case of conveyances by minor wards of a portion of their interest in an estate, to their guardian who was also their aunt, in consideration of the care bestowed by her upon such minors and upon their father and mother, and of love and affection, one minor having at the time of the conveyance been still under age and the other having just passed her majority and the guardian's accounts having not as yet been settled.—Williams v. Davison's Estate, 133 Mich. 344.

¶ 279. One who upon a petition conferring no jurisdiction upon the court is appointed guardian of an alleged incompetent person has no standing in court to compel an assignment to himself of a mortgage executed to another person for the ward's use and benefit.—Partello v. Holton, 79 Mich. 372.

¶ 280. In a suit against a guardian for appropriating moneys left in the keeping of his ward, there is no error in excluding defendant's inventory of the ward's property filed in the probate court by him as guardian, or in rejecting the evidence of defendant's clerk as to what particular sums of money were included in the inventory, and as to defendant's good faith, especially if defendant does not offer to show that he has in good faith paid out the money for the ward's benefit, or done any act that would debar him from full protection on the settlement of his guardianship account in the probate court.—Martin v. Sheridan, 46 Mich. 93.

VII. BONDS AND ACTIONS ON SAME.

§ 81. Obligation and breach of and liability on bonds.

On bonds for sale of real estate, see post § 82.

Liability of sureties, see post §§ 83, 84.

Actions and procedure on bonds, see post §§ 85, 86.
Defenses, objections and estoppels, see post § 87.
Presumptions and evidence, see post § 88.
Bond on qualifying for letters, see ante § 20.
Bond by retiring guardian to successor to pay back converted moneys, see also Bonds ¶ 38.
Liability of infant on guardian's bond, see Infants.

¶ 281. A guardian is not liable upon his bond for payments made to him by an executor before the time limited in the will for the payment of a legacy therein bequeathed to the ward, he having at the time no right, in the capacity of guardian, to receive the money.—Perkins v. Tooley, 74 Mich. 220.

¶ 282. Money devised to a ward to be paid to her when she comes of age, but improperly paid over to the guardian while the ward is still a minor, is not received by him as guardian, because he has no business with it, and he is not liable for it on his bond.—Hinckley v. Washtenaw Probate Judge, 45 Mich. 343.

§ 82. ——On bonds for sale of real property.

Necessity and sufficiency of bond on sale of real estate, see ante § 43.

¶ 283. A misapplication by a guardian of the proceeds of a sale of his ward's land is a breach of his bond given upon the sale for which he and his sureties are liable.—Schlee v. Darrow's Estate, 65 Mich. 362.

§ 83. Liability of sureties.

See also ante ¶ 283.
Bond on qualifying for letters, see ante § 20.
Notice and procedure on discharge of sureties, see post § 84.
Obligation and defenses of sureties in general, see Suretyship, II.
Conclusiveness of probate order granting leave to sue on guardian's bond as to liability of sureties, see Probate Courts, III.

¶ 284. A ward's ratification, by executing, on coming of age, a deed to the purchaser, of a guardian's sale voidable for irregularities, does not affect a surety on the guardian's bond given upon the sale, and such surety is liable for the guardian's failure to account for the proceeds of the sale.—Schlee v. Darrow's Estate, 65 Mich. 362.

¶ 284a. An order of the probate court fixing the amount due from the guardian is binding upon the sureties on the bond without notice of the hearing.—Rice v. Wilson, 129 Mich. 520.

§ 84. ——Notice and procedure on discharge of sureties.

¶ 285. Under Comp. L. 1897, § 9501, requiring notice to all persons interested upon petition for discharge of sureties on probate bonds, a discharge of sureties, on a guardian's bond without notice to the ward or his next of kin or without examination or passing upon the account by the court is ineffectual and void.—Rice v. Wilson, 129 Mich. 520.

§ 85. Actions and procedure on bonds.

Applications for leave to sue, see post § 86.
Defenses, objections and estoppels, see post § 87.
Presumptions and evidence, see post § 88.
Bond on qualifying for letters, see ante § 20.
Necessity and sufficiency of bond for sale of real estate, see ante § 43.
Action, suits and proceedings generally, see ante, IV.
Time within which actions on bond barred, see Limitation of Actions.

¶ 286. If a guardian neglects his duty, an action may be brought on his bond, which is the same whether the ward is an infant or an incompetent. (How. St., § 6331.)—In re Munck's Estate (Lyster's Appeal), 54 Mich. 325.

¶ 287. Under Comp. L. 1897, §§ 8711, 8717, 8719, relative to the custody of incompetent wards and administration of their estates by their guardian, the power of a common-law court over a demand against an incompetent under guardianship is exhausted by the rendition of judgment, and payment of such judgment must be enforced by suit on the guardian's bond.—Nolan v. Garrison, 156 Mich. 397.

¶ 288. In the absence of an accounting before the proper tribunal, a suit cannot, save in exceptional cases, be maintained against a surety on a deceased guardian's bond by the ward after attaining her majority.—Tudhope v. Potts, 91 Mich. 490.

§ 86. ——Applications for leave to sue.

¶ 289. No notice is necessary of an application for leave to sue upon a guardian's bond.—Landon v. Comet, 62 Mich. 80.

¶ 290. An application is properly made to the probate court under How. St., § 6331, by the administrator of the estate of an incompetent person, for leave to bring suit upon the bond of the guardian of the deceased, which bond is properly executed to the judge of said court.—Welch v. Van Auken, 76 Mich. 464.

¶ 291. The fact that part of an incompetent person's estate in his guardian's hands consists of securities which the guardian refuses to turn over to the administrator does not affect the probate court's jurisdiction to grant leave to sue upon the guardian's bond, even though resort to chancery may become necessary.—Welch v. Van Auken, 76 Mich. 464.

¶ 292. Upon an application for leave to sue upon a guardian's bond given before sale of real estate, the probate court cannot pass upon the merits of the controversy or fix the liability of any obligor.—Schlee v. Darrow's Estate, 65 Mich. 362.

§ 87. Defenses, objections and estoppels.

Time within which action may be brought against sureties as determined by time of guardian's discharge, see also ante ¶ 90.

¶ 293. An action upon the bond given by a guardian licensed to sell real estate cannot be defeated by showing that the sale was void because of his neglect to publish and post notices and to make proper proof thereof. The bond covers his neglects or omissions to make the sale in a legal manner, though it does not cover any illegalities or defects occurring prior to the granting of the license.—Schlee v. Darrow's Estate, 65 Mich. 362.

¶ 294. Acceptance of appointment as guardian of incompetent person, and taking possession of ward's estate, estop guardian and his surety from questioning regularity of appointment in suit on his bond.—Welch v. Van Auken, 76 Mich. 464.

§ 88. Presumptions and evidence.

¶ 295. It will not be presumed in advance that a guardian of an incompetent will neglect his statutory duty to pay his ward's debts under the supervision of the probate court, but it will rather be presumed that he will do so, and that it will not become necessary to bring suit upon his bond.—Nolan v. Garrison, 156 Mich. 397.

GUARDS to GUTTERS.

Cross-References.

Guards—
- At elevator shafts and openings in floors of buildings, see Buildings.
- On bridges and highways, see Bridges, III; Highways, XII.
- For protection of servants working at machines, see Master and Servant, III.
- At railroad crossings, see Railroads, VIII.

Guessing Contests—
- As gambling contracts, see Gambling Contracts.
- As criminal gaming or lottery, see Crimes, II; Indictment.

Guests—
- At inns, see Inns.
- Liability of landlord or tenant for injuries to visitors, see Landlord and Tenant, IV, D.
- Imputed negligence of driver to guest riding in vehicle, see Negligence, IV.

Guilt or Innocence—
- Presumptions as to, see Indictment, VIII, A; Evidence, II.
- Admissibility and sufficiency of criminal evidence, see Indictment, VIII, B, C.
- Pleas of guilty, see Indictment, V.
- Sentence and judgment, see Indictment, XI.

Gunpowder—
- See Explosives.
- Conditions in insurance policies as to explosives, see Insurance, VIII, XII.

Guns—
- Crimes involving use or possession of weapons, see Crimes, II; Homicide; Indictment.
- Negligence in using or furnishing weapons, see Negligence.

Gutters—
- Liability to adjoining owner for projection or eaves-drip, see Adjoining Owners §§ 6, 7.
- Liability and rights as to surface waters, see Waters, II.
- Liability for street injuries due to want of gutters or to defective ones, see Highways, XII; Municipal Corporations, XII.

HABEAS CORPUS.

TREATS of the common law writ for the purpose of inquiring into the legality of detention of a person and of the writ as used to bring persons in custody before the issuing court for any lawful purpose, as to testify.

Analysis.

§ 1. In general; grounds and office of writ.
§ 2. To admit prisoners to bail.
§ 3. To review capias or contempt proceedings.
§ 4. To determine rightful custody of children.
§ 5. To investigate commitment as lunatic.
§ 6. Jurisdiction and power to issue writ.
§ 7. Petition for writ and issuance, form and contents of writ.
§ 8. Service and return to writ or objections to it.

§ 9. ——Compelling return or obedience to writ.
§ 10. Effect and conclusiveness of return.
§ 11. Power and jurisdiction to hear.
§ 12. Hearing and scope thereof.
§ 13. ——Evidence or showing and presumptions.
§ 14. Judgment on habeas corpus and effect of same.
§ 15. ——Appeal or review of judgment.
§ 16. Further proceedings and liberation or remand of prisoner.

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§ 1. In general; grounds and office of writ.

To admit to bail, see post § 2.
To review capias or body execution, see post § 3.
To determine proper or legal custody of children or lunatics, see post §§ 4, 5.
Jurisdiction to issue, see post § 4.
Habeas corpus proceedings as means of reviewing other proceedings, see ante §§ 1-5, 12.
Habeas corpus from supreme court to review errors by circuit court on habeas corpus issued by it, see post § 15.
Matters triable, see post § 12.
Constitutional rights of persons accused of crime and constitutional provisions as to due process, see Constitutional Law.
Matters affecting validity of imprisonment and irregularities in indictment or prosecution thereon, see Indictment.
Habeas corpus as mode of reviewing conviction, see also Indictment, XVI, A.
Grounds for enforcing or declining to enforce decree for custody of child, see also Divorce ¶ 446.
Legality of arrest and commitment for hearing, see Arrest, Commitment and Bail.
Legality of sentence and imprisonment for crime, see Crimes, I-E; Indictment and Prosecution, XI et seq.
Sufficiency of record of commitment to show imprisonment for crime on conviction thereof, see Indictment, XII.
Order admitting prisoner to bail as res adjudicata of question arising on habeas corpus for prisoner's release, see Former Adjudication ¶ 415.
Constitutional right to writ and provisions as to suspension, see Const. art. II, § 11.
Construction of general habeas corpus statute as applicable to every writ of that kind, see Jud. Act, chap. XXXVI, § 70; Comp. L. 1915, § 13522.
Necessity of testimony by prisoner as ground, see Jud. Act, chap. XXXVI, § 1 et seq.; Comp. L. 1915, § 13453.
Habeas corpus to bring prisoner in for hearing and punishment for contempt, see Jud. Act, chap. V, §§ 7-9; Comp. L. 1915, §§ 12274-12276.
Propriety of habeas corpus after certiorari issues, see Jud. Act, chap. XXXVI, § 41; Comp. L. 1915, § 13493.
Provisions for certiorari in lieu of habeas corpus when offense is not bailable, see Jud. Act, chap. XXXVI, § 38 et seq.; Comp. L. 1915, § 13490 et seq.
Penalty for refusing copy of warrant, process or commitment for detention, see Jud. Act, chap. XXXVI, § 56; Comp. L. 1915, § 13508.
Persons denied by statute the right to have the writ, see Jud. Act, chap. XXXVI, § 8; Comp. L. 1915, § 13460.
Provision for opportunity in extradition proceedings for application for habeas corpus, see Comp. L. 1915, § 15885.
Statutory denial of writ to liberate Wisconsin prisoners while in transit across parts of Michigan, see Comp. L. 1915, § 15112.

¶ 1. Habeas corpus is the proper remedy for a conviction without jurisdiction.—In re Hamilton's Case, 51 Mich. 174.

¶ 2. Habeas corpus is a proper remedy where a sentence to a certain prison is wholly void.—In re Allen, 139 Mich. 712.

¶ 3. Technical defects in a justice's warrant of commitment are not reviewable in habeas corpus proceedings; redress must be sought in some way prescribed by statute for review by an appellate court.—In re Hamilton's Case, 51 Mich. 174.

¶ 4. Habeas corpus is not the proper remedy to test the validity of an order of the recorder's court of Detroit, made under Comp. L. 1871, § 7957, How. St. § 9570, and committing to the state prison, until further order, one who has been tried in that court for murder and acquitted as insane; the question should be raised by writ of error or other appropriate remedy.—In re Underwood, 30 Mich. 502.

¶ 5. Habeas corpus is not the proper remedy to review the alleged want of a preliminary examination, and the illegal arrest in another state and transportation into Michigan of a respondent who has been convicted and sentenced to state prison.—In re Ellis, 79 Mich. 322.

¶ 6. A conviction under a valid city ordinance, on a valid complaint, by a court having jurisdiction to try and determine the offense charged, cannot be disturbed on habeas corpus.—In re Bushey, 105 Mich. 64.

¶ 7. The writ of habeas corpus will not be granted to review a final judgment in an ordinary criminal cause for errors which

are properly reviewable by writ of error, and where that writ is an adequate remedy.—In re Eaton, 27 Mich. 1; In re Coffeen, 38 Mich. 311.

¶ 8. The validity of a conviction and sentence in a common-law proceeding is not to be reviewed on habeas corpus, but rather on writ of error.—In re Coffeen, 38 Mich. 311.

¶ 9. An appellate court can use the writ of habeas corpus as one means of exercising its supervisory power; but tribunals which have no appellate power cannot use it as a writ of error.—In re Hamilton's Case, 51 Mich. 174.

¶ 10. Habeas corpus will not lie to review proceedings of the trial court, where jurisdiction is shown; such review should be taken on writ of error.—In re Lewis, 124 Mich. 199.

¶ 11. Habeas corpus will not lie to release a prisoner on the ground that the commitment, in reciting conviction for larceny "from" a store, failed to charge the statutory crime of larceny "in" a store in the daytime; where the return set up the facts and no objection was made to their consideration, and where the return showed conviction by a court of competent jurisdiction of an offense properly charged which subjected the prisoner to the punishment meted out to him.—In re Lewis, 124 Mich. 199.

¶ 12. When there is a valid conviction and irregular sentence which under the law might have been corrected by a new sentence when the case was reviewed on writ of error, habeas corpus will not be permitted to perform the function of a writ of error; and it is doubtful if in the first instance the question could have been raised on habeas corpus.—In re Butler, 138 Mich. 453.

¶ 13. When there is a valid conviction and an irregular sentence, which may, under the law, be corrected by a new sentence, habeas corpus will not be permitted to perform the function of a writ of error.—In re Vitali, 153 Mich. 514.

¶ 14. An irregularity in a warrant or judgment restraining a person convicted of crime cannot be corrected by an attempt to make the writ of habeas corpus perform the office of a writ of error.—In re Forscutt, 167 Mich. 438.

¶ 15. Petitioner brought habeas corpus for his release against the warden of the state's prison. The order of commitment of petitioner recited that he was convicted of having committed the crime of uttering and publishing a forged and counterfeit instrument. The record of the trial disclosed that petitioner was informed against for an offense described in 3 Comp. Laws 1897, § 11660. The sentence imposed was a proper one for the offense there described. The record further showed that the jury found the petitioner guilty "of uttering and publishing a forged and counterfeit instrument." The judgment entry contained nothing aiding or correcting the record of the verdict. Held, habeas corpus would not lie on account of these irregularities, but they must be asserted in a court of errors.—In re Satt, 164 Mich. 472.

¶ 16. An application for a writ of habeas corpus was refused where it involved the right of a certain person to act as justice of the peace; the court declined to consider that question except in a proceeding instituted against the person himself.—In re Corrigan, 87 Mich. 66.

¶ 17. A juvenile offender sentenced to the reform school at Lansing will be released on habeas corpus where it appears that the report of the county agent was dated five days after the commitment, since Comp. L. 1897, § 2261 requires that such report shall be made after the arrest and before further proceedings.—In re Mills, 131 Mich. 325.

§ 2. To admit prisoners to bail.

Admission to bail in general, see Arrest, VIII.

To admit prisoner to bail pending writ of error in which stay is allowed, see Comp. L. 1915, § 14590.

¶ 18. Where there is good reason to believe that a murder has been committed, and a person is detained on reasonable grounds of suspicion to await examination before a police magistrate upon the charge of having been concerned therein, a higher court will not interfere, pending the examination, to release him on habeas corpus.—In re Peoples, 47 Mich. 626.

¶ 19. The discretion of the circuit court in refusing to admit a prisoner to bail will not be interfered with unless it has been exercised in an arbitrary, unjust or oppressive manner, or where the refusal is clearly erroneous.—In re Tubbs, 139 Mich. 102.

¶ 20. Habeas corpus to obtain petitioner's release upon bail will not be granted where the refusal of the circuit judge was based on a finding that the proof was evident and the presumption great that petitioner was guilty of murder, and the evidence taken before the examining magistrate was sufficient to sustain the finding.—In re Tubbs, 139 Mich. 102.

§ 3. To review capias or contempt proceedings.

Time allowable after service of writ, see post § 8.

To test refusal to quash capias, see also Civil Arrest ¶ 85.

Limitations of statute on right to writ, see Jud. Act, chap. XXXVI, § 8; Comp. L. 1915, § 13460.

¶ 21. The proper remedy to test the legality of an arrest on a capias ad respondendum is habeas corpus, of which the defendant may avail himself before pleading.—Miller v. Rosier, 31 Mich. 475.

¶ 22. Habeas corpus is not the proper remedy to review the regularity of a prima facie regular commitment for refusing to pay alimony; the remedy is by appeal.—Bissell's Case, 40 Mich. 63.

¶ 23. The clerk of the court by inadvertence dated an order of commitment for contempt March 14th, instead of March 15th. The attorney for petitioner in habeas corpus corrected the order, and the court later approved of such correction. Held, the correction was not ground for quashing the commitment.—In re Knott, 162 Mich. 10.

§ 4. To determine rightful custody of children.

To review custody of insane, see post § 5.
Power to issue writ, see post ¶ 32.
Sufficiency of petition for writ, see post § 7.
Sufficiency of return to writ, see post § 8.
Proper person to have custody of children and considerations governing disposal, see Infants, II; Parent and Child, I; Divorce, IX; Incompetents and Delinquents (abandoned or delinquent children).

¶¶ 24, 25. Whether the writ will issue to a person here to compel the production of a minor child under guardianship here who has been removed from the state and is detained abroad, quære; the court being divided.—In re Jackson, 15 Mich. 417.

¶ 26. Habeas corpus will not be granted as a matter of right to change the custody of children where it does not clearly appear that such change would be for their interest. —Matter of Heather Children, 50 Mich. 261.

§ 5. To investigate commitment as lunatic.

To determine proper custody of child, see ante § 4.
Provision for writ to inquire into detention in asylum for insane, feeble minded or epileptic persons, see Comp. L. 1915, §§ 1344, 1558.

¶ 27. The writ of habeas corpus runs into insane asylums and lies to review the orders of probate courts committing persons to such asylums. — Palmer v. Kalamazoo Circuit Judge, 83 Mich. 528.

¶ 28. Habeas corpus is not the proper remedy to test the validity of an order of the circuit judge, entered after an inquiry into the sanity of one in jail awaiting arraignment on a charge of arson, committing the accused to the asylum for the dangerous and criminal insane until restored to his right mind; and should be denied in view of How. St., § 8575, subd. 2, which provides for remand to custody if it appears that the prisoner is detained "by virtue of the final judgment of any competent court of civil or criminal jurisdiction."—In re Maguire, 114 Mich. 80.

§ 6. Jurisdiction and power to issue writ.

Allegations of jurisdictional facts, see post ¶ 37.
Power to hear writ, see post § 11.
Validity of act conferring power on court commissioners, see Constitutional Law § 58.
Extent of circuit court's supervisory jurisdiction, see Courts § 55.
Power of judge at chambers to issue, see also Courts ¶ 187.
Power of circuit court commissioner to issue writ and limits of his powers, see Courts § 86.
Jurisdiction of Municipal Courts, see Municipal Courts, II.
General power of supreme court, see Const. art. VII, § 4; Jud. Act, chap. I, § 9; Comp. L. 1915, § 12014.
Constitutional and general statutory jurisdiction of circuit courts, see Const. art. VII, § 10; Jud. Act, chap. VI, § 1, ¶ 2; Comp. L. 1915, § 12299, ¶ 2.
Courts to which application for habeas corpus to inquire into cause of detention must be presented, see Jud. Act, chap. XXXVI, § 9; Comp. L. 1915, § 13461.
Provision for issuance from supreme or circuit court where prisoner is detained in county jail on criminal charge, see Jud. Act, chap. XXXVI, § 71; Comp. L. 1915, § 13523.
Power of Detroit Recorder's Court, see Comp. L. 1915, § 14649.
Statutory provisions conferring jurisdiction of habeas corpus to testify, see Jud. Act, chap. XXXVI, §§ 1, 3, 4; Comp. L. 1915, §§ 13453, 13455, 13456; see also Comp. L. 1915, §§ 1752, 14586.
Provisions as to persons detained on criminal accusations in Wayne County, see Comp. L. 1915, § 1870 et seq.
Writs to bring in contemptuous prisoners for hearing and punishment, see Jud. Act, chap. V, § 8; Comp. L. 1915, § 12275.

¶ 29. It seems that the writ should be taken out from the supreme court, if that court is to pass upon the evidence in the proceedings.—Corrie v. Corrie, 42 Mich. 509.

¶ 30. The action of a circuit judge in habeas corpus proceedings is strictly judicial where no jury is required and the judge acts personally, and it need not be taken in open court or during term.—Goodchild v. Foster, 51 Mich. 599.

¶ 31. A circuit court commissioner has no authority under Const. art. 6, § 1, to issue the writ of habeas corpus where the inquiry contemplates the review or investigation of the proceedings of a judicial tribunal, since

judicial power is vested by the constitution in certain specified courts, and proceedings had in such a case before a commissioner, being void for want of jurisdiction, would not bar like proceedings before the supreme court. The statute authorizing commissioners to issue this writ must be construed in connection with this provision of the constitution.—In re Buddington, 29 Mich. 472; In re Burger, 39 Mich. 203.

¶ 32. A circuit judge at chambers has jurisdiction to issue the writ of habeas corpus to get possession of children sent to the state public school by order of the probate judge.—Goodchild v. Foster, 51 Mich. 599.

¶ 33. Justices of the peace have no power to issue the writ of habeas corpus to enable persons convicted of disorderly conduct to come before them for the purpose of giving bail.—In re Fowler, 49 Mich. 234.

¶ 34. The recorder of Detroit has no authority to issue a writ of habeas corpus to take a prisoner from the reform school, who has been lawfully sentenced there, unless to testify as a witness. He cannot bring the prisoner up for a new sentence on the ground of a mistake as to his age when the former sentence was imposed.—In re Mason, 8 Mich. 70.

§ 7. Petition for writ and issuance, form and contents of writ.

Grounds for issuance, see ante §§ 1-5.

Occasions for issuance without petition, see Jud. Act, chap. XXXVI, § 16; Comp. L. 1915, § 13468.

Applications by attorney general or prosecuting attorney on behalf of the people, see Jud. Act, chap. XXXVI, § 61; Comp. L. 1915, § 13513.

Requisite proof of absence or disability of judge primarily empowered to issue writ, see Jud. Act, chap. XXXVI, § 10; Comp. L. 1915, § 13462.

Statutory liability for damages for refusal of writ, see Jud. Act, chap. XXXVI, § 17; Comp. L. 1915, § 13469.

Discretion to require payment of fees of respondent and specification of amount so to be paid, see Jud. Act, chap. XXXVI, § 68; Comp. L. 1915, § 13520.

Tender of fees as requisite and provision absolving public attorneys from such tender when applying for writ, see Jud. Act, chap. XXXVI, §§ 62, 63; Comp. L. 1915, §§ 13514, 13515.

Filing fee in Grand Rapids Superior Court, see Jud. Act, chap. XLVI, § 2; Comp. L. 1915, § 13670.

Statutory fees of commissioners for hearing motions for issuance of writs, see Jud. Act, chap. XLIX, § 1; Comp. L. 1915, § 13723.

Provision as to prompt issuance, see Jud. Act, chap. XXXVI, §§ 9, 12; Comp. L. 1915, §§ 13461, 13464.

Statutory form and contents of the writ, see Jud. Act, chap. XXXVI, §§ 13, 14; Comp. L. 1915, §§ 13465, 13466.

Sufficiency of writ and permissible objections for uncertainty, description or name, see Jud. Act, chap. XXXVI, § 15; Comp. L. 1915, § 13467.

Statutory form and contents of petition for writ to inquire into cause of detention, see Jud. Act, chap. XXXVI, § 11; Comp. L. 1915, § 13463.

Statutory requirements as to seal on writ, return day and indorsements, see Jud. Act, chap. XXXVI, §§ 58-60; Comp. L. 1915, §§ 13510-13512.

Writs to bring in prisoners to be dealt with for contempt, see Jud. Act, chap. V, § 9; Comp. L. 1915, § 12276.

For habeas corpus ad testificandum, see Jud. Act, chap. XXXVI, § 2; Comp. L. 1915, § 13454.

Summary warrant for taking person of prisoner and producing him before court, see Jud. Act, chap. XXXVI, § 52; Comp. L. 1915, § 13504.

Summary arrest of custodian of prisoner, see Jud. Act, chap. XXXVI, § 53; Comp. L. 1915, § 13505.

Certiorari in lieu of habeas corpus, when proper, see Jud. Act, chap. XXXVI, § 38; Comp. L. 1915, § 13490.

¶ 35. Where a petition by a wife sets out the detention of a child by the husband, it is sufficient, even though it does not allege the unfitness of the husband and the fitness of the petitioner, to care for the child.—In re Knott, 162 Mich. 10.

¶ 36. A petition in habeas corpus filed by a wife against a husband, alleged that a minor child was detained by the husband in Detroit or elsewhere, and that the parents and the child had their home in the county in which the petition was filed. Held, the allegations were sufficient to give the court jurisdiction.—In re Knott, 162 Mich. 10.

¶ 37. A petition in habeas corpus by a wife is sufficient to give the court jurisdiction which alleges that the husband has removed their child under five years from her custody without her consent and is detaining him in the county or elsewhere, and that the husband lives in the county where the petition is filed.—In re Knott, 162 Mich. 10.

¶ 38. Issue of the writ of habeas corpus to give to their guardian the custody of minor children less than fourteen years old is not a matter of right where it does not clearly appear that it would be for the interest of the children.—Matter of Heather Children, 50 Mich. 261.

§ 8. Service and return to writ or objections to it.

Compelling return, post § 9.

Conclusiveness and effect of return, see post § 10.

Mode of service of writ, see Jud. Act, chap. XXXVI, §§ 64, 65; Comp. L. 1915, §§ 13516, 13517.
Manner of executing summary warrant for arrest of prisoner and custodian, see Jud. Act, chap. XXXVI, § 54; Comp. L. 1915, § 13506.
Proper person to serve writ, see Jud. Act, chap. XXXVI, § 62; Comp. L. 1915, § 13514.
Time for return and computation of allowance for distance on writs returnable forthwith, see Jud. Act, chap. XXXVI, § 69; Comp. L. 1915, § 13521.
Duty to produce body of prisoner named in writ, see Jud. Act, chap. XXXVI, § 20; Comp. L. 1915, § 13472.
Proper and necessary contents of return and form of same, see Jud. Act, chap. XXXVI, §§ 18, 19; Comp. L. 1915, §§ 13470, 13471.
Showing in return of reasons of sickness or infirmity for not producing prisoner before court, see Jud. Act, chap. XXXVI, § 37; Comp. L. 1915, § 13489.
Sheriff's statutory fees for bringing up prisoner, see Jud. Act, chap. XLVIII, § 2; Comp. L. 1915, § 13719.
Keeping of prisoner pending judgment on the writ, see Jud. Act, chap. XXXVI, § 33; Comp. L. 1915, § 13485.

¶ 39. The service of a writ of habeas corpus by a copy is void.—Klein v. Klein, How. N. P. 266.

¶ 40. Where the writ is issued on behalf of a party detained in execution, the plaintiff in execution is entitled to four days' notice before any order of discharge is made; and the appearance of his attorney for the purpose of objecting to the want of notice is no waiver.—People ex rel. Moore v. Kehl, 15 Mich. 330.

¶ 41. In habeas corpus proceedings appearing and objecting to the sufficiency of a notice of return to a writ of habeas corpus applied for by a defendant held under a body execution will not waive the sufficiency of such notice.—People ex rel. Moore v. Kehl, 15 Mich. 330.

¶ 42. The person upon whom a writ of habeas corpus is served should set forth in his return the authority for the detention; but on review by certiorari, the order of commitment produced by petitioner was regarded as such authority, no objection having been made.—Palmer v. Kalamazoo Circuit Judge, 83 Mich. 528.

¶ 43. In a habeas corpus by a wife against a husband for the detention of their child under five years, the husband's return is insufficient which states that the child has not been under his restraint and control since the application for the writ, that he has not since said time transferred the custody of the child, and that at the present time he does not know the child's whereabouts.—In re Knott, 162 Mich. 10.

§ 9. ——Compelling return or obedience to writ.

Contempt proceedings in general, see Contempt.
Duty to obey writs, statutory provisions, see Jud. Act, chap. XXXVI, §§ 66, 67; Comp. L. 1915, §§ 13518, 13519.
Attachment proceedings on disobedience of writ, see Jud. Act, chap. XXXVI, §§ 21-25; Comp. L. 1915, §§ 13473-13477.
Penalty for disobedience of habeas corpus ad testificandum, see Jud. Act, chap. XXXVI, § 6; Comp. L. 1915, § 13458.
Concealment of prisoner or evasion of writ by transfer of custody or place as a misdemeanor, see Jud. Act, chap. XXXVI, §§ 49-51; Comp. L. 1915, §§ 13501-13503.

¶ 44. In committing a respondent in habeas corpus proceedings for contempt in refusing to make a complete and explicit return, the court is not exercising the inherent jurisdiction and power of courts to compel obedience to the orders of court, but is following the method which the statute (3 Comp. Laws 1897, §§ 9869-9873) affirmatively requires shall be followed to enforce obedience to the command of the writ.—In re Knott, 162 Mich. 10.

§ 10. Effect and conclusiveness of return.

Effect of return to sustain commitment verbally defective, see ante ¶ 11.
Dismissal of second writ on answer showing no new question, see post ¶ 63.
Conclusiveness of return to certiorari, see Certiorari.
Statutory right of imprisoned person to traverse return, see Jud. Act, chap. XXXVI, § 36; Comp. L. 1915, § 13488.

¶ 45. In a wife's habeas corpus proceedings against a husband for the detention of a child, the husband's return as to the location of the child is traversable.—In re Knott, 162 Mich. 10.

§ 11. Power and jurisdiction to hear.

Proper court to issue writ, see ante § 6.
Disability of judge at chambers to determine on writ, see Courts § 58.
Disability of court commissioners to adjudicate custody of children, see Courts § 86, ¶ 309.

¶ 46. Whether a circuit judge cannot hold court for hearings on habeas corpus at other times than when the circuit court for the county is in session, quære.—In re Buddington, 29 Mich. 472; In re Burger, 39 Mich. 203.

¶ 47. Circuit court commissioners have no power under Const. art. 6, §§ 1, 16, to adjudicate under habeas corpus upon the right

to custody of children.—Rowe v. Rowe, 28 Mich. 358.

§ 12. Hearing and scope thereof.
See also ante ¶ 6.
Power to hear, see ante § 11.
Inefficacy of the writ to do the office of a writ of error, see ante § 1.
Duty to proceed to hearing on return of writ, see Jud. Act, chap. XXXVI, § 26; Comp. L. 1915, § 13478.
Matters excluded from hearing, see Jud. Act, chap. XXXVI, § 30; Comp. L. 1915, § 13482.
Mode of hearing on certiorari issued in lieu of habeas corpus, see Jud. Act, chap. XXXVI, § 39; Comp. L. 1915, § 13491.
Hearing and examination on summary arrest of prisoner and custodian, see Jud. Act, chap. XXXVI, § 55; Comp. L. 1915, § 13507.
Proper official to represent state on habeas corpus for inmate of Ionia house of correction, see Comp. L. 1915, § 1919.

¶ 47a. Inasmuch as habeas corpus is not adapted to review proceedings of a trial court where jurisdiction is shown, the supreme court will not inquire whether or not the trial court after receiving a plea of guilty and before pronouncing sentence, made the investigation required by law.—In re Manaca, 146 Mich. 697.

¶ 48. In habeas corpus proceedings between parents for the custody of a child there should be full inquiry and examination on oath to enable the court to decide as the welfare of the child may require.—Corrie v. Corrie, 42 Mich. 509.

¶ 49. On habeas corpus, where the petitioner is held by virtue of a commitment fair on its face, charging him with contempt of court in refusing to give evidence, it is competent for him to go behind the commitment and show that the court committing him had no jurisdiction of the proceeding in which he was called as a witness.—In re Morton, 10 Mich. 208; In re Hall, 10 Mich. 210.

¶ 50. In habeas corpus on extradition, the local courts are limited to an examination of the papers before the Governor to determine whether a crime is charged, an inquiry as to the identity of the accused, and the question of flight.—In re Palmer, 138 Mich. 36.

¶ 51. The supreme court, upon a petition of habeas corpus to inquire into the legality of a sentence imposed upon the petitioner upon conviction of a crime cannot impose a proper sentence nor amend nor modify a sentence, but it can only determine whether the petitioner is lawfully imprisoned in view of the judgment and commitment.—In re Hamilton, 188 Mich. 499.

§ 13. ——Evidence or showing and presumptions.
Rule as to re-examination of evidence on review, see post § 15.
General law of evidence, see Evidence.
General presumptions on collateral attack, see Judgments, VI.
Presumptions of regularity attending sentences for crime, see Indictment, XI, XVI, D.

¶ 52. In habeas corpus proceedings, as in others where the attack is collateral, the judgments of a superior court receive different consideration than that accorded to those of inferior tribunals, the general rule being that nothing shall be intended to be out of such jurisdiction, except that which especially appears to be.—In re Lewis, 124 Mich. 199.

¶ 53. Where it appears in the recitals of a body execution issued by a justice of the peace that a judgment was rendered for an amount within the jurisdiction of the justice, giving the date and names of the parties, it will be presumed in habeas corpus proceedings, that all the preliminaries necessary to the issuance of the execution were complied with.—In re Gaskill, How. N. P. 140.

¶ 54. In habeas corpus on extradition, the fact that the affidavits disclosed that the accused was present in the other state at a date shortly before that laid in the indictment but not at that date or since is not sufficient to negative flight.—In re Palmer, 138 Mich. 36.

§ 14. Judgment on habeas corpus and effect of same.
Matters triable, see ante ¶ 51.
Finality of the judgment for purpose of review in higher court, see post § 15.
Conclusiveness of findings on review, see post § 15.
Recommitment or further proceedings after discharge, see post § 16.
Conclusiveness on supreme court issuing original writ of the order of the committing court, see also Former Adjudication ¶ 193.
Habeas corpus decision as res adjudicata, scope and extent of facts decided, see also Former Adjudication ¶¶ 76-78.
Effect of circuit court's denial of release from void commitment made by probate court as bar to original writ of habeas corpus from supreme court, see Former Adjudication ¶ 25.
Denial of habeas corpus as bar to subsequent application, see also Former Adjudication ¶ 25.
Parol evidence to explain judgment in habeas corpus when urged as res adjudicata, see Former Adjudication § 97.
Right to costs and parties liable and entitled, see Costs §§ 9, 51.

Notice to third persons interested in restraint before passing judgment, see Jud. Act, chap. XXXVI, § 34; Comp. L. 1915, § 13486.
Notice to prosecuting attorney before passing judgment where imprisonment is on criminal accusation, see Jud. Act, chap. XXXVI, § 35; Comp. L. 1915, § 13487.
Grounds for discharge or remand, see Jud. Act, chap. XXXVI, § 27 et seq.; Comp. L. 1915, § 13479 et seq.
Provisions as to persons detained on criminal accusation in Wayne County, see Comp. L. 1915, § 1870 et seq.
Nature of disposal of case to be made on certiorari heard in lieu of habeas corpus, see Jud. Act, chap. XXXVI, § 40; Comp. L. 1915, § 13492.
Provisions as to costs in habeas corpus, see Jud. Act, chap. XXXVI, § 57; Comp. L. 1915, § 13509.

¶ 55. Where it appeared that the petitioner was held by an officer who had no legal authority for that purpose, but that there was authority in the keeper of the state reform school to detain him, under a legal commitment from which he had not been properly discharged, the court would not order him released, but remanded him to the custody of the keeper of the reform school.—In re Mason, 8 Mich. 70.

¶ 56. Where, in proceedings by habeas corpus, the supreme court was equally divided as to the disposition of a case involving a parent's right to the custody of his child, the writ was dismissed without any decision as to the rights of parties and without prejudice to any existing right or adjudication or any future remedy.—Stockman's Case, 56 Mich. 218.

¶ 57. A discharge of a prisoner in habeas corpus proceedings is a final adjudication that his detention was illegal, but is not conclusive that the arrest was illegal where no claim is made in the petition that the arrest was illegal and the discharge was based upon detention for an unreasonable length of time.—Friesenhan v. Maines, 137 Mich. 10.

¶ 58. One committed on failure to comply with an order to give security to keep the peace, and discharged upon habeas corpus for a defect in the commitment, and subsequently be arrested and imprisoned upon a second commitment issued in due form upon said order is lawfully imprisoned (How. St. § 8954, subd. 1).—In re Reinheimer's Case, 97 Mich. 619.

¶ 59. After the correction of the certificate of the circuit judge which was requisite to a valid commitment to the industrial school for boys, so as to accord with the facts, it was proper to remand the petitioners in the habeas corpus proceedings in question, and to cause the return to be amended; and under 3 Comp. L. 1897, § 9898, such action did not operate to put the petitioners in jeopardy a second time for the same cause.—In re Collins, 135 Mich. 91.

¶¶ 60, 61. The determination of a court on habeas corpus as to the custody of children is, as a general rule, conclusive in a subsequent application for the writ, unless some new fact altering the status of the case has occurred.—In re Sneden, 105 Mich. 61.

¶ 62. Where the opinion of the circuit judge makes clear that his decision in habeas corpus proceedings instituted by a father to obtain custody of his child from the grandparents of the child, was based upon the idea of the superior legal right of the parent, and also makes clear that he had in mind the rule that such legal right will not be enforced against the best interests of the child, language indicating a balancing of the rights of the parent and the interest of the child, rather favorable to the parent, will not be sufficient to overturn the conclusion reached by the circuit judge.—Smith v. Kiel, 150 Mich. 417.

¶ 63. On habeas corpus in the supreme court where respondent answers that the same facts and circumstances were before the circuit court on an earlier habeas corpus for custody of the same child, and there is nothing in the petition to show that the testimony on the earlier hearing was irreviewable because not reported or that it was insufficient to support the judgment of the circuit court, or that such judgment was contrary to law, the petition must be dismissed.—In re Sneden, 105 Mich. 61.

§ 15. ——Appeal or review of judgment.

Disposal on division of court, see also ante ¶ 56.
Sufficiency of the judgment disposing of custody of child, see also ante ¶ 62.
General law of review on writs of error or certiorari, see Appeal; Certiorari.
Reviewableness on appeal or error of habeas corpus, see also Appeal § 19.
Impropriety of bill of exceptions for review, see Appeal § 90, ¶ 405.
Interest in relator to sustain certiorari to review habeas corpus, see Certiorari § 8.
Questions of fact reviewable on certiorari to review habeas corpus, see Certiorari § 55.
Mandamus to review grant or denial of habeas corpus, see Mandamus, II.

¶ 64. The proper remedy for errors committed in proceedings on habeas corpus before a circuit judge is by certiorari or by habeas corpus in the supreme court, not by writ of error.—People ex rel. Faust v. Calhoun Circuit Judge, 30 Mich. 266.

¶ 65. The discharge by the circuit court on habeas corpus of a prisoner civilly held is a final judgment reviewable on error.—In re Hicks, 20 Mich. 129.

¶ 66. An order of discharge in habeas corpus proceedings of a person held as a criminal is final, unless otherwise provided by statute, and is not open to review on appeal or writ of error.—People v. Conant, 59 Mich. 565; People v. Fairman, 59 Mich. 568.

¶ 67. Certiorari is the proper writ by which the supreme court reviews such habeas corpus proceedings as are reviewable, and error does not lie.—In re Brock, 144 Mich. 42.

¶ 68. Where the supreme court, after examination of the testimony sent up by agreement with the return on certiorari to review habeas corpus proceedings, finds that there is evidence which supports the conclusion of the circuit court, no re-examination of the evidence will be made for the purpose of determining facts.—Smith v. Kiel, 150 Mich. 417.

¶ 69. An order made in habeas corpus proceedings will not be vacated on mandamus where it appears from the record that such defects exist in the proceedings under which defendants were held in custody as would on a new writ justify their discharge. —Township of Fruitport v. Muskegon Circuit Judge, 90 Mich. 20.

¶ 70. An invalid habeas corpus order for discharge from insane asylum may be vacated on certiorari without remanding person discharged, where it appears to be unprofitable to do so.—Palmer v. Kalamazoo Circuit Judge, 83 Mich. 528.

§ 16. Further proceedings and liberation or remand of prisoner.

Remand from improper to proper officer, see ante ¶ 55.

Dismissal without prejudice to future application for custody of child, see ante ¶ 56.

Dismissal of second petition on answer showing no new question, see also ante ¶ 63.

Vacating discharge on certiorari without remand where useless, see also ante ¶ 70.

Grounds for liberation or remand, see Jud. Act, chap. XXXVI, § 27 et seq.; Comp. L. 1915, § 13479 et seq.

Remand after bringing prisoner to testify, see Jud. Act, chap. XXXVI, § 5; Comp. L. 1915, § 13457.

When prisoner may be recommitted after discharge, see Jud. Act, chap. XXXVI, § 47; Comp. L. 1915, § 13499.

Provisions for remand if not bailable or entitled to discharge, see Jud. Act, chap. XXXVI, § 32; Comp. L. 1915, § 13484.

Provision for admission to bail if commitment is irregular, see Jud. Act, chap. XXXVI, § 31; Comp. L. 1915, § 13483.

Fixing bail on hearing certiorari issued in lieu of habeas corpus, see Jud. Act, chap. XXXVI, §§ 42-46; Comp. L. 1915, §§ 13494-13498.

Official liability for recommitting or further detaining prisoner, see Jud. Act, chap. XXXVI, § 48; Comp. L. 1915, § 13500.

¶ 71. One who has been discharged on habeas corpus for a defect in a commitment issued by a justice of the peace on his failure to comply with an order requiring him to furnish sureties to keep the peace, may lawfully be imprisoned upon a second commitment in due form issued by the same justice upon the same order.—In re Reinheimer, 97 Mich. 619.

HABENDUM to HARDSHIP.

Cross-References.

Habendum Clause—
- Construction in deeds, see Deeds, III. and especially Deeds § 49.

Habere Facias—
- Writ of possession in ejectment, see Ejectment § 59.

Habitation—
- In sense of domicile, see Domicile.
- Crimes against, see Crimes, II; Indictment.

Habits—
- Personal habits affecting capacity or qualifications of the persons, see Incompetents; Insane Persons, I; Wills, II.
- Personal habits affecting measure of damages for personal injury or death, see Damages, III, E, IV, IX, XI; Death by Wrongful Act § 33 et seq.
- Dissolute or irresponsible habits as disqualification for trust, see Estates of Decedents, III, A; Guardianship, § 10; Receivers, II, A; Trusts, V.
- Admissibility of evidence of reputation as to habits, see Evidence, VII, B; Indictment, VIII, B.
- Cross-examination of witness as to habits bearing on credibility, see Examination of Witnesses § 62.

Habitual Criminals—
- Augmentation of punishment on second conviction, see Crimes § 31.

Habitual Drunkards—
- As incompetents or insane persons, see Incompetents; Insane Persons.
- Capacity for crime, see Crimes § 14.
- Drunkenness as crime, see Crimes, II; Indictment; Intoxicating Liquors, VIII.
- Grounds for divorce, see Divorce § 14.

Hackstands, Hackmen—
- Regulation of use of station grounds by carrier, see Carriers § 8.
- Licensing and regulation, see Licenses; Municipal Corporations, IX; Constitutional Law.
- Actionable negligence in use of highways, see Highways, XIII, B.

Half Blood and Whole Blood—
Inheritable rights of kindred, see Descent, X 13.
Half-Truths—
As fraud, see Fraud § 20.
As element of mistake, see Mistake.
Effect to discredit witness, see Witnesses, VI.
Halls, Hallways—
Building regulations in general and liability for defective or dangerous conditions, see Buildings.
Duty and liability of master to servants, see Master and Servant, III.
Liability between landlord and tenant, see Landlord and Tenant, IV.
Hallucinations—
As insanity, see Insane Persons, I; Wills, II.
Effect on criminality of act, see Crimes § 13.
Handbills—
Regulation of distribution or use in advertising, see Municipal Corporations, IX.
Defamation by means of circulars, see Libel.
Criminal advertising, see Crimes, II; Indictment.
Handcuffs—
Use in making arrest as aggravation of wrong, see False Imprisonment § 3.
Hand Money—
In the sense of money given in earnest of bargain, see Frauds, Statute of, II, C, 2.
Handwriting—
Lay and expert opinions as to genuineness and authorship, see Evidence §§ 252, 260, 276, 277.
Comparisons to support opinions, see Evidence §§ 253, 297.
Comparisons by jury, see Evidence § 569.
Rules of criminal evidence relating to handwriting and proof of signatures, see Indictment, VIII, B.
Evidence of genuineness of instruments, see Execution of Instruments, § 18.
Proof of signatures to wills, see Wills, V.
Harboring—
Criminal enticing or harboring persons, see Crimes, II; Indictment.
Alienation of affections and criminal conversation, see Husband and Wife, V, B.
Actions by parents for harboring or enticing children, see Parent and Child, III; Seduction.
Harbors—
See Navigable Waters; Wharves; Shipping; Municipal Corporations, IX.
Hard Labor—
Punishment for crime, see Crimes, I, E.
Hardship—
In bargain as constructive fraud, see Fraud, II.
As consideration working equity for or against specific relief, see Injunctions, I, V; Nuisances, III; Specific Performance, III, IV.
Rules against onerous construction, see Contracts, VI, A; Deeds, III, A; Wills, VI, A; Statutes, V.

HARMLESS AND PREJUDICIAL ERROR.

TREATS of the effect of judicial errors in civil cases considered with respect to their harmfulness or harmlessness to the party objecting. It excludes the right to review the judgment or cause and the procedure for such review (see Appeal; Certiorari), the propriety of affirmance or reversal on the whole case or of remand for new trial or further proceedings (see Appeal, XIII), and the necessity and sufficiency of objections, exceptions, requests, and motions to preserve a ruling and objection thereto for review (see Saving Questions). Grounds for New Trial are treated in that topic. The harmless error doctrine in criminal cases is treated in Indictment, XV.

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I. GENERAL PRINCIPLES; EFFECT OF HARMLESSNESS.

[Note. It is not intended to treat in this topic the decisions that any given thing was error or was not erroneous, but only those which have passed on the question whether errors, concededly such, were harmful or harmless in their qualities and effects. Since it is presumed that an error was harmful (see Appeal § 353 et seq.), it follows that nearly all of the cases turn on "harmlessness" of the error.

Whether a given act or practice was error is a question of correctness of the practice and is therefore treated in the topic treating of that practice. Errors, defects and informalities in writings and doings which are not a part of judicial proceedings relate to the requisites and sufficiency of the particular instrument or act under question; and accordingly they are treated in connection with that to which they relate under the appropriate specific topic. The grounds for new trial are treated in New Trial, II. In many instances, however, the court states that the errors are or are not such as to constitute grounds for new trial, where it intends merely to say that the error is or is not prejudicial. Where the harmfulness or harmlessness of error is expressed in such manner, the decisions are kept in this topic.]

Harmless error in criminal cases, see Indictment, XV.

Harmless error in proceedings for enforcement of municipal ordinances, see Municipal Corporations, XVI, B.

Harmless error in condemnation proceedings, see Eminent Domain § 139.

Costs for frivolous appeal or error, see Costs, V.

Sufficiency of error to constitute ground for new trial, see New Trial, II.

Affirmance for want of substantial grievance, see Appeal § 481.

Want of available errors as reason for refusing additional time to file return to error, see Appeal § 129, ¶ 579.

Immaterial defects and informalities in certificates of acknowledgments, see Acknowledgments §§ 10, 21.
Technical and unsubstantial objections to depositions, see Depositions § 25.
Irregularities harmfully affecting result of election and thereby vitiating it, see Elections, VII.
Harmless errors in orders and decisions of school officers or boards, see Schools, VIII.
General rule that judgment will not be reversed for errors not affecting it, see also Appeal, XII, F.

§ 1. In general; harmlessness or material effect on result.

More favorable result or recovery impossible in any event, see post § 2.
Technical errors, see post § 3.
Errors involving nominal or trivial damages only, see post § 4.
Errors involving costs only, see post § 5.
For treatment in detail of errors harmless in themselves as presented by pleadings, evidence, instruction, judgment and subsequent proceedings, see post II.
Questions declined by supreme court because unnecessary to decision of cause, see Appeal §§ 261-266.
Burden of showing error on the record and presumptions as to harmfulness, see Appeal §§ 352-360.
Necessity or occasion for new trial or for final judgment above, see Appeal, XIII, B.
Binding force of precedents over apparent justice of the case, see Courts, IV.
Sufficiency of error to warrant granting of new trial, see New Trial, II.
Statutory rule for disregarding unsubstantial errors, see Jud. Act, chap. XVI, § 1; Comp. L. 1915, § 12478 (Statute of Amendments).
Statutory grounds for reversal, error productive of miscarriage of justice, see Comp. L. 1915, § 14565.

¶ 1. Judgment will not be reversed for non-prejudicial error.—Keating v. Retan, 80 Mich. 324; Durfee v. Newkirk, 83 Mich. 522.

¶ 2. A judgment will not be reversed for a mere formal error in the proceedings of the court below which does not affect the merits of the cause.—Lyell v. Sanbourn, 2 Mich. 109; Smith v. Township of Sherwood, 62 Mich. 159.

¶ 3. Judgment will not be reversed for an immaterial error.—Hale v. Houghton, 8 Mich. 458.

¶ 4. Judgment will not be reversed for error that does not prejudice plaintiff in error.—Maxon v. Perrott, 17 Mich. 332; Hammond v. Hannin, 21 Mich. 374; Threadgool v. Litogot, 22 Mich. 271; English v. Caldwell, 30 Mich. 362; Lenox v. Fuller, 39 Mich. 268; Reading v. Beardsley, 41 Mich. 123; Swart v. Kimball, 43 Mich. 443; Barton v. Gray, 57 Mich. 622; Finan v. Babcock, 58 Mich. 301; Mathews v. Phelps, 61 Mich. 327; Lane v. Pere Marquette Boom Co., 62 Mich. 63; Landon v. Comet, 62 Mich. 80.

¶ 5. Rulings upon a point that has no legal foundation and is immaterial to the case do not furnish any ground of complaint to a plaintiff in error who relies on it.—O'Rourke v. O'Rourke, 43 Mich. 58.

¶ 6. Exceptions which refer to questions that, however decided, could work no legal prejudice, will not be considered on error.—Davis v. Bush, 28 Mich. 432.

¶ 7. Judgment will not be reversed on account of any rulings that could not have changed the result.—Eberstein v. Camp, 37 Mich. 176.

¶ 8. If, on examining the facts, the court is satisfied that plaintiff in error was not prejudiced by any ruling or instruction, the judgment will be affirmed.—Township of Monroe v. Whipple, 62 Mich. 560.

¶ 9. The rule that error which does not prejudice should be disregarded means such error as does not prevent a party from obtaining his just rights, and it applies in all cases and in all proceedings had before courts.—O'Donnell v. Connecticut Mut. Fire Ins. Co., 73 Mich. 1.

§ 2. More favorable result or recovery impossible in any event.

Final judgment without new trial where it would be impossible or unavailing, see Appeal §§ 508-511.

¶ 10. Judgment for defendant should not be disturbed if any conclusive reason why no recovery can be had appears.—Lentz v. Teutonia Fire Ins. Co., 96 Mich. 445.

¶ 11. Where there is no cause of action it is not material whether rulings adverse to the plaintiff were or were not correct.—Richards v. Tozer, 27 Mich. 451; Bewick v. Fletcher, 41 Mich. 625; Parker v. Fields, 48 Mich. 250.

¶ 12. An error cannot be held harmless on the theory that in any event the recovery should have been more than the jury awarded, unless the record suffices to show with certainty that this is so by containing all the evidence requisite to such a determination.—Black v. Simon, 116 Mich. 382.

¶ 13. Where it appears, upon the whole case, that the plaintiff is not entitled to recover, the judgment against him will not be disturbed for errors in the rulings of the trial court.—Barnum v. Stone, 27 Mich. 332.

¶ 14. Where the plaintiff below assigns as error that the judgment, which was for de-

fendant, is not supported by the facts found, the assignment will be of no advantage to him unless the facts found entitle him to judgment, for otherwise judgment would necessarily pass against him and in favor of his adversary.—Peabody v. McAvoy, 23 Mich. 526.

¶ 15. A case should not be reversed for errors committed against a party who is not, in any view of the evidence, entitled to succeed.—In re Stockdale's Estate (Appeal of City of Flint), 157 Mich. 593.

§ 3. Technical errors.

See also post ¶ 43.
Disregarding technical form of order of reference, see also Accounting Suits ¶ 35.

¶ 16. The court will not, on appeal, review proceedings for merely technical errors in matters pertaining only to regularity in practice.—Hess v. Final, 32 Mich. 515.

¶ 17. A verdict of no cause of action will not be set aside for technical errors where plaintiff on a new trial can only recover nominal damages with costs against himself. —Mears v. Cornwall, 73 Mich. 78.

¶ 18. Where parties elect to go to trial upon general and informal allegations, and to carry on their controversy upon some point or points of difference tacitly understood, and it appears that the merits have been fairly tried, the judgment will not be reversed upon technicalities.—American Merchants' Union Exp. Co. v. Phillips, 29 Mich. 515.

§ 4. Errors involving nominal or trivial damages only.

Entering final judgment above where only nominal damages could be recovered on new trial, see Appeal § 504.
Dismissal or affirmance on hearing for want of substantial grievance, such as nominal damages that would not carry costs, see Appeal § 481.
Damages for vexatious appeal where assignments are frivolous or dispute trivial, see Costs §§ 125, 126.

¶ 19. A case will not be remanded for failure to award nominal damages where judgment for them would not carry costs.—Haven v. Beidler Mfg. Co., 40 Mich. 286; McLean v. Charles Wright Medicine Co., 96 Mich. 479; Stevens v. Yale, 113 Mich. 680.

¶ 20. A charge that plaintiff who is entitled to nominal damages can recover nothing is not reversible error unless the judgment carries costs to defendant.—Wyatt v. Herring, 90 Mich. 581.

¶ 21. A judgment for defendant will not be set aside where it appears that plaintiff, if entitled to recover, can recover no more than nominal damages.—Wilcox v. Morton, 132 Mich. 68.

¶ 22. A judgment for defendant will not be reversed where, even upon plaintiff's theory, no damages beyond nominal damages were proven.—Laetz v. Tierny, 153 Mich. 279.

¶ 23. Under Comp. Laws 1897, § 10995, permitting a defendant in ejectment to recover for improvements providing there has been six years' actual occupancy, where the amount which the defendant should have been awarded in a trial court is very small, the case will not be reversed, because not allowed.—Sleight v. Roe, 125 Mich. 585.

§ 5. Errors involving costs only.

Denial of costs where errors are technical and unmeritorious, see Costs § 102.

¶ 24. Where a defendant has answered after his plea and demurrer have been overruled, the supreme court will not review the interlocutory proceeding of overruling them, for the sake of passing upon a trifling question of costs.—Van Slyck v. Skinner, 41 Mich. 186.

§ 6. Amount of verdict or outcome as indication of prejudice or harmlessness.

See also post ¶¶ 141, 495.
Erroneous admission of evidence cured by amount of verdict, see post § 101.
Harmlessness of instruction indicated by amount of verdict, see post § 130.

¶ 25. A large verdict may be taken as an indication that an error in a charge was harmful in its effect on the jury.—Moers v. Michigan United Rys. Co., 158 Mich. 659.

¶ 26. The smallness of the verdict may be taken as an indication that the jury was not misled by an improper instruction as to the amount to be allowed.—Brockway v. Patterson, 72 Mich. 122.

¶ 27. Where the recovery in an action for personal injuries was for $6,500, it cannot be said that an erroneous instruction permitting a jury to take into consideration loss of earning capacity was not prejudicial.—Pierce v. C. H. Bidwell Thresher Co., 153 Mich. 323.

¶ 28. An instruction based on a claim of damages in recoupment, which stated a rule of damages computed on each thousand feet of lumber sawed by an alleged defective mill, and which was erroneous because not covered by the notice of recoupment, was not cured by a general charge withdrawing it from the jury; where there had been evidence adduced as to such damages and the effect may have been to influence the jury in reducing plaintiff's claim of $1,300 to $76.—Sinker, Davis & Co. v. Davis, 76 Mich. 557.

¶ 28a. The failure of the court to instruct the jury in an action by a passenger against an interurban railroad for damages for personal injuries sustained as a result of collision where officers of the defendant were

called for cross-examination under Pub. Acts 1909, No. 307, How. St., 2nd Ed., § 12865, that the plaintiff was bound by the testimony of such witnesses unless the testimony was contradicted by other testimony, is reversible error where plaintiff used unwarranted and prejudicial language concerning such officers and in argument disparaged their credibility in toto and where the verdict was excessive, although on the sole issue respecting which the witnesses were questioned the jury found their testimony to be true.—Rathbone v. Detroit United Ry., 187 Mich. 586. (Bird, J., dissenting.)

§ 7. Errors not harmful to party complaining.

Errors in rulings preliminary to trial or on pleadings, see post § 18.

Errors in admission, retention, rejection or striking of evidence, see post §§ 45, 46.

Irregularities in verdict or judgment, see post § 75.

Rulings as to new trial and subsequent proceedings, see post § 77.

Right of nonappellant to urge matter making error harmless, see Appeal § 220.

Urging one's own error to make other error harmless, see Appeal § 221.

Right of defendant to have attachment dissolved for error affecting other party, see Attachment ¶ 270.

Doctrine that appellant alone can complain of error, and that he cannot complain of those affecting adversary or coparties, see Appeal, XI, D.

¶ 29. Plaintiff in error cannot complain of errors in his own favor or that prejudice his opponent only.—Brigham v. Gurney, 1 Mich. 349; Sleight v. Henning, 12 Mich. 371; Kelso v. Saxton, 40 Mich. 666; Bull v. Brockway, 48 Mich. 523; Hudnut v. Gardner, 59 Mich. 341; Beemer v. Hughes, 179 Mich. 110.

¶ 30. An appellant cannot ask a reversal of the decree for an error in no way affecting his rights.—Martin v. McReynolds, 6 Mich. 70; Warner v. Whittaker, 6 Mich. 133; Griggs v. Detroit & M. R. Co., 10 Mich. 117; Michigan Ins. Co. v. Whittemore, 12 Mich. 427.

¶ 31. On a writ of error the supreme court corrects only such errors as have been committed adversely to the interest of the party suing out the writ.—Berry v. Lowe, 10 Mich. 9.

¶ 32. Rulings cannot be made on error on questions of law that have not been decided against the plaintiff in error.—Marcott v. Marquette, H. & O. R. Co., 47 Mich. 1.

¶ 33. A decree that is not prejudicial to the appellants will be affirmed, even though it is not as favorable as it should be to nonappellants.—Hanchett v. McQueen, 32 Mich. 22.

¶ 34. A decree will not be reversed for a mere irregularity not affecting injuriously the interests of the appellants.—Kellogg v. Putnam, 11 Mich. 344.

¶ 35. A plaintiff cannot complain of a verdict in favor of defendant on his claim of recoupment for less than the evidence warrants, where defendant does not appeal.—Sparks v. Lord, 198 Mich. 415.

¶ 36. A defendant cannot on appeal object to a decree below which awards the plaintiff less than a strict enforcement of his rights would give him.—A. M. Campau Realty Co. v. City of Detroit, 162 Mich. 243.

¶ 37. A defendant to an injunction bill cannot object that the suit was revived against the representatives of his deceased codefendant where they themselves have not appealed.—Pratt v. Lewis, 39 Mich. 7.

¶ 38. A rule of damages entitling a defendant to double damages, in that he could take a building erected at its then value, not exceeding the contract price, deducting from that value the difference between such value and what it would be worth if it had been such a building as contracted for, does not give a defendant reason to complain, as it gives him a greater amount of damages than he is entitled to.—Eaton v. Gladwell, 121 Mich. 444.

¶ 39. In an action of trover the fact that a verdict was rendered for an amount of interest less than the amount based upon various rates of interest in force during the time for which interest is to be computed is harmless to the defendant.—Hoffman v. H. M. Loud & Sons Lumber Co., 138 Mich. 5.

¶ 40. Defendant city, by action of its city council and board of review, arbitrarily reduced a valuation for assessment on the property of a certain corporation from $800,000 to $10,000. Plaintiff, another corporation, which was compelled thereby to pay more than its share of taxes, sues to recover back the excess. The court found the property of the said certain corporation to be $1,000,000 instead of $800,000. Held, plaintiff could not complain of this because it was thereby benefited.—Fletcher Paper Co. v. City of Alpena, 160 Mich. 462.

§ 8. Errors cured by other things.

Detailed treatment of errors cured by other things as presented by pleadings, evidence, instructions, judgment and subsequent proceedings, see post, III.

Election of right or adoption of theory not affected by alleged error, see post § 9.

¶ 41. Errors during the progress of a trial are immaterial where the verdict is the only one that could be justified by the undisputed facts and the law applicable thereto.—Robinson v. Charles Wright & Co., 94 Mich. 283.

¶ 42. Errors made in rulings which resulted in a certain determination, are not material where, as a matter of law, the determination should have been made.—People ex rel. Davis v. Campfield, 150 Mich. 675.

¶ 43. Technical errors in the admission of evidence and giving of instructions may not work a reversal where a judgment of $1,200 for the death of a nine-year-old boy is not excessive.—Sykes v. Village of Portland, 177 Mich. 290.

¶ 44. Where a verdict might have been directed for the plaintiff under one count of his declaration, errors committed on the trial, held harmless.—Board Sup'rs of Chippewa County v. Bennett, 185 Mich. 544.

¶ 45. In an action for libel where the evidence clearly supports the verdict that the alleged statements were true, errors in rejecting and admitting testimony, in remarks of counsel, and in the giving and refusing of instructions will not be considered.—Lachman v. Fuller, 125 Mich. 473.

¶ 46. Where, even if there were no defense, the finding of facts would not support a judgment for the plaintiffs, a judgment for the defendant will not be reversed for any errors in rulings as to the validity of the special defense set up.—Shelden v. Dutcher, 35 Mich. 10.

¶ 47. The question of the right of an intending purchaser who had deposited money to bind a contract for the sale of a homestead, which sale became invalidated by the refusal of the wife to join, to intervene in garnishment of such money for a debt of the husband, became immaterial where the garnishee raised the same defense as the intervenor.—H. Stern, Jr., & Bros. Co. v. Wing, 135 Mich. 331.

¶ 48. Where by consent of both parties a case is submitted upon a certain theory as to the rule for damages applicable to the case, a new trial should not be granted on the ground that the rule was not the proper one.—T. Wilce Co. v. Kelley Shingle Co., 130 Mich. 319.

§ 9. ——Election of right or adoption of theory not affected by alleged error.

¶ 49. Error in allowing recovery for improvements becomes immaterial where plaintiff in ejectment elects to take the value of the land.—Cook v. Bertram, 86 Mich. 356.

¶ 50. In an action by a minor to recover the amount paid on the purchase price for a motorcycle and counterclaim for the depreciation in the value of the motorcycle during the period of retention by the plaintiff, where it appeared that plaintiff returned the motorcycle for repairs, demanded its return and, upon refusal, demanded the money paid on the purchase price, held that assignments of error based upon the theory that the minor rescinded the contract as claimed by defendant were without merit, where the jury found that the rescission was by defendant.—Jackson v. Haverford Cycle Co., 194 Mich. 286.

§ 10. Errors invited by objector.

Invited errors in pleadings, see post § 81.
Invited errors in evidence, see post § 124.
Invited error in instructions, see post § 149.
Invited findings, see post § 152.

¶ 51. A party cannot complain when a trial judge decides a question correctly from the point of view he is encouraged to take by counsel for such party.—Adkin v. Pillen, 136 Mich. 682.

¶ 52. The supreme court, in reviewing on error after appeal the proceedings of a justice, will disregard mere informalities and technicalities, and will not disturb his judgments upon objections which he was given no opportunity to examine, or which were so blindly stated as not to attract his attention.—Wilcox v. Toledo & A. A. R. Co., 45 Mich. 280.

¶ 53. An accountant cannot complain of an amount charged against him where it appears that at most it is but a relatively small amount for a single year's taxes on one of several lots, and as accountant he failed to state the data of tax payments so that the payments could be apportioned as among different lots.—Cutcheon v. Corbitt, 99 Mich. 584.

§ 11. Erroneous rulings supportable on objections not made.

Correct rulings based on wrong reasons, see post § 12.

¶ 54. A ruling containing error cannot be sustained by raising some different objection on review, which might have brought the same result, but which had it been made below would have been met by amendment.—Douglas v. Marsh, 141 Mich. 209.

§ 12. Correct rulings based on wrong reasons.

Correct admission or exclusion of evidence on wrong ground, see post § 20.
Charging correct rule on wrong theory, see post § 51.
Directing verdict on wrong ground with correct result, see post § 54.

¶ 55. A judgment will not be reversed because a wrong reason is given for a correct ruling, instruction or conclusion.—Wilson v. Wagar, 26 Mich. 452; Wellover v. Soule, 30 Mich. 481; Kellogg v. Lovely, 46 Mich. 131; Hill v. Wright, 49 Mich. 229; Olmstead v. Farmers' Mut. Fire Ins. Co., 50 Mich. 200; Hatzenbuhler v. Lewis, 51 Mich. 585; Dunning v. Calkins, 51 Mich. 556; Monaghan v. Agricultural Fire Ins. Co., 53 Mich. 238; Swain v. Baldwin, 54 Mich. 119.

¶ 56. When an issue determinable as a matter of law is correctly decided but a wrong reason given the case will not be reversed, but will be affirmed.—Eames v. Barber, 192 Mich. 1; Saginaw Suburban Ry. Co. v. Connelly, 146 Mich. 395.

¶ 57. This court will not reverse a correct decree because the court below erred in its reasons for granting it.—Ormsby v. Barr, 22 Mich. 80; Tillotson v. Webber, 96 Mich. 144; Board of Supervisors of Kent County v. Board of Supervisors of Mecosta County, 126 Mich. 299; Wolcott v. Tweddle, 133 Mich. 389; Samberg v. American Exp. Co., 136 Mich. 639; Grand Lodge, I. O. O. F. v. Barker, 139 Mich. 701; Van Cleve v. Radford, 149 Mich. 106.

¶ 58. It is no ground for reversal that the court below, in allowing recovery back of an illegal tax, gave a wrong reason for holding such tax invalid.—Fletcher v. Township of Alcona, 72 Mich. 18.

¶ 59. One party cannot complain of a correct ruling in striking out incompetent testimony on motion of the other party because the other party failed to give reasons for his motion.—Sterling v. City of Detroit, 134 Mich. 22.

¶ 60. The points upon which a verdict is directed should be stated by the court in its instructions to the jury, but failure to do so will not be ground for reversal where the record shows that a correct result was reached.—Bergstrom v. Staples, 82 Mich. 654.

¶ 61. Where in defending a suit on an accident policy the company relies on a particular condition which the supreme court holds to have been waived, the judgment for plaintiff should be affirmed although the facts supporting the finding are not those submitted to the jury.—Hause v. Standard Acc. Ins. Co., 172 Mich. 59.

¶ 62. Where, in an action to recover back property assigned under an illegal contract, it appears that the parties are in pari delicto, a judgment in favor of one of the parties will be affirmed, though the trial court gave a wrong reason, where the result was correct.—Benson v. Bawden, 149 Mich. 584.

¶ 63. In a suit by a shipper against a railroad to recover for demurrage charges on potatoes delayed in shipment on account of cold weather, it is not admissible for plaintiff to show by his books that he had sustained loss from freezing on other cars of potatoes which were shipped out at the time in question, and it is proper to exclude such evidence, although objections were raised to it by defendant on other than the true grounds.—L. Starks Co. v. Grand Rapids & I. Ry. Co., 165 Mich. 642.

¶ 64. Where, under a special count on a void contract, a party recovered under an erroneous rule of damages—no objection being made to the invalidity of the contract or to such rule—the same damages to which he would have been entitled on the ground of an implied promise to pay for services outside of his contract, the judgment was not disturbed.—Burroughs v. Morse, 48 Mich. 520.

¶ 65. Where a justice's judgment has been reversed in the circuit on certiorari there can be no reversal on error, if any objections taken to the proceedings before the justice were such as to warrant the judgment of reversal below and show a correct result though based on wrong reason.—Bigalow v. Barre, 30 Mich. 1.

¶ 66. A decree in equity will not be set aside for containing superfluous reasons for the conclusion reached, if the result is correct, and the decree does not prejudice defendants. So held where a bill to obtain the release of a security was sustained, not only on the ground that the alleged assignment of the security was never operative, but that it was void as against creditors. But in affirming the decree on the first ground it might properly be amended by striking out what related to insolvency.—Hutton v. Cuthbert, 51 Mich. 229.

§ 13. Weakness or strength of case as affecting harmfulness.

Repeated trials with same result, see post § 14.

¶ 67. Where a proper question is put, and objection to it properly overruled, and the witness answers the question and then proceeds to state matters not responsive to the question, and this volunteered testimony is at once stricken out on objection, the fault or mistake of the witness will not justify a reversal of the judgment unless the case is a very peculiar and very strong one.—Hill v. Robinson, 23 Mich. 24.

¶ 68. Remarks of counsel, which would be regarded as prejudicial error in a doubtful case, were held to be cured by the charge of the court to disregard all remarks not based on evidence and that stricken remarks and testimony are no part of the case and to be given no attention at all.—Cameron Lumber Co. v. Somerville, 129 Mich. 552.

§ 14. ——Repeated trials with same result.

¶ 69. A case which has been four times decided by a jury in plaintiff's favor should not be reversed again unless substantial error, resulting in a miscarriage of justice, has been committed.—Seligman v. Estate of Ten Eyck, 74 Mich. 525.

II. ERRORS DEEMED HARMLESS IN THEMSELVES OR NOT HARMFUL TO OBJECTOR.

A. RULINGS PRELIMINARY TO TRIAL AND ON PLEADINGS.

§ 15. In general; pleadings.

In revivor and substitution, see post § 16.
In formation of jury, see post § 17.

Harmfulness to objector, see post § 18.
Cured or invited errors in pleading or preliminary rulings, see post III, A.
Errors in pleadings cured by other things, see post III, A.
Harmlessness of formal defects or errors in pleadings, see Pleading, XI.
Sufficiency of demurrer and failure to demur as waiver of errors or defects in pleadings, see Pleading, IV, XI.
Variance of pleadings and proof as harmless error, see also Pleading, X.

¶ 70. Refusal to permit complainant in a creditor's bill, to amend his complaint at the time of hearing, even if error, will not avail him where he failed to make out a prima facie case under his bill of complaint as filed or according to the proposed amendment.—Wilson v. Henry, 137 Mich. 675.

¶ 71. If a plea in abatement was bad defendant is not prejudiced by overruling the objection that it ought to have been disposed of before going into the merits.—East v. Cain, 49 Mich. 473.

¶ 72. In assumpsit for work and labor, the holding of the court that defendant's plea of payment is an admission of the amount plaintiff had earned is of no consequence, where defendant does not question the amount.—Hunkins v. Kent, 151 Mich. 482.

¶ 73. Judgment in a suit to recover taxes paid under protest will not be disturbed on appeal, on the ground of alleged defects in the description of certain parcels of property so taxed, where the decision of the court on that branch of the claim was in favor of appellant.—Diamond Match Co. v. Village of Ontonagon, 140 Mich. 183.

§ 16. In revivor and substitution.

¶ 74. Substitution of plaintiff's administrator to prosecute ejectment rather than the heirs, is not prejudicial error, and is amendable in supreme court.—Cook v. Bertram, 86 Mich. 356.

¶ 75. An objection that an administrator is not entitled to maintain the action of ejectment and that it was error to admit him to sue after plaintiff's death and that verdict and judgment in his favor are erroneous, is technical and not ground for reversal; since the judgment would be amendable in the supreme court.—Cook v. Bertram, 86 Mich. 356.

¶ 76. Where, after death of a joint defendant, suit was discontinued as to him, and judgment was rendered against the other defendant, who, in suing out a writ of error, entitled the case as if deceased were still a party, held, that the irregularity might be disregarded.—Campau v. Brown, 48 Mich. 145.

§ 17. In formation of jury.

¶ 77. Errors assigned upon the proceedings in summoning and striking the jury in justice's court are immaterial if no jury was had on the trial.—Boatz v. Berg, 51 Mich. 8.

¶ 78. Where the parties have obtained a competent and impartial jury, a verdict will not be set aside and a new trial granted because the trial judge erred in retaining a juror who was in fact disqualified, but who was afterwards peremptorily challenged and later excused.—Pearce v. Quincy Min. Co., 149 Mich. 112.

§ 18. Harmfulness to objector.

¶ 79. Suit was brought against joint parties, but summons was served on only one, who stipulated for taking a deposition. The other afterwards appeared, and on the trial the deposition was ruled out on his objection that it was taken without his consent and without notice to him. Held, that the defendant who stipulated could not bring error on this ruling.—French v. Canada Southern R. Co., 42 Mich. 64.

B. ADMISSION, RETENTION, REJECTION OR STRIKING OF EVIDENCE.

§ 19. In general.

Admission or exclusion on wrong ground, see post § 20.
Errors in order or method of proof, see post § 21.
Erroneous admission or retention, see post §§ 22-35.
Erroneous exclusion or striking out of evidence, see post §§ 36-42.
Exclusion or reception in trials by court without jury or on reference, see post §§ 43, 44.
Harmfulness to objector, see post §§ 45, 46.
Cured or invited errors in evidence, see post III, B.
Admission of evidence in proceedings to dissolve attachment, see Attachment ¶ 342.

¶ 80. Errors in the admission and rejection of evidence are immaterial where such evidence did not affect the controlling question.—Thomas v. Bush, 200 Mich. 224.

¶ 81. Where the record shows that the result could not have been different if excluded testimony had been admitted, or vice versa, no new trial will be ordered on such grounds.—Pickard v. Kleis, 56 Mich. 604.

¶ 82. To obtain a reversal, an appellant must show not only that the rules of evidence were violated, but that he was prejudiced thereby.—Belmer v. Boyne City Tanning Co., 160 Mich. 669.

§ 20. Admission or exclusion on wrong ground.

Correct ruling on wrong ground in general, see ante § 12.

¶ 83. Improper reasons for the admission of testimony do not make its admission

erroneous if it was admissible at all.—Brown v. Barnes, 39 Mich. 211.

¶ 84. Where incompetent evidence has been rejected upon an objection that it was immaterial and irrelevant, the judgment will not be reversed upon this ground unless it appears that the ruling worked legal prejudice to the party offering the evidence.—Jennison v. Haire, 29 Mich. 220.

§ 21. Errors in order or method of proof.

¶ 85. Where proof of the actual consideration of a purchase is made, it is immaterial, in a case involving the bona fides of the purchase, which party had the duty of introducing it or the order in which it came in.—Stone v. Welling, 14 Mich. 514.

¶ 86. Although a defendant was entitled to have her deposition in reference to which she was being questioned read to her before being examined upon it, the failure to do so was not prejudicial where nothing was drawn out which had any tendency to injure her case.—Vosburg v. Brown, 119 Mich. 697.

¶ 86a. There was no harm, even if there was error, in treating marriage as an established fact, it having been already proved by the certificate, and then receiving proof that the parties lived together as husband and wife for the purpose of showing their harmonious relations prior to the alleged alienation.—Mead v. Randall, 111 Mich. 268.

§ 22. Erroneous admission or retention.

Incompetent, irrelevant or immaterial evidence, see post §§ 23-26.
Evidence merely cumulative in effect, see post § 27.
Evidence of facts admitted or conceded, see post § 28.
Evidence of facts put in proof by party objecting, see post § 29.
Parol or secondary evidence, see post § 30.
Conclusions and opinions of witness, see post § 31.
Hearsay evidence, see post § 32.
Evidence of record in another suit or proceedings, see post § 33.
Evidence affecting credibility or impeachment of witnesses, see post § 34.
Allowance of leading questions, see post § 35.
Admission of irregular proof of title as harmless error in ejectment by dowress who made prima facie case without it, see also Dower ¶ 131.

¶ 87. A judgment will not be reversed for the admission of testimony that could not have changed the result.—McKeown v. Harvey, 40 Mich. 226; In re Mower's Appeal, 48 Mich. 441; Rivard v. Rivard, 109 Mich. 98.

¶ 88. Reversal will not be granted on the ground of improper questions where no harmful testimony was elicited thereby.—Styles v. Village of Decatur, 131 Mich. 443.

¶ 89. The erroneous admission of evidence is harmless error where such admission in no way affects the adverse party or the result.—Edison Illuminating Co. v. Misch, 200 Mich. 114.

¶ 90. It was not prejudicial to ask an expert on cross-examination whether it would be evidence of delirium for a person in her last sickness to ask for some one to draft her will, it being common knowledge that such is not evidence of delirium but of its absence.—McHugh v. Fitzgerald, 103 Mich. 21.

¶ 91. Error in admitting testimony so limited in purpose that it could not have prejudiced plaintiff in error, is not ground for reversal.—Runnells v. Village of Pentwater, 109 Mich. 512.

¶ 92. Plaintiff in ejectment stated that he would show title from the government and that his proofs would be mostly documentary. He introduced a record which was not proper evidence, and was received against objection, and on closing sought to show by the admissions of defendant that the latter claimed under a certain person who had been shown at the outset to be the grantee of the purchaser named in the record, and the grantor of the person under whom plaintiff claimed. The court directed a verdict for the plaintiff. Held, that the credibility of the evidence of admissions was for the jury, and that the error in admitting the record therefore became material.—Newell v. McLarney, 49 Mich. 232.

¶ 93. On a claim for services of a character that might give rise to a presumption that they were rendered gratuitously, but which claimant gave evidence were rendered on a promise of payment by testator, it was not prejudicial to the executor resisting the claim to admit the will to show that there was no provision therein for payment.—Allen v. Field's Estate, 124 Mich. 466.

¶ 94. In an action to recover damages for injuries to plaintiff's automobile from a collision with defendant's automobile, the admission of plaintiff's affirmative answer to the question whether he was able to stop his car in time to avoid hitting people who would walk in front of it, held, if erroneous, not prejudicial to defendant.—Whitman v. Collin, 196 Mich. 540.

¶ 95. Where there is evidence that defendant's title to a substantial portion of timber for the cutting of which he had contracted, was defective, admission of evidence that defendant did not practically own all of the land that the timber was on is harmless error, although such evidence might lead the jury to think that defendant did not own the timber.—Mott v. Penoyar, 153 Mich. 273.

¶ 96. Where in an action for assault and battery, plaintiff brings error for the insuf-

ficiency of the verdict in his favor, prejudicial error is established by showing the improper admission of evidence tending to prove plaintiff's malice toward defendant.—Mills v. Warner, 167 Mich. 619.

¶ 97. The court, in a case of assault and battery, having properly excluded evidence of previous threats by the plaintiff, permitted the plaintiff to prove the negative—that at the time in question the plaintiff made no threats. Held to be error, and calculated to prejudice the jury, though ordinarily the admission of negative evidence might have been harmless.—Heiser v. Loomis, 47 Mich. 16.

¶ 98. On case made after judgment on a trial and findings by the court, where it appeared that evidence bearing on the turning point of the merits, and adapted to influence the findings as to a vital part, was improperly admitted against objection, judgment was reversed and a new trial ordered.—Earle v. Westchester Fire Ins. Co., 29 Mich. 414.

¶ 99. Errors in the admission of evidence before a justice will not reverse on certiorari where no injury is done.—Carver v. Detroit & Saline Plank Road Co., 126 Mich. 458.

¶ 100. In an action involving a lien for sawing logs the erroneous admission of testimony as to the customary method of removing lumber from the sawyer's wharves when no lien rights are concerned is prejudicial where the jury is instructed that it may consider "all the evidence in the case" in determining whether or not the lien was waived.—Germain v. Central Lumber Co., 116 Mich. 245.

¶ 101. Where plaintiff's testimony has been admitted to negative a report presumed in law to be false, and the burden of establishing which is upon defendant, who, however, has not introduced evidence tending to establish it, the admission of such testimony is harmless error.—Simons v. Burnham, 102 Mich. 189.

¶ 101a. In an action by a husband for alienation of the affections of his wife, the admission of evidence of plaintiff that he had heard from other people that they had seen her with defendant, when restricted to admission as affecting plaintiff's conduct towards his wife, held to be harmless error.—Hendrickson v. Harry, 200 Mich. 41.

§ 23. Incompetent, irrelevant or immaterial evidence.

In contract actions, see post § 24.
In replevin, see post § 25.
In tort actions, see post § 26.
Mortality table different from American Experience Table and showing shorter expectancy as harmless error, see also Death by Wrongful Act ¶ 91.

¶ 102. The admission of incompetent, irrelevant or immaterial evidence from which no injury could result to the plaintiff in error is no ground for reversal.—Minnesota Min. Co. v. National Min. Co., 11 Mich. 186. Affirmed 3 Wall 332, 18 L. ed. 42; Wright v. Wilson, 17 Mich. 192; Final v. Backus, 18 Mich. 218; Continental Ins. Co. v. Horton, 28 Mich. 173; Hubbardston Lumber Co. v. Covert, 35 Mich. 254; Shipman v. Seymour, 40 Mich. 274; Denton v. Smith, 61 Mich. 431; McCormick v. Olbinski, 132 Mich. 30.

¶ 103. A reversible error in the admission of testimony must relate to some material point, and be such as would naturally tend to mislead or prejudice a jury.—Dawson v. Falls City Boat Club, 125 Mich. 433.

¶ 104. Permitting a witness to answer an immaterial question on cross-examination is not reversible error, where no substantial prejudice results.—Kelley v. Paulsen, 162 Mich. 169.

¶ 105. The admission of incompetent evidence, made the basis of an instruction, cannot be regarded as harmless error.—Bettinghouse v. Bettinghouse, 156 Mich. 169.

¶ 106. The admission of irrelevant testimony is a cause for reversing the judgment on a bill of exceptions whenever its tendency would be to embarrass or mislead the jury.—Pennsylvania Min. Co. v. Brady, 14 Mich. 260.

¶ 107. Where incompetent and immaterial evidence which misled the court, and therefore probably influenced the jury's verdict, was admitted against objection, under counsel's promise to follow it up by other evidence showing its competency and materiality, which he did not do, judgment was reversed and a new trial granted.—Hudson v. Feige, 64 Mich. 142.

¶ 108. The fact that papers having no relation to any issue in the case are introduced in evidence in connection with relevant papers, is not prejudicial where those papers had no tendency to obscure the real issues in controversy, or to lead the jury to decide the issues erroneously.—Bennett v. Greenwood, 151 Mich. 274.

¶ 109. It cannot be said that the answer of a witness over objection that he advised the township authorities to "pay something" to plaintiff was taken to establish a liability of the part of the township, where it appeared that the witness was township clerk and presented the claim for the plaintiff and advised its payment at her request but not because he believed it a legitimate claim.—Smith v. Township of Sherwood, 62 Mich. 159.

¶ 110. Testimony of a plaintiff in a deposition taken upon direct and cross interrogatories, consisting of a conclusion, hearsay

evidence, and testimony volunteered so as to deprive the defendant of the benefit of cross-examination, does not warrant the reversal of a judgment for the plaintiff when the error is not prejudicial, the testimony not being material.—Kaempfer v. Lindsay, 121 Mich. 425.

¶ 111. An assignment that the trial court erred in admitting certain evidence, will not be considered where the rejection of such evidence would not have changed the result.—Miller v. Tanners' Supply Co., 150 Mich. 292.

¶ 112. In an action by a wife under the Civil Damage Act, Comp. L. 1897, § 5898, How. 2nd Ed., § 5074 against a saloon keeper and his sureties to recover damages for injury to her person, property, and means of support, where it appeared that the defendant saloon keeper kept a small book with reference to his business, in which was a notation as to the time when notice had been given him by the wife not to sell intoxicating liquors to the husband, held that the cross-examination of defendant as to other entries unconnected with the case, in the course of which it appeared that defendant had been sued two other times under the act, was not prejudicial error.—Baker v. Mohl, 191 Mich. 516.

¶ 113. Admission on behalf of defendant of a letter with verses written on the reverse side from plaintiff to defendant's attorney and reflecting upon defendant was error, where the matter in the letter was outside the issue and the verses tended to prejudice plaintiff's case.—Stevens v. Beardsley, 122 Mich. 671.

¶ 114. In garnishment, the objection by claimant that plaintiff was permitted to show by incompetent testimony that certain prior garnishment suits were no longer pending, was not material where the claims of the creditor prosecuting such suits had been assigned to the claimant and the garnishee had paid him the amount in question.—Burnham v. Home Ins. Co., 119 Mich. 588.

¶ 115. Where a plaintiff in ejectment establishes a prima facie title through conveyances from parties claiming under a deed executed by the apparent owner of the land, who had been in possession for many years, and the title thus established is disputed in no way unless defendant has acquired a title by adverse possession, the erroneous admission in evidence of the record of a deed purporting to have been executed to said apparent owner is error without prejudice.—Hoban v. Cable, 102 Mich. 206.

§ 24. ——In contract actions.

¶ 116. In an action to recover damages for failure to deliver baskets, the admission of testimony that plaintiff had loaned money to defendants, although erroneous, was not harmful.—Dodge v. Reynolds, 135 Mich. 692.

¶ 117. Where in a suit by a city to recover for the services of men supplied by it to watch a water main during the construction by defendant corporation of a private tunnel, defendant's officer testifies over objection on cross-examination that one of the city's pipes was allowed by defendant to burst instead of being protected, and the city's counsel comments on such fact to the jury, no reversible error is committed where the city does not seek to recover for the bursting of said pipe.—Board Water Com'rs, City of Detroit v. Butler Bros. Const. Co., 168 Mich. 137.

¶ 118. In assumpsit for the value of work and materials required to be done by a contractor by fraud on the part of the other party and the engineer of the railroad under construction, testimony of a witness that he would not have considered it prudent to make the contract without a provision for a certain allowance, though not properly in the case, is harmless where the plaintiff prevailed and it was as likely to have favored the objecting defendants as the plaintiffs.—Bush v. Brooks, 70 Mich. 446.

¶ 119. In an action against an estate for the value of services rendered decedent held that the admission in evidence of a promissory note made by claimant in favor of decedent, which had been adjusted by the commissioners on claims, not as an off-set, but for other purposes, though erroneous, was not prejudicial error.—In re Wigent's Estate, 189 Mich. 507.

¶ 120. Where the recovery in an action for breach of covenant of warranty is limited to the amount paid for the premises with interest thereon and costs, it is not substantial error to admit evidence as to improvements made on the premises and lost by eviction.—Webb v. Holt, 113 Mich. 338.

¶ 121. Where a plaintiff sues to collect a loan, evidence admitted showing whether her husband owed any debts at the time of his death, or whether he had children or heirs, is immaterial, but its admission is harmless error.—Leonard v. Piggott, 152 Mich. 436.

¶ 122. The admission of evidence of a custom of a consignee with reference to securing from a carrier notations of shortages upon freight bills was improper, in an action by the assignee of a consignee against the receivers of a railroad company to recover for shortages, where there was no evidence tending to show that defendants knew of such custom, but its admission was not reversible error.—Oceana Canning Co. v. King, 200 Mich. 268.

¶ 123. On the contest of a claim for services claimed to have been rendered on a promise of payment by testator, where the will had been introduced to show that it contained no provision for payment, and where the executor who was residuary lega-

tee was not a relative of the testator, it was not prejudicial to the executor to ask him on cross-examination whether he drew the will, and to refuse to strike his answer.—Allen v. Field's Estate, 124 Mich. 466.

¶ 124. In action for wages defendant is not prejudiced by the admission of testimony by plaintiff in regard to a book of account kept by him even if the book is not competent evidence of the account between the parties where no claim is made for any credit which does not appear by defendants' testimony and plaintiff's account credits defendant with a payment not charged against him on defendants' books.—Keel v. Wilson Fruit Juice Co., 176 Mich. 345.

¶ 125. In an action by a woman to recover loans made her husband, an incompetent represented by his guardian, testimony as to dealings between them before marriage, details of their domestic relations generally and as to loans made other members of his family, is prejudicial; where it was partly irrelevant and partly incompetent as between husband and wife, and tended against a fair and impartial trial.—Stevens v. Stevens, 181 Mich. 449.

¶ 126. In an action to recover for the breach of a building contract the admission of evidence of the owner's future intentions as to the completion of the building being immaterial, is not prejudicial to the defendant.—Newton v. Consolidated Construction Co., 184 Mich. 63.

§ 25. ——In replevin.

¶ 127. In replevin by a chattel mortgagee against one claiming the property by virtue of a contract with the mortgagor, it was harmless error to permit the mortgagor to testify that after the contract was delivered to him he returned the contract to defendant to make a copy and that defendant never returned it.—Hood v. Olin, 68 Mich. 165.

¶ 128. In an action of replevin to recover an automobile left in defendant's garage for repairs and on which defendant claimed a lien for additional repairs necessitated by an injury to the car sustained in testing it out after certain repairs had been made, evidence as to the custom of defendant's garage as to trying out cars brought for repairs held to be harmless error.—Slattery v. Tillman, 197 Mich. 349.

§ 26. ——In tort actions.

¶ 129. That the plaintiff in an action to recover damages for a negligent injury has a family and lives with it is immaterial, but admission of such evidence is not prejudicial error.—Hewitt v. Flint & P. M. R. Co., 67 Mich. 61.

¶ 130. In an action by a manufacturer of marble monuments to recover damages caused by the blowing of soot and other substances from defendant's premises upon monuments left out of doors by plaintiff, testimony that it was the custom of marble dealers to leave their work out of doors was inadmissible, as the custom could not limit defendant's rights, but as plaintiff had a legal right to leave his monuments out of doors if he chose, the admission of such evidence did not injure defendant.—Skelton v. Fenton Electric & Power Co., 100 Mich. 87.

¶ 131. Error in admitting rules of a street railway company governing its employees in management of switching in an action for personal injuries growing out of a collision at a switch between a street car and an automobile in which plaintiff was riding held not to have been prejudicial where defendant's theory of the cause of the collision was such that the jury was not misled.—Brown v. Detroit United Railway, 179 Mich. 404.

¶ 132. In an action at common law for the death of a railroad pump operator alleged to be due to the failure of defendant to furnish deceased with a place and machinery reasonably safe in which and with which to work, held that the admission of evidence that the deceased started the machine the same way every time the witness saw him start it, and as to the manner in which it was started was not prejudicial error.—Snowden v. Detroit & M. Ry. Co., 194 Mich. 87.

¶ 133. After a former employee of defendant testified that, shortly after the accident, his superiors told him to find out by whose car plaintiff was hurt, and that he thought he asked all the motormen who were then at work. Defendant carrier was not prejudiced by permitting the witness further to state that he was unable to ascertain what car caused the injury it not being as claimed susceptible of an inference that the facts were concealed.—Tunnicliffe v. Bay Cities Consol. R. Co., 107 Mich. 261.

¶ 134. Admission in trover of evidence that defendant, claiming by purchase and in hostility to defendant's chattel mortgage, offered to pay the mortgage debt, where immaterial because defendant was not the debtor or in privity of obligation, is harmful, since it tends to show defendant's claim of ownership and also that plaintiff had no right to take the property under his mortgage.—Wright v. Starks, 77 Mich. 221.

¶ 135. An electric light company was sued by an employee for injuries sustained, as alleged, by reason of the improper stringing of its wires, whereby electricity was communicated from live to dead wires, and a witness was allowed to testify to a like condition of the wires some months after the accident, and to their change by him. Held, that, while the condition of the wires immediately before, at the time, and soon after

the accident was alone material, the evidence was not so prejudicial as to warrant a reversal solely because of its admission.—Kraatz v. Brush Electric Light Co., 82 Mich. 457.

¶ 136. In an action against a railroad for an injury caused to plaintiff through the throwing of a mail bag from a passing train, the admission of a notice given by the defendant to the mail agent who threw the bag, to the effect that his negligence if any, occasioned the action and that he would be responsible for any verdict rendered and tendering him control of the suit, was not error, as the letter contained no admissions of liability on the part of the defendant.—Shaw v. Chicago & Grand Trunk R. Co., 123 Mich. 629.

¶ 137. In an action for damages consisting in an enforced shut-down of plaintiff's mill due to backing up water on its dam and power plant and in the loss of operating time thereby, it was harmless error to admit evidence of the amount plaintiff had invested in its plant.—Michigan Paper Co. v. Kalamazoo Valley Elec. Co., 141 Mich. 48.

¶ 138. Admission of testimony that plaintiff's intestate was a wealthy man and had money at interest, if error, was not injurious to plaintiffs, where the case must have turned on the question of contributory negligence.—Proper v. Lake Shore & M. S. Ry. Co., 136 Mich. 352.

¶ 139. In a suit by plaintiff vendee of land to recover damages for false representations made by defendant vendor as to the land being good for farming and capable of growing numerous crops, plaintiff was allowed to testify to the extent of the labor and effort made to produce crops and to state that enough could not be raised to support his family; that he had to go elsewhere for work; and that his family had to be assisted by others. Held, while the testimony was remote and might have been properly excluded, its reception did not constitute reversible error.—Yanelli v. Littlejohn, 172 Mich. 91.

¶ 140. In an action for personal injuries, the admission of evidence of plaintiff's poverty, if error, is harmless where admitted in rebuttal of a contention that the action was a speculative one and that counsel were to have a share in the recovery, there being nothing in the record to show that the evidence was used for any other purpose or that the jury because of it enhanced the damages awarded to plaintiff.—Arndt v. Bourke, 120 Mich. 263.

¶ 141. Incompetent testimony as to the changing of dangerous machinery some time after the action, in an action against a mill company for the death of an employee by contact with an exposed gear, and as to defendant's relation to a certain "trust," will be regarded as prejudicial error, where the verdict returned was grossly excessive.—McDonald v. Champion Iron & Steel Co., 140 Mich. 401.

§ 27. Evidence merely cumulative in effect.

Evidence of facts admitted or conceded, see post § 28.

Evidence of facts put in proof by party objecting, see post § 29.

Erroneous exclusion of evidence that is merely cumulative, see post § 38.

¶ 142. An admission of cumulative testimony upon a point conclusively proven by competent testimony, even if improper, is harmless error.—Mott v. Penoyar, 153 Mich. 273.

¶ 143. The unnecessary admission of oral evidence to the same point as written evidence already introduced is harmless error.—Final v. Backus, 18 Mich, 218.

¶ 144. It is error to admit oral testimony to explain a letter where there is no ambiguity, but where it is clear that the testimony was not explanatory but collateral, it could not have prejudiced the other party and is harmless.—Fairfield v. Hart, 139 Mich. 136.

¶ 145. Where a witness has testified on direct and cross-examination what he thought about passengers having alighted at the time of giving a signal to start, his further testimony that at that time he stated to the passenger "I thought you were all off" is not ground for reversal.—Reese v. Detroit United Ry., 159 Mich. 600.

¶ 146. It is fairly presumable that articles ordered to be "sent" will be delivered by a railroad company at their depot, in the absence of any other usage or agreement, and that the vendor will not be required to accompany them and make further delivery. Evidence of a custom of fruit tree sellers to "make delivery" at stations along railroad lines, being in conformity with the legal presumption, could have wrought no injury to the defendant in an action to recover the price of such trees sold and delivered.—Kelly v. Waters, 31 Mich. 404.

¶ 147. Where, in an action to recover damages for defendant's breach of its oral contract to furnish 100 flat cars daily to be loaded with gravel, plaintiff has proved such contract by the uncontradicted testimony of two witnesses, defendant is not injured by plaintiff's testifying that at the time the contract was agreed upon he made a memorandum of its contents, and that in said memorandum no reference was made to flat cars.—Robinson v. Lake Shore & M. S. R. Co., 103 Mich. 607.

§ 28. Evidence of facts admitted or conceded.

Evidence of facts put in evidence by party objecting, see post § 29.

¶ 148. A defendant cannot be harmed by the improper introduction of evidence that does not go beyond his own admissions.—Fowler v. Gilbert, 38 Mich. 292.

¶ 149. It seems that a party is not damnified by proofs that agree with his own admissions.—John Hancock Mut. Life Ins. Co. v. Moore, 34 Mich. 41.

¶ 150. Where plaintiff's employment as defendant's attorney is conclusively shown by admitted acts of defendant, the improper admission of testimony as to the fact of such employment is, as to defendant, harmless error.—McCurdy v. New York Life Ins. Co., 115 Mich. 20.

¶ 151. Where an agent's authority to execute an insurance policy is admitted by failing to deny it under oath, the admission of parol evidence of such authority though the authority actually conferred was in writing, is not prejudicial error.—Wooliver v. Boylston Ins. Co., 104 Mich. 132.

¶ 152. It is at most harmless error to permit a witness in an action for personal injuries against a street railway company to testify that he had told a third person in answer to a question that he could tell who the conductor on the street car was when the identity of the conductor is undisputed. —Leach v. Detroit Elec. Ry., 129 Mich. 286.

¶ 153. It being practically conceded, upon the trial of a suit to recover commissions on the sale of logs, that defendant, if liable at all, should pay commissions upon all the logs specified in the contract, the fact that a witness who had seen a part of the logs only was permitted to state his estimate of the quantity was harmless error requiring no reversal.—Burrell v. Gates, 112 Mich. 307.

¶ 154. In an action to recover the value of lumber sold, the admission of books to show the quantity, without evidence that they were correctly kept, was not material where an agreed estimate was prepared showing the number, pieces and sizes required, and a determination of the amount simply required a mathematical calculation. —Rathbun v. Allen, 135 Mich. 699.

¶ 155. In an action to recover the price paid for certain beans, upon the ground that plaintiff had been defrauded by defendant's representations that they were "red kidney beans," it does not constitute reversible error to admit hearsay testimony that the beans were not "red kidney beans," where defendant himself has conceded this fact.—McNitt v. Henderson, 155 Mich. 214.

¶ 155a. Where a man who agreed to furnish a team for farm use signed a note given for a horse, and afterwards, in a suit thereon, defended on the ground that he was incompetent to make the note, it was held that the question whether in order to entitle plaintiff to recover he should make it appear that the purchase was necessary for defendant's use did not arise where the horse was bought for farm use and was actually taken on the farm and used by the defendant.—Shoulters v. Allen, 51 Mich. 529.

¶ 155b. Where, in a suit upon an insurance policy issued by defendant's local agents, the execution of the policy is not denied by defendant under oath at the time of filing its plea, the authority of the agents to execute the policy, as well as the fact of its execution, is admitted, and therefore, though the authority actually conferred was in writing, defendant is not harmed by admission of parol evidence of such authority. —Wooliver v. Boylston Ins. Co., 104 Mich. 132.

§ 29. ——Evidence of facts put in proof by party objecting.

Harmfulness to objector in general, see also post §§ 45, 46.

¶ 156. A party to an action who has himself testified on cross-examination, without objection, that one of his witnesses had stolen certain articles from him when in his employ, is not prejudiced by the admission of testimony to the effect that he had accused such witness of taking other articles. —Hoffman v. Adams, 106 Mich. 111.

§ 30. Parol or secondary evidence.

Parol or secondary evidence cured by admission of other evidence, see post § 84.

Use of copy of survey instead of original to refresh memory as harmless error, see also Examination of Witnesses ¶ 107.

¶ 157. The admission of oral evidence to prove an agreement for the transfer of an interest in lands is none the less error because the agreement itself was void.—Rawdon v. Dodge, 40 Mich. 697.

¶ 158. Immaterial error, such as the incompleteness of secondary evidence of a lost survey referred to in a deed where such evidence conforms to the deed, cannot be complained of.—Heffelman v. Otsego Water Power Co., 78 Mich. 121.

¶ 159. Where the destruction of a note and mortgage is shown, and sufficient parol testimony given of their contents, an objection that the prior introduction of a certified copy of the record of the mortgage disclosed that there was but one witness to its execution becomes immaterial.—Coon v. Bouchard, 74 Mich. 486.

¶ 160. In an action on a life insurance policy where the insured had disappeared and been gone for more than seven years

without having been heard from, the admission of a letter written by defendant's superior officer to the local officer of defendant in which it is stated that "if he [insured] does not turn up before seven years, I assume that the order could be held liable for his claim after that time" cannot be said to have been prejudicial because the letter could not have affected the company, and even had the letter been excluded, a different verdict could not have been expected to have been returned.—Heagany v. National Union, 143 Mich. 186.

§ 31. Conclusions and opinions of witness.

Admission of conclusions and opinions cured by other evidence, see post § 88.

¶ 161. Harmless error in questions calling for conclusions of a witness that could not have misled the jury, are not regarded.—City of Detroit v. John Brennan & Co., 93 Mich. 338.

¶ 162. Although the jury should draw all conclusions of fact, where plaintiff, who while driving in a highway was injured by an obstruction, testifies that he was driving as carefully as he could, and gives fully facts upon which his conclusion is based, it cannot be presumed that defendant was prejudiced by his being allowed to make his own conclusion.—Langworthy v. Township of Green, 88 Mich. 207.

¶ 163. In an action to recover damages for personal injuries sustained by plaintiff while driving with a companion in a buggy, where plaintiff was asked whether he observed any carelessness or careless act on the part of his companion while so driving, held that if such question was incompetent as calling for a conclusion, admission of the question and answer was not reversible error.—Hall v. City of Flint, 195 Mich. 638.

¶ 164. Error in allowing the defendant to testify that he had stated to the prosecuting attorney all the facts about the case that he knew is not prejudicial; where, in an action for false imprisonment and malicious prosecution, the undisputed facts of the case clearly establish probable cause for the making of the criminal complaint by defendant, regardless of the advice of the prosecuting attorney.—Lansky v. Prettyman, 140 Mich. 40.

¶ 165. In an action by a lumber company against the owner of a building to recover for materials furnished directly to the defendant and for the balance due on the contract of the contractor which defendant had agreed to pay in consideration of plaintiff not holding defendant's property, held that the admission of the answer of a witness to the question as to what defendant's general manager meant by protecting himself in his conversation with defendant and witness that it was "by a lien" was harmless error, although it constituted the conclusion of the witness.—Monroe Lumber Co. v. Bezeau, 192 Mich. 307.

¶ 166. Where in a personal injury case the accident was caused by the collision of an automobile with a carriage driven by a horse, and there was a sharp dispute on the facts and any testimony showing a reckless rate of speed was well calculated to turn the scale in favor of the plaintiff, the admission in evidence of testimony of an occupant of the carriage run down as to the rate of speed was so prejudicial as to cause a reversal where the person so testifying was not in a position to have a reasonable opportunity to judge of the speed.—Wright v. Crane, 142 Mich. 508.

¶ 166a. In an action to recover damages for fire alleged to have been communicated from defendant's traction engine, error in permitting a witness to answer that he did not know of any way in which the fire could have caught except from the engine, even if a negative conclusion which should have been drawn by the jury, is not prejudicial where there is no suggestion of any other source from which the fire might have started.—Rogers v. Fowler, 151 Mich. 485.

¶ 166b. In an action to recover damages for fire alleged to have been communicated from defendant's traction engine, and traced to the road where it had passed, the statement of a witness that there was at the time of the fire no other source suggested than that it was occasioned by the engine, is not prejudicial where no other source was suggested at the trial.—Rogers v. Fowler, 151 Mich. 485.

§ 32. Hearsay evidence.

Hearsay cured by admission of other evidence, see post § 83.

¶ 167. Even though declarations of the driver of an automobile immediately after a collision with a motorcycle as to the fault of the driver should have been excluded, in an action for damages for injury to the motorcycle, as being hearsay or mere narrative of a past event, such admission was not prejudicial error where no different result would have been reached by the jury if the testimony had been rejected.—Link v. Fahey, 200 Mich. 308.

¶ 168. Erroneous admissions of certain subsequent conversations as to the cause of a collision between an interurban car and a moving van, in an action to recover damages for personal injuries sustained in such collision, held prejudicial error when they probably controlled the result.—Hyatt v. Leonard Storage Co., 196 Mich. 337.

¶ 169. The admission, in an action by the assignee of the consignee of goods against the receivers of a railroad company to recover for a shortage in the shipment, of hearsay evidence that the teamster hauling the

goods from the railroad to the warehouse of the consignee told witness that he hauled only a certain number of cases, a number considerably less than that shipped, was reversible error, where defendants introduced positive testimony to the effect that the car was delivered to the consignee upon the team track with the seals unbroken and the only testimony, aside from the statement of the teamster, was based upon the notation of shortage upon the freight bill made by an agent of defendant.—Oceana Canning Co. v. King, 200 Mich. 268.

§ 33. Evidence of record in another suit or proceeding.

Admission of former testimony where witness present testifies again to same effect, see also Evidence ¶ 1878.

¶ 170. Admitting records of other suits between same parties involving same subject-matters, is not prejudicial error.—Baumier v. Antiau, 79 Mich. 509.

¶ 171. It was not error to admit evidence of the proceedings against a fraudulent debtor in an action on the bond, since if such evidence showed that the proceedings were void it defeated the action, and if it did not it was harmless.—Butts v. Davis, 50 Mich. 310.

¶ 172. In an action for a forcible trespass plaintiff was allowed to show that defendant had been convicted of crimes of violence but afterwards released on review of the convictions. Held, that this evidence ought to have been struck out on defendant's motion; though the refusal to strike it out would not, perhaps, warrant a reversal.—Pigott v. Lilly, 55 Mich. 150.

§ 34. Evidence affecting credibility or impeachment of witnesses.

¶ 173. Where a witness on cross-examination testifies that he has not been impeached in previous suits, and denies that he once asked a man if he was going to swear against his (witness') reputation for truth and veracity, the admission of the latter testimony is harmless error where not followed by any contradiction.—Mears v. Cornwall, 73 Mich. 78.

¶ 174. Questions to witnesses as to whether they were spiritualists or mediums cannot be said to have prejudiced the cause of the contestant of a will where it does not appear but that their testimony had been taken as true, and no argument was made to the jury concerning the religious beliefs of the witnesses.—In re Morse's Estate, 146 Mich. 463.

¶ 175. In a suit for personal injury plaintiff's attorney, one Zabel, put defendant's attorney, one Smith, on the stand as a witness, and over his objection asked him whether he was acting as agent for defendant in a certain negotiation for a settlement, and as to a certain conversation between Zabel and Smith relative to an agreement between them for defendant's doctor to examine the plaintiff. Zabel then took the stand and contradicted Smith's evidence. To all this defendant objected, and for taking exception was rebuked by the court. Smith's reputation in the community was good. Held, the proceeding was not so prejudicial in tending to make Smith appear ridiculous before the jury as to call for a reversal of a verdict in favor of plaintiff.—Logan v. Agricultural Society Lenawee County, 156 Mich. 537.

§ 35. Allowance of leading questions.

Leading questions cured by admission of other evidence, see post § 89.

¶ 176. Leading questions which were unimportant are harmless error.—Michigan Paper Co. v. Kalamazoo Valley Elec. Co., 141 Mich. 48.

¶ 177. Allowance of leading questions regarding immaterial matters and working no harm to the other party is not ground for reversal.—Tredway v. Antisdel, 86 Mich. 82.

¶ 178. The objection that questions are leading will not, in general, be noticed on error.—Church v. John Davis & Co., 93 Mich. 477.

¶ 179. Error does not lie on the allowance, by a referee, of leading questions.—Campau v. Brown, 48 Mich. 145.

¶ 180. Failure of the court to rule on objections to leading questions held not prejudicial where the reception of the questions was within the court's discretion.—Nutter v. Colyer, 180 Mich. 107.

§ 36. Erroneous exclusion or striking of evidence.

Deficiency of pleadings to show cause of action, see post § 37.
Facts already proved or admitted, see post § 38.
Matters not in issue, see post § 39.
Exclusion of questions as leading or informal, see post § 40.
Questions without proper foundation, see post § 41.
Exclusion of photographs and real evidence, see post § 42.

¶ 181. The rejection of testimony that could not have affected the result of the case is not prejudicial error.—Smith v. Smith's Estate, 91 Mich. 7; Hollister v. Brown, 19 Mich. 163; People for use of National Sewer Pipe Co. v. Sharp, 133 Mich. 378; Hannula v. Cleveland-Cliffs Iron Co., 188 Mich. 543; Horowitz v. Blay, 193 Mich. 493.

¶ 182. It is not an error affecting the result to strike out evidence that is too indefinite to be considered.—Overall v. Bezeau, 37 Mich. 506.

¶ 183. A reversal will not be granted because of refusal to admit in evidence an unimportant newspaper article.—Hart v. Village of New Haven, 130 Mich. 181.

¶ 184. A new trial will be granted for the error of the court in excluding testimony clearly bearing on the case, and showing the relation of the parties thereto.—Colwell v. Adams, 51 Mich. 491.

¶ 185. It is not prejudicial error to exclude testimony which, in itself, is so vague, inconclusive and insufficient that a verdict which should be based upon it would have to be set aside.—Campau v. Lafferty, 50 Mich. 114.

¶ 186. It is not an immaterial error to exclude evidence where other evidence might have been put in if it had been received.—Ellis v. Spaulding, 39 Mich. 366.

¶ 187. Where the question is whether a debtor's transfer of a stock of goods to his brother in payment of a debt was fraudulent as to creditors, the exclusion of certain orders for the goods given, unknown to the brother, by the debtor, after agreeing to the transfer, is harmless if erroneous at all.—Partlow v. Swigart, 90 Mich. 61.

¶ 188. The exclusion of a list of property owned by a defendant, in an action for conspiracy to defraud due to an attorney inducing a client to loan money to the defendant, on inferior security, is not prejudicial to the defendant where he testifies as a witness that he had no property which was not mortgaged.—Hardy v. Trick, 121 Mich. 251.

¶ 189. Exclusion of evidence of the date of a conversation tending to show an admission of acceptance of goods sold is not prejudicial error when it fully appears such date was subsequent to the vendor's receipt of the goods.—Black v. Delbridge, Brooks & Fisher Co., 90 Mich. 56.

¶ 190. In ejectment by the original owner of land against one who acquired title by adverse possession if at all in 1891 or 1896 it is not reversible error to refuse to permit a purchaser from the latter to be cross-examined as to why certain payments were withheld in order to show good faith of defendant in claiming title in 1907.—Merritt v. Westerman, 180 Mich. 449.

¶ 191. In ejectment, where the testimony all tended to prove, and the court charged the jury that defendant was in possession of the strip in question for more than 15 years before the commencement of the suit, possible error in striking out testimony of matters of public notoriety, was not prejudicial.—Miller v. Shumway, 135 Mich. 654.

¶ 192. Where a breach of contract of employment to cut and manufacture certain timber is alleged, in that defendant did not have title to the timber for the cutting of which he contracted, rejection of deeds and bills of sale which would have established title to merely a small portion of the timber involved is harmless error, since that would not have altered plaintiff's right to regard the contract as broken, nor have affected the measure of damages.—Mott v. Penoyar, 153 Mich. 273.

¶ 193. On the trial of an action of assumpsit for work and labor, an offer made in good faith, of a memorandum of payments made to plaintiff, which was withdrawn on intimation of the court that it was inadmissible, is not error, where no prejudice results to defendant.—Hunkins v. Kent, 151 Mich. 482.

¶ 194. Where, in an action upon an insurance policy, plaintiff has testified that he paid $50 on his contract of purchase of the insured property, the exclusion of testimony on defendant's part that plaintiff in a conversation had after the fire with the adjuster and the local agents claimed he had paid $150 on the contract, does not justify reversal even if the testimony were competent, for whether plaintiff paid one sum or the other could not affect the rights of the parties under an instruction that made the case turn upon the disclosure or nondisclosure of the true condition of plaintiff's title.—Wooliver v. Boylston Ins. Co., 104 Mich. 132.

¶ 195. In an action by a contractor on a building contract, where defendant had offered much testimony tending to show the defective character of the construction, but had introduced no evidence tending to show the cost of remedying defects except the cost of fixing the basement floor, and plaintiff then introduced evidence that the building was completed in accordance with the plans and specifications, the striking out, after both parties had closed, of evidence on behalf of defendant as to cost of remedying other portions of the work, as improper rebuttal, was not reversible error.—McMillan v. Portsmouth Township School District No. 2, 200 Mich. 280.

§ 37. ——Deficiency of pleadings to show cause of action.

¶ 196. A decree of dismissal will not be reversed and the case remanded for failure to afford opportunity to take proofs where the bill fails to state a cause for relief.—Wyandotte Public Schools v. Harding, 157 Mich. 86.

§ 38. ——Facts already proved or admitted.

Erroneous admission of evidence that is merely cumulative in effect, see ante § 27.

¶ 197. It is not prejudicial error to exclude further evidence of a fact already proved and admitted by the other side.—Ward v. Carey, 200 Mich. 217.

¶ 198. The exclusion of a letter admissible only for the purpose of showing the animus of a witness is not prejudicial error where his hostility is already apparent from his testimony.—Burt v. Long, 106 Mich. 210.

¶ 199. It is not prejudicial error to exclude cumulative testimony upon a point that is not disputed.—Little v. Williams, 107 Mich. 652; Miller v. Jurczyk, 109 Mich. 637.

¶ 200. It was not reversible error for the court in an action by a materialman against a contractor and surety upon a bond to strike out the general statement of a witness that all the creditors agreed to an extension of time when the facts had been fully gone into by direct and cross-examination and the witness had then stated that some of the creditors were not present.—People v. Traves, 188 Mich. 345.

¶ 201. Where, in a suit by the owner of a marble shop to recover damages for injury to monuments left out of doors by the blowing of soot thereon from the defendant's premises, a witness for plaintiff has testified on cross-examination that stains upon marble penetrate deeper by time, the rejection of the further question as to when he would do work upon marble that was stained, —at once, or after waiting a year,—is not prejudicial to defendant, as the former testimony amounted to saying that the stains should have early treatment.—Skelton v. Fenton Electric Light & Power Co., 100 Mich. 87.

¶ 202. In the face of evidence of reliance on representations made by means of fictitious leases as to the rental of property it was harmless to exclude evidence that reliance was placed on similar representations made by the lessee, who was alleged to have been a coconspirator in the fraud.—Pinch v. Hotaling, 142 Mich. 521.

¶ 203. Where a witness examined on two trials of a cause is not present at a third trial, the exclusion of his original testimony is not prejudicial error if his testimony, given on the second trial—when he was fully examined—is admitted, and is as favorable as that given on the first trial.—Schindler v. Milwaukee, L. S. & W. R. Co., 87 Mich. 400.

¶ 204. Where it is admitted that, at the time suit was brought against a township for the support of a poor person, she required more aid than the township was allowing, it is not harmful error to exclude testimony that at a previous time plaintiff told the supervisor that no more help was needed.—Eckman v. Township of Brady, 81 Mich. 70.

§ 39. ——Matters not in issue.

¶ 205. Reversible error cannot arise from excluding testimony immaterial to the issue. —Brown v. Spiegel, 167 Mich. 645.

¶ 206. The exclusion of the record of plaintiff's conviction and sentence on a warrant issued for the offense of being a disorderly person, in an action for damages for illegal arrest and imprisonment without a warrant, is harmless error where they would have been immaterial if admitted.—Larson v. Feeney, 196 Mich. 1.

¶ 207. The right to recover in ejectment depends on the plaintiff's proving title in himself; and the rejection, for insufficient authentication, of a foreign deed offered by defendant is therefore immaterial where plaintiff claims under tax-titles only.—Crooks v. Whitford, 47 Mich. 283.

¶ 208. In an action on a bond, where the defense was that the execution of the bond was conditioned upon its being signed by another party named in the bond, and that such party did not sign, the exclusion from cross-examination of one of the defendants, of statements that he knew that the other defendant who did sign as a surety was interested as a principal, was harmless, where the issue had been narrowed to the question as to whether the name of the party who did not sign appeared in the bond when it was signed by the defendants, or whether it was written in and erased after they had signed.—People for use of National Sewer Pipe Co. v. Sharp, 133 Mich. 378.

¶ 209. The exclusion of the testimony of the assignee of a land contract, in an action against the latter's agent by the representative of the estate of the assignor for breach of trust in failing to pay over money paid to such agent as the alleged agent of the assignor for the purpose of payment of a debt for a furnace placed upon the premises by the assignor, was not prejudicial error, where the controlling question was that of agency, and the assignee was not present at the time of the payment, and such testimony related to irrelevant and immaterial collateral matters.—Cutter v. Powers, 200 Mich. 375.

¶ 210. Where, in an action for goods sold, the jury found for plaintiff and, under the issues, must have found either that the goods conformed to the contract of sale or that they were accepted as conforming to the contract, defendants were not injured by exclusion of evidence tending to prove the amount of their damages, since if admitted such testimony could not have affected the result.—Brown v. Harris, 139 Mich. 372.

¶ 211. The rejection of unimportant impeaching testimony which could not have had a material bearing on the result is harmless. —Bialy v. Krause, 142 Mich. 158.

¶ 212. Exclusion of testimony of the value of goods on the first floor of a store is not prejudicial though pertinent to the value of the whole stock, where it is not contended that this would enable the witness to fix the

value of the whole stock, which is the fact in issue and which was fully gone into and proved.—Schloss v. Estey, 114 Mich. 429.

¶ 213. In an action involving the boundary of a certain lot, it is not prejudicial to exclude questions relative to the length of the lot, which was not in controversy, where it appeared that witness had not surveyed to ascertain the depth of the lot.—Freda v. Olschefski, 131 Mich. 201.

§ 40. ——Exclusion of questions as leading or informal.

¶ 214. Where it does not appear that adverse rulings have prevented a party from making a full showing of the case, the supreme court may decline to disturb the judgment for errors in overruling questions on formal objections when their exclusion does not appear to have done injury.—Fraser v. Jennison, 42 Mich. 206.

¶ 215. Error will not lie on the exclusion of a question as leading, where it is apparent that counsel could have elicited the facts desired by changing the form of the question.—Burt v. Long, 106 Mich. 210.

§ 41. ——Questions without proper foundation.

¶ 216. It is not error of which the offering party can complain to exclude a question, "What, in your opinion, did that horse * * * get frightened at?", where the court intimated that the witness ought first to be asked if he knew, and where such knowledge as a foundation was not put in evidence and the entire testimony of the witness was not such as to afford such a foundation.—Foster v. East Jordan Lumber Co., 141 Mich. 316.

§ 42. ——Exclusion of photographs and real evidence.

¶ 217. In an action for personal injuries occasioned by a defective sidewalk the exclusion from the evidence of a photograph showing the condition after the accident had happened was harmless error where there was disputed evidence as to whether the conditions were the same at the time of taking the photograph and at the time of the accident, and the photograph would throw no light upon the disputed questions.—Ness v. City of Escanaba, 142 Mich. 404.

§ 43. Exclusion or reception in trials by court without jury.

On reference, see post § 43.

¶ 218. The striking out and refusal to strike out immaterial testimony, if erroneous, is not prejudicial to the case where the trial is by the court.—Reed v. Whipple, 140 Mich. 7.

§ 44. ——On reference.

Irregularities in findings or report of referee, see post § 74.

Allowance of leading questions by referee, see also ante ¶ 179.

¶ 219. In a divorce suit, the court referred the case to a master to take testimony on the single fact of the husband's being afflicted with venereal disease, and limited the evidence to that of doctors. The wife went outside of this, and called other witnesses. The court found the evidence did not support the charge of disease, but granted a divorce on other grounds. Held, the husband was not prejudiced by the proceedings before the commissioner.—Delor v. Delor, 159 Mich. 624.

§ 45. Harmfulness to objector.

Evidence of facts put in proof by party objecting, see also ante § 29.

Erroneous questions evoking answers favorable to party objecting, see post § 46.

¶ 220. Judgment will not be reversed for the admission of testimony which the verdict shows could not have injured plaintiff in error.—Thomas v. Dansby, 74 Mich. 398; Hollister v. Brown, 19 Mich. 163; Rossman v. Bock, 97 Mich. 430.

¶ 221. A plaintiff who is successful in recovering a judgment cannot avail himself of any error in the rejection of testimony.—Tuttle v. Briscoe Mfg. Co., 190 Mich. 22, 12 N. C. C. A. 909.

¶ 222. Where an improper question is put on cross-examination, and the inquiry is practically excluded by the court, no error arises if the answer given does not injuriously affect the objecting party.—Matla v. Rapid Motor Vehicle Co., 160 Mich. 639.

¶ 223. Judgment will not be reversed for the admission of immaterial or irrelevant testimony that is not of such a character as naturally to prejudice the jury against the party objecting to such admission.—McKinnon v. Gates, 102 Mich. 618.

¶ 224. The admission against objection of evidence that should have been excluded is not ground for reversal if it appears that such evidence was not prejudicial to the rights of plaintiff in error.—Montross v. Eddy, 94 Mich. 100.

¶ 225. Where indorsers sued by a bank defend on the ground of false representations made by plaintiff's president as to the solvency of the maker of the indorsed notes, the admission of a statement of the maker's financial condition after the taking of the notes is not error prejudicial to plaintiff.—Alpena Nat. Bank v. Greenbaum, 80 Mich. 1.

§ 46. ——Erroneous questions evoking answers favorable to party objecting.

Erroneous questions cured by answers, see post §§ 121-123.

¶ 226. Errors in permitting plaintiff to ask improper questions on cross-examination of defendant's witnesses are harmless where

the answers given are in defendant's favor. —Johnson v. Grondin, 170 Mich. 447.

¶ 227. Where a witness is improperly permitted to testify as to the danger of running an engine over a crossing without a lookout and a light, defendant cannot assign this as reversible error where the answer given is favorable to him.—Jackson v. Detroit & M. Ry. Co., 161 Mich. 163.

¶ 228. An improper question in cross-examination is harmless where the answer evoked did not show a fact injurious to the complaining party.—Warren v. City Elec. Ry. Co., 141 Mich. 298.

¶ 229. The admission on cross-examination of questions not strictly admissible is not error for which a judgment will be reversed where the answers could not prejudice the party objecting.—Beebe v. Knapp, 28 Mich. 53.

C. INSTRUCTIONS AND TRIAL PRACTICE.

§ 47. Erroneous instructions in general.

Harmlessness dependent on existence or state of evidence, see post § 48.

Instructions variant from issues, see post § 49.

Errors or ambiguities in parts of charge, see post § 50.

Charging correct rule on wrong theory, see post § 51.

Instructions on subjects presenting no jury question, see post § 52.

Charges on burden of proof, weight and effect of evidence, and misstatements of evidence, see post §§ 55-57.

Instructions on damages, values and prices, see post §§ 58, 59.

¶ 230. An erroneous charge which could not affect the verdict is no ground of error. —Clark v. Moore, 3 Mich. 55; Cummings v. Stone, 13 Mich. 70; Sinclair v. Murphy, 14 Mich. 392; Sheehan v. Dalrymple, 19 Mich. 239; Seymour v. Detroit Copper & Brass Rolling Mills, 56 Mich. 117; Johnston v. Davis, 60 Mich. 56.

¶ 231. A judgment will not be set aside for an erroneous instruction to the jury if the result could not have been different under a proper instruction.—Case v. Dewey, 55 Mich. 116; Morse v. Byam, 55 Mich. 594.

¶ 232. A judgment will not be reversed for an error in the charge that could not have misled the jury.—Continental Ins. Co. v. Horton, 28 Mich. 173.

¶ 233. Where erroneous rulings in giving or refusing instructions to a jury work no prejudice to legal rights, they are immaterial.—McDonough v. Sutton, 35 Mich. 1.

¶ 234. Where a question of fact is properly submitted, and the finding thereon necessarily determines the result, an error of the judge in the theory on which he submits the case may not be such error as to require reversal.—Finan v. Babcock, 58 Mich. 301.

¶ 235. Reversal must follow where the whole charge to the jury was vague and misleading, so that there was not a fair trial.—Loring v. Frue, 104 U. S. 223, 26 L. ed. 713.

¶ 236. In a contested election case an instruction to the jury that if illegal votes were received in a district and the evidence did not show in whose favor they were cast, they being, however, as numerous as the majority received in that district, then the election in such district should be thrown out and disregarded, was held harmless even if erroneous, as the result would have been the same if the illegal votes had been deducted and apportioned.—Attorney-General v. May, 99 Mich. 538.

¶ 237. To charge that an indorsee for collection cannot maintain an action unless he owns the note sued on is not prejudicial error in a case where such indorsee cannot maintain suit because his indorser could not maintain it.—Wintermute v. Torrent, 83 Mich. 555.

¶ 238. That the court by its charge permitted the jury to apply a rule concerning the degree of care required of the defendant that was unwarranted is not reversible error where it does not appear that the result would have been different had the court given a more modified or restricted rule as to the degree of care.—Bishop v. Baldwin, 147 Mich. 22.

¶ 239. An instruction is not objectionable as placing upon plaintiff in an action to recover for injuries occasioned by a collision between vehicles, the duty of maintaining an outlook to discover approaching vehicles, where the jury could not have been misled under the theory of the case as it was tried. —Buxton v. Ainsworth, 153 Mich. 315.

§ 48. Harmlessness dependent on existence or state of evidence.

¶ 240. Defendant sued for negligence is not harmed by an instruction on a question of contributory negligence of which there is no evidence.—Weiden v. Brush Electric Light Co., 73 Mich. 268.

¶ 241. A charge that it would be left to the jury to determine whether they would believe an uncontradicted witness, is harmless error where there was no witness whose testimony wholly uncontradicted.—Rhode v. Metropolitan Life Ins. Co., 132 Mich. 503.

¶ 242. It is not prejudicial error to charge the jury that the burden of proving a point is on the defendant where the only evidence on the question supports the plaintiff's contention.—Michigan Sanitarium & Benevolent Ass'n v. City of Battle Creek, 138 Mich. 676.

¶ 243. A trustee in bankruptcy sued to recover a preferential payment made to defendants by the debtor before his bankruptcy. The evidence clearly indicated that the defendants at the time of the payment to them knew the debtor was insolvent. Held, that in view of this, the error of the court in instructing that the defendants were liable if reasonable men would have been put on inquiry as to debtor's solvency, was not prejudicial.—Matthews v. Joannes Bros. Co., 156 Mich. 663.

¶ 244. Error in an instruction in conclusively imputing to principals knowledge obtained by their agent, is not neutralized by evidence from which it may be inferred that the principal regarded such knowledge as immaterial.—Weaver v. Richards, 150 Mich. 20.

¶ 245. Where the state of the evidence is such that there is no question for the jury as to a given matter, a charge and a refusal to charge in regard to such matter are not erroneous, because they work no injury to the party excepting.—Ames v. Quimby, 106 U. S. 342, 27 L. ed. 100, 1 Sup. Ct. Rep. 116.

¶ 246. Where, in an action against a village for injuries caused by the defective condition of a bridge, there was testimony which tended to show that such condition was due to a railroad company's negligence, an instruction that defendant, if damages were awarded against it, "might have a remedy" against the company, was held not prejudicial.—Williams v. Village of Petoskey, 108 Mich. 260.

¶ 247. A charge that the principal ratified the act of its agent in licensing the cutting of certain standing timber, in replevin, even though there was no evidence justifying such charge, was not prejudicial, where the authority of such agent was established by undisputed testimony.—Antrim Iron Co. v. Anderson, 140 Mich. 702.

¶ 248. Whether or not a charge on the necessity of ascertaining an agent's authority was correct need not be determined, if it appears that the person had actual knowledge that the agent lacked authority to make a lease and referred it to the directors of the corporate principal for approval.—Berlin v. Belle Isle Scenic Ry. Co., 141 Mich. 646.

¶ 249. In an action on a contract whereby defendant was bound to manufacture logs furnished by plaintiff into lumber, a charge that it was his duty to do so in a workmanlike and economical way only states what the law requires in the case of any contract, and cannot prejudice defendant, especially if no question is raised as to how it was done.—Hopkins v. Sanford, 41 Mich. 243.

¶ 250. In an action for slander, a charge that if defendant used the words alleged the verdict should be for plaintiff, followed by instructions that unless, under the circumstances, the words charged plaintiff with a crime and were so understood by the hearers, then defendant is not guilty, is not reversible error where the court could properly have charged that the words were actionable per se.—Hinchman v. Knight, 132 Mich. 532.

¶ 251. If, on the whole case, it is plain the evidence had no tendency to make out a cause of action, a judgment against the plaintiff will not be disturbed for any error in the charge to the jury.—McDonough v. Sutton, 35 Mich. 1.

¶ 252. In an action to recover damages against a township for personal injuries sustained by plaintiff while driving over a public road, an instruction that a barrier across a road closed from travel is not a positive requirement but that other notice of such closing may be given, as by the situation of the road, held not prejudicial to plaintiff where plaintiff claimed other notice.—Long v. Township of Weare, 195 Mich. 706.

§ 49. Instructions variant from issues.

¶ 253. An instruction that ice on streets coming from natural causes would not create a liability against defendant city, in an action for injuries caused by a defective street, and that if such ice was the cause of the accident, the plaintiff could not recover, was not prejudicial to the city, where the plaintiff did not claim either in the declaration or at the trial that the liability of the city arose because of the unnatural accumulation of ice, but it was the claim of the city that the streets were generally covered with ice, that the horse of the person injured was smooth-shod, and because of these the accident occurred.—Warn v. City of Flint, 140 Mich. 573.

§ 50. Error or ambiguities in parts of charge.

[Note. The doctrine that the charge will be construed as a whole and will be taken to have carried to the jury a meaning as an entirety, and its corollary that detached parts of the charge cannot be singled out and assigned as error because standing alone they might have been erroneous, belong to the law of Instructions. See that topic. There are decisions to the effect that an "error" in the charge is harmless where the other portions of the charge overcome or neutralize it. Such decisions have been treated as exemplifying the general law of Instructions and they are placed in that topic notwithstanding they may sound in terms of harmless error.]

Errors in the charge cured by other actions, rulings or findings, see post III, C.
Construction of the charge as a whole, see Instructions, II, C.
Construction as to conflicts and ambiguities in charge, see Instructions, II, C.

¶ 254. Judgment will not be reversed because the charge was ambiguous if it is apparent that the jury could not have been misled.—Sheehan v. Dalrymple, 19 Mich. 239.

¶ 255. Inconsistencies in the charge of the court are not ground to reverse, where it is apparent that the jury were not misled thereby.—Maier v. Massachusetts Ben. Ass'n, 107 Mich. 687.

¶ 256. The giving of a nonprejudicial conflicting charge is not reversible error.—Kennedy v. Ford, 183 Mich. 481.

¶ 257. Where the locus in quo is well understood as being a strip of land of certain dimensions between the two lots, the fact that the charge to the jury designates it as part of lot six instead of lot five, as claimed in the declaration, is not injurious to plaintiff.—Beecher v. Ferris, 117 Mich. 108.

¶ 258. In a suit by a claimant against an estate for services rendered the deceased, held, that an instruction by the court assuming the period of service in question to be ten years, when in fact it was only eight years and two months, is not reversible error where the defendant, in his requests and otherwise, treated the period as ten years. —In re Johnson's Estate, 100 Mich. 585; Beecham v. Wetherbee, Id.

¶ 259. An instruction that an executor was entitled to $1.50 per day when in fact the statute fixes the rate at $1.00 per day is not prejudicial to the executor, though it was for the jury to find how many days he had spent in the business of the estate, since it cannot be assumed that the jury would have found a greater number of days had the error not occurred.—In re Gallagher's Estate, 120 Mich. 365.

¶ 260. Under a charge directing a verdict in favor of a defendant, it becomes of no importance what special expressions may have fallen from the court, as the only question is whether there was anything to go to the jury.—Karp v. Citizens' Nat. Bank, 76 Mich. 679.

§ 51. Charging correct rule but on wrong theory.

Correct rulings based on wrong reasons, see ante § 12.

¶ 261. In a suit against a defendant broker for failure to deliver stocks which he contracted to sell to plaintiff, the trial court instructed the jury on the question of damages on the erroneous theory that plaintiff was entitled to recover for a conversion of the stocks. The rule of damages laid down, however, was the same as if he had instructed on the proper theory of a recovery for breach of contract. Held, the error was not reversible.—Goodspeed v. Smith, 162 Mich. 641.

§ 52. Instructions on subjects presenting no jury question.

Submitting theory or count, see also post § 63.

¶ 262. Contradictory instructions in a suit on an indemnity bond held harmless error where the subject upon which they were given presented no question of fact for the jury.—Fidelity & Deposit Co. of Maryland v. Maile, 177 Mich. 231.

¶ 263. A trial court in instructing a jury in a cause determinable wholly on questions of law, rather than fact, may err, but the error is not a prejudicial one.—Louden v. East Saginaw, 41 Mich. 18.

§ 53. Directing verdict.

On wrong ground with correct result, see post § 54.

¶ 264. A ruling directing a verdict for defendant will be sustained, irrespective of the reasons for it, if plaintiff made no case on his own showing.—Williams v. City of Grand Rapids, 59 Mich. 51.

¶ 265. A judgment for defendant, based upon the direction of a verdict for erroneous reasons, will not be sustained on the ground that the record shows the action to have been barred by the statute of limitations, where the circumstances of the trial indicate that plaintiff was prevented from making proofs tending to remove the bar.—Garn v. Lockard, 108 Mich. 196.

¶ 266. A verdict was improperly directed for the defendant by the trial court. The case was governed by foreign law, which was not proved in the lower court. Held, the verdict would not be allowed to stand, even though by the foreign law defendant was not liable.—Carnell v. Halpin, 159 Mich. 42.

¶ 267. Even though a breach of warranty was not declared on the defendant in an action in assumpsit on the common counts is not prejudiced by the action of the court in directing a verdict for $150.00 for one of a team of horses traded by defendant to plaintiff, although $200.00 of the agreed price of $300.00 for such team was paid by trading another team therefor, where the testimony of plaintiff that the defendant's horses were each sold at the same valuation, is uncontradicted and one of the horses was returned as unsatisfactory at defendant's request and replaced by another, which, becoming ill, was returned likewise at defendant's request and died while in defendant's possession, defendant refusing to pay plaintiff the value of the horse or to replace it with another.—Taylor v. Belton, 188 Mich. 302.

§ 54. ——On wrong ground with correct result.

See also ante ¶ 264.

General principle as to correct rulings based on wrong reasons, see ante § 12.

¶ 268. Where the result attained by the direction of a verdict is legally right, erroneous reasons given by the court for its action cannot be prejudicial.—Wilson v. Michigan Cent. R. Co., 94 Mich. 20; Toomey v. Eureka Iron & Steel Works, 89 Mich. 249; Lentz v. Teutonia Fire Ins. Co., 96 Mich. 445; Illinois Roofing & Supply Co. v. Aerial Advertising Co., 142 Mich. 698.

¶ 269. Where the court below, sustaining an unfounded objection to plaintiff's recovery, directed a verdict for defendant, judgment will not be reversed if any other of defendant's objections was good.—Peet v. Knights of Maccabees, 83 Mich. 92.

¶ 270. Where a verdict should have been directed for defendant as requested on the ground of variance, and the declaration could not have been amended so as to set up the cause of action proved, because of the statute of limitations, a judgment for the defendant will not be reversed despite errors in course of the trial.—Van Cleve v. Radford, 149 Mich. 106.

¶ 271. On an appeal from a directed verdict based on one ground, the parties did not, by stipulating that all the questions included in the motion of defendant might be considered in the supreme court, impose a duty upon this court to examine all the points presented in the motion to direct a verdict; if the reason given by the trial court was insufficient, but the judge reached a correct conclusion, the judgment will be affirmed.—Crawley v. Studebaker Corporation, 183 Mich. 462.

¶ 272. Directing a verdict on a wrong ground is not cause for reversal, where the result was correct.—Kelley v. Davison, 185 Mich. 123.

§ 55. Charges on burden of proof and presumptions.

¶ 273. An instruction in ejectment that the defendants must sustain their claim of adverse possession of their lessor by a "fair" preponderance of the evidence, held harmless error, where the jury was not misled.—Tyler v. Wright, 188 Mich. 561.

¶ 273a. An instruction that plaintiff has to sustain the burden of proof, which does not necessarily mean by the number of witnesses, but that if his testimony has satisfied the jury of the very right of the case, he has done so, is not prejudicial to defendant.—Bennett v. Greenwood, 151 Mich. 274.

§ 56. Charging on weight, credibility or effect of evidence.

¶ 274. In assumpsit for services rendered and moneys expended an instruction that the preponderance of the evidence means that the evidence must be of a little better quality than that opposed to it is held not prejudicial error under the circumstances.—Stoner v. Riggs, 128 Mich. 129.

¶ 275. That the court, in charging the jury, said that defendant's claim was sustained to some extent by the testimony of two witnesses, was not regarded as ground for reversal where the remark could not have prejudiced the jury.—Cartier v. Douville, 98 Mich. 22.

¶ 276. A judgment cannot be reversed upon an instruction to the jury which in itself was correct, whether the reason for it did or did not involve an opinion on facts. —Hatzenbuhler v. Lewis, 51 Mich. 585.

¶ 277. Where in a personal injury action the testimony of the witnesses for the respective parties was in irreconcilable conflict, and the sole issue before the jury involved the credibility of the witnesses, a charge to the effect that there was no room for an honest mistake on the part of the witnesses, and thus intimating that somebody was stating an untruth, while perhaps subject to criticism, was not prejudicial error.—Harrison v. Green, 157 Mich. 690.

§ 57. Assumptions of fact and misstatements of evidence.

¶ 278. Error in giving a contradictory and confusing instruction in regard to defendant's knowledge of, and his neglect to ascertain the falsity of, an article complained of as libellous, is not ground for reversal, where the undisputed testimony shows that the article was published after notice of its falsity.—Hatt v. Evening News Ass'n, 94 Mich. 114, on rehearing 94 Mich. 119.

¶ 279. Where the fact of the injury complained of is established by the undisputed evidence, it is not reversible error for the court to state to the jury in the charge "there is no doubt plaintiff has been severely injured."—Corcoran v. City of Detroit, 95 Mich. 84.

¶ 280. Error in charging that there was testimony of a value of $700 of the property lost, which the proofs of loss showed was worth about $400, the policy being for $400, cannot be held harmless where there was no testimony in the case establishing a value of $400 or more.—Walker v. Western Underwriters' Ass'n, 142 Mich. 162.

¶ 281. In an action of assumpsit where plaintiff claimed that it offered to deliver barrels which had been ordered by defendant, and received instructions from defendant to store them and after having done

so defendant's general manager some time later looked them over and indicated his approval and acceptance, an inadvertence by the court in charging the jury and assuming that he accepted the barrels before they were stored was not so prejudicial and erroneous as to require a judgment in favor of the plaintiff to be reversed.—T. W. Snook & Son v. Mt. Clemens Sugar Co., 180 Mich. 691.

¶ 282. The fact that the court predicated a portion of its charge upon the misstatement of the evidence held not prejudicial where the evidence was so short and clear that it was apparent that the jury could not have been thereby misled.—T. W. Snook & Son v. Mt. Clemens Sugar Co., 180 Mich. 691.

¶ 283. Plaintiff was thrown while getting on a street car, and his hand skinned. Later the hand swelled and had to be amputated. A physician testified that the swelling was due to a blow on the hand, and not to being poisoned by Canadian thistles. The court in instructing the jury told them that this physician ascribed the loss of the hand to the accident. Held, that this instruction, though inaccurate, was not, taken in the light of all the evidence, prejudicial error.—Hull v. Detroit United Ry., 158 Mich. 682.

¶ 284. In an action by an agent, who had entered into a contract for the sale of patterns with defendant, to recover an alleged balance for patterns returned, an instruction that defendant's proposal to return the goods and plaintiff's acceptance of them by actually shipping them as directed, constituted a new agreement under which defendant was authorized to appraise the goods and determine their value, but required to act in good faith and allow plaintiff "such credits as the goods were reasonably worth, taking into consideration the kind, nature and character of the same," held not prejudicially erroneous or misleading, although the terms of the correspondence may have been incomplete as an executory contract, as, if defendant accepted and retained the goods plaintiff was entitled to their reasonable worth.—Hines v. Pictorial Review Co., 192 Mich. 256.

§ 58. Instructions on damages, values and prices.

See also ante ¶¶ 20, 27, 28.
Improper allusions to malice or matters of aggravation, see post § 59.

¶ 285. In an action for the death of a husband, in which proof that deceased was a wealthy man was admitted, the giving of an instruction which limited the widow's damages to the worth of such contributions as she would have received out of her husband's personal earnings, but which did not direct a verdict of not guilty if they found that she received no support from such earnings, was not injurious to plaintiff, where the case must have turned on the question of contributory negligence.—Proper v. Lake Shore & M. S. Ry. Co., 136 Mich. 352.

¶ 286. Plaintiffs sued defendant in case for fraud in making false representations as to land sold by defendant to plaintiffs. The court instructed that the measure of damages was the amount of payments made on the land and a fair compensation for labor and expenditures in improving the land, less the actual value of the land. Held, that this erroneous instruction constituted reversible error despite the fact that plaintiffs under the proper instruction might have recovered much larger damages.—Painter v. Lebanon Land Co., 164 Mich. 260.

¶ 287. A charge leaving the jury to base its verdict on value of sawing and not on the contract price, the judge having first charged that some recovery could be had under the contract despite a plea of limitations, works no error, where there was testimony to warrant finding that the contract was treated as an entirety through its several years during which payments were made, and the appellant's requests conceded that, if the sawing was done on logs delivered under the contract and in a certain year, it was not barred; and where there was no evidence of value but the contract price. In that situation the result would be the same.—Burch v. Woodworth, 68 Mich. 519.

§ 59. ——Improper allusions to malice or matters of aggravation.

¶ 288. Where the damages by trespass are expressly limited to the actual loss, a reference in the charge to malice is not prejudicial.—Keables v. Christie, 47 Mich. 594.

¶ 289. Where punitory damages are not allowable under the charge of the court, an instruction characterizing the alleged trespass as "wilful and negligent" is not prejudicial.—Moret v. Mason, 106 Mich. 340.

§ 60. Denials and modifications of requests.

Requests for special findings, see post § 61.
Modification and refusal of requests in general, see Instructions, III.

¶ 290. A request for an instruction that the jury is not to be influenced by sympathy for either party should be granted in most cases, but a judgment will not be reversed for failure so to instruct in a case, where it is clear that sympathy has not inspired the verdict.—Doyle v. Dobson, 74 Mich. 562.

¶ 291. Refusal to give an instruction that an offer of compromise by defendants sued for negligence cannot be regarded as error without injury even though defendants' negligence is indisputable, where plaintiff's contributory negligence is also involved in the question of liability.—Pelton v. Schmidt, 104 Mich. 345.

¶ 292. Where the only witness, who could have given any testimony as to want of notice to an alleged bona fide purchaser on which the burden was to prove that fact, had no recollection of the facts, there was no evidence thereon to go to the jury; and consequently error, if any, in not charging fully enough on that point will not be considered.—Whitaker Iron Co. v. Preston National Bank, 101 Mich. 146.

¶ 293. In an action for criminal conversation, the refusal of an instruction as to the weight to be given to evidence of the defendant's previous good character is not error where the evidence was wrongfully admitted.—Knickerbocker v. Worthing, 138 Mich. 224.

¶ 294. It is not reversible error for the trial court to modify and change defendant's requests to charge and then give them as though they had been proffered by the defendant, where the instructions as given correctly state the law.—Anthony v. Cass County Home Tel. Co., 165 Mich. 388.

¶ 295. Where defendant vendee of a printing press seeks to defend against a suit for the recovery of the purchase price on the ground that the sale of same was induced by fraudulent representations of plaintiff vendor, and the court in submitting said defense couples it with defendant's other defense that the sale was made conditional upon the press proving satisfactory, no reversible error is committed in failing to present, as requested by defendant, said defenses separately in the charge to the jury, where it appears from defendant's testimony that he did not rely upon the representations made by plaintiff.—Paddock v. Hatch, 169 Mich. 95.

¶ 296. In an action for slander for speaking words charging plaintiff with having burned defendant's house, held that it was not reversible error to refuse a request to charge the jury that they should not consider the intent of defendant in making a complaint in a criminal prosecution for arson.—Rabior v. Kelley, 194 Mich. 107.

¶ 296a. In an action on an insurance policy, error in refusing to instruct that proofs of loss admitted in evidence were not competent to prove ownership or the fact or amount of loss, was not prejudicial, where such facts were otherwise properly and sufficiently established.—Kennedy v. London & L. Fire Ins. Co., 157 Mich. 411.

§ 61. ——Requests for special findings.

¶ 297. Where by the facts as agreed upon by the parties the defendant was entitled to have the law found in his favor, the court's omission to respond to propositions of law submitted for special findings under Circuit Court Rule 87 did not prejudice the plaintiff.—Macomber v. Saxton, 28 Mich. 516.

¶ 298. The refusal of the court in an action against a city, to submit a special question as to whether on the day stated the sidewalk in question was unsafe or unfit for travel, was reversible error; and a substituted question as to whether the city up to and including such date used ordinary care to keep the sidewalk in reasonable repair for reasonably safe and convenient public travel, did not cure the error.—Beaudin v. Bay City, 136 Mich. 333.

¶ 299. The refusal to submit special questions to a jury not controlling of the general verdict, is not reversible error.—Moss v. Detroit & M. Ry. Co., 182 Mich. 40.

¶ 300. It is not error to refuse a request to find facts where if the facts had been found as requested, the disposition of the case could not have been different.—Kennedy v. Stimming, 192 Mich. 600.

§ 62. Omissions to charge or incomplete charge.

¶ 301. Where the instructions confined the jury to the consideration of certain charges of negligence, of which there was evidence, error in not specifically instructing the jury to disregard other allegations of negligence as to which there was no evidence, is not prejudicial.—Clemens v. Gem Fibre Package Co., 153 Mich. 495.

§ 63. Submitting or withdrawing theory or count.

Instructions on subjects presenting no jury question, see ante § 52.
Withdrawing question or case from jury as cure for erroneous admission of evidence, see post § 98.

¶ 302. A refusal to submit the facts to the jury upon one branch of plaintiff's claim because of defects in the declaration is not an error of which the plaintiff can complain if the record shows a fatal gap in his evidence.—Houghton County Sup'rs v. Rees, 84 Mich. 481.

¶ 303. Where the declaration upon a note contains three counts, a refusal by the court to withdraw, because of a variance, all consideration of the case under one count is not prejudicial error, where the other two are sufficient to allow a recovery.—Roberts v. Hawkins, 70 Mich. 566.

§ 64. Improper comments of court during course of trial.

Comments incident to requests and rulings, see post § 65.

¶ 304. The improper language of a judge in the course of a trial is not ground for reversal where not delivered in presence of the jury.—Van Driel v. Stevens, 200 Mich. 291.

¶ 305. Where an attaching officer sued in trover by a mortgagee attacks the mortgage as fraudulent, and where the evidence shows without conflict that the mortgage was properly filed, it is not error prejudicial to defendant for the court to comment upon entries in the city clerk's record books which are not in evidence.—Keating v. Retan, 80 Mich. 324.

¶ 306. In a trespass case against a brother-in-law who had entered the plaintiff's house contrary to the plaintiff's wish and, as the defendant claimed, aided the plaintiff's wife to carry off the furniture, in which case the only question left to the jury is the assessment of damages, a sarcastic remark of the court as to the conduct of defendant in kicking over a table and breaking the dishes "to save the property, I suppose, for his sister," is not so prejudicial as to justify a reversal.—Burns v. Kirpatrick, 91 Mich. 364.

¶ 306a. In a suit to recover for support and care of defendant's wife, the court in the course of the trial intimated that plaintiff had proved her theory of the case and defendant had failed to establish his theory; stated that defendant had turned the wife over to plaintiff to be taken care of, and was bound to pay for such care; and intimated that defendant had neglected to provide for her. Held, such remarks constituted prejudicial error as indicating the attitude and personal opinion of the court.—Toms v. Vreeland, 167 Mich. 341.

¶ 306b. Plaintiff having rested, defendant argued that plaintiff's testimony did not make out a case, and the court, in necessarily passing upon the question, stated the impression made upon his mind by the proofs. Held, that such statement was not objectionable or prejudicial to the defendant, as the case afterwards went to the jury.—Wiltse v. State Road Bridge Co., 63 Mich. 639.

§ 65. Comments incident to requests and rulings.

¶ 307. A remark by a trial judge, after giving a requested instruction, to the effect that he was unable to see how the request was applicable but if the jury could see any application thereof to the issues they could apply it, held not reversible error.—Detroit United Ry. v. City of Pontiac, 193 Mich. 466.

¶ 308. It was harmless error for the court to say that some of the defendant's requests for instructions he gave only because the attorney for the plaintiff requested him to do so for fear he had made a mistake in declining, where the defendant was not entitled to have them given in the first place.—O'Dea v. Michigan Cent. R. Co., 142 Mich. 265.

¶ 309. For the trial court in giving a requested instruction, to preface it with the statement that "I am requested to charge you" and in concluding to modify or qualify the instruction, held not error.—Newton v. Consolidated Construction Co., 184 Mich. 63.

¶ 310. In an action by a husband to recover damages suffered because of an injury to his wife from the collision of plaintiff's buggy with defendant's automobile, including charges for medical services, the action of the court in stating to counsel for defendant, who improperly asked the attending physician on cross-examination whether he did not expect to get his bill out of the litigation, that such question was improper, insulting, and that counsel should be reprimanded for it, and in telling counsel to pay heed to what the court had said, upon his taking exception to the language of the court, held not prejudicial error, where the verdict was not a miscarriage of justice.—Jolman v. Alberts, 192 Mich. 365.

§ 66. Misconduct of counsel.

Misleading or irrelevant argument, see post § 67.
Improper criticism of opposing party, counsel or witness, see post § 68.
Misstatements of facts or law, see post § 69.
Manner, course and conduct of trial in general, see Trial, II.
Desistance from argument on objection followed by avowal of facts stated, see also Argument of Counsel ¶ 118.

¶ 311. Improper remarks of counsel on the argument below are not necessarily ground for reversal unless clearly prejudicial.—Donovan v. Richmond, 61 Mich. 467.

¶ 312. Improper argument of counsel will not reverse where it could not have affected the verdict.—Holcomb v. Alpena Power Co., 175 Mich. 500.

¶ 313. Improper matter in opening statement by counsel held not to have been ground for reversal where not prejudicial.—Ford v. Savage, 111 Mich. 144.

¶ 314. Where counsel use argument which is clearly prejudicial and is unchecked by the court, and court immediately makes a charge closing with a direction "to decide this matter as it affects you" and a large verdict is returned, the error is prejudicial.—Glassbrook v. Lansing Wheelbarrow Co., 177 Mich. 29.

¶ 315. The fact that justice was substantially done in a judgment rendered will not preclude reversal for errors due to the appellee's endeavor to cloud the issue by injecting into the case questions which do not belong there.—Laird v. Laird's Estate, 127 Mich. 24.

¶ 316. Where the court is satisfied that the same verdict would have been rendered in any event, it will not reverse a judgment

because a remark of counsel in support of his right to ask a question was improper.—Daniels v. Weeks, 90 Mich. 190.

¶ 317. An improper argument of the plaintiff's counsel to the jury pertaining to the act of the assignor of the cause of action in making the assignment, held not prejudicial to the defendant, where the fact was undisputed and the result was not affected.—Case v. Rudolph Wurlitzer Co., 186 Mich. 81.

§ 67. ——Misleading or irrelevant argument.

¶ 318. Argument of plaintiff's counsel that demurrer after demurrer had been interposed, and difficulty experienced because of appeals, while improper, was not prejudicial, where the testimony led to but one conclusion, the one reached by the jury.—Clement v. Crosby & Co., 157 Mich. 643.

¶ 319. In an action for attorney fees rendered in a garnishment suit the remark of plaintiff's counsel in his argument to the jury that he "could point to some other cases where the defendant had captured men's logs and never paid for them," is improper, and should have been rebuked by the court but is not error requiring reversal.—DeLong v. Muskegon Booming Co., 88 Mich. 282.

¶ 320. In an action for personal injuries against a street railway company where the conductor who was a witness for the plaintiff testified that he was discharged for incompetence and defendant's witness testified that he was discharged for failure to ring up fares, it is not prejudicial error for counsel in his argument to refer to the neglect of the company of its duty to thousands of its citizens in employing an incompetent conductor as this tends toward impeaching the defendant's witness rather than toward the introduction of a new issue into the case.—Leach v. Detroit Elec. Ry., 129 Mich. 286.

¶ 321. Reference by the plaintiff's counsel in his opening statement to the jury, to the fact that his client was a woman while the defendant was a nonresident corporation, held not prejudicial to the defendant, where it did not influence the jury in the outcome.—Case v. Rudolph Wurlitzer Co., 186 Mich. 81.

§ 68. ——Improper criticism of opposing party, counsel or witness.

¶ 322. Remarks of counsel do not constitute prejudicial error where merely discourteous to opposing counsel and of a personal nature.—Goodwin v. Union Ins. Co. of Philadelphia, 163 Mich. 41.

¶ 323. Erroneously permitting counsel to comment upon the fact that certain witnesses who had testified on a former trial for the opposing party were not called, although at the place of trial and under no disability does not warrant reversal where it would have been easy for plaintiff in error to show, if such was the fact, that such witnesses were unimportant and immaterial.—Cook v. Standard Life & Accident Ins. Co., 86 Mich. 554.

¶ 324. A remark by a plaintiff's counsel imputing to opposing counsel a statement, which is denied and resented, as to the defense's theory, is improper, but if not of a tendency to prejudice the jury, and not, as having that tendency, called to the court's attention with the request that the jury be warned against it, is nonprejudicial error.—Kirchner v. Detroit City R., 91 Mich. 400.

§ 69. ——Misstatements of facts or law.

¶ 325. Where a will is contested on the ground of undue influence and mental incompetency the verdict against it should not be set aside merely because counsel for the contestants in his opening to the jury makes statements in regard to the testatrix mental condition which are not fully borne out by the proofs.—Prentis v. Bates, 93 Mich. 234, on rehearing 88 Mich. 567.

¶ 326. A judgment, on verdict directed by the court, against members of an unincorporated church society on obligations incurred therefor, will not be reversed because counsel, in his opening statement, relied on the liability of defendants as agents of a principal having no legal existence, although this ground was not conclusively established, where the declaration was on the common counts, and defendants were clearly liable by reason of their relationship to the society itself; the latter ground of liability being equally within the declaration.—Clark v. O'Rourke, 111 Mich. 108.

¶ 327. Where, in a personal injury suit, counsel for plaintiff indulges, in his argument to the jury, in arguments inflammatory and contrary to the rule of law laid down by the trial judge during the course of the argument upon objection being made by defendant, but neither at that point nor in the charge is the jury told to consider only the law stated by the court, the judgment in favor of plaintiff will be reversed where the verdict seems on the whole to be against the weight of the evidence.—Keeley v. City Electric Ry. Co., 168 Mich. 79.

§ 70. Harmfulness to objector.

Submission of improper questions to jury, see post § 71.

¶ 328. A verdict will not be disturbed for an error in a charge which operated to the advantage of the plaintiff in error.—Comstock v. Smith, 20 Mich. 338.

¶ 329. Plaintiff in error cannot complain of an instruction that is erroneous only because too favorable to himself.—Langworthy v. Township of Green, 95 Mich. 93.

¶ 330. A plaintiff in error cannot complain of a charge which favors him too much.—Bull v. Brockway, 48 Mich. 523.

¶ 331. A judgment will not be reversed because inconsistent instructions were given to the jury, if those adverse to the plaintiff in error were all correct.—Niagara Fire Ins. Co. v. De Graff, 12 Mich. 124.

¶ 332. An instruction as to the measure of damages cannot be regarded as prejudicial error where it allows no less than the correct rule would warrant.—Hubbell v. Blandy, 87 Mich. 209.

¶ 333. A party cannot take advantage of an alleged error in an instruction where he does not show that he was prejudiced by it. —Granger v. Darling, 156 Mich. 31.

¶ 334. A party cannot complain of an inconsistency in a cnarge due to the fact that the court gave an instruction preferred by him which was more favorable to him than the law justified.—Hess v. Preferred Masonic Mut. Acc. Ass'n., 112 Mich. 196.

¶ 335. Where defendant in replevin has established a lien for sawing upon a quantity of lumber of which that replevied was only a portion, a ruling which permits the assessment of his damages at such a proportion of his whole lien as the lumber replevied bore to the whole quantity subject to the lien is not one of which plaintiff can complain, the error being in his favor.—Chadwick v. Broadwell, 27 Mich. 6.

¶ 336. Where the parties to an action proceeded upon distinct hypotheses as to their relations to each other, which hypotheses respectively their evidence tends to support, a charge which, while properly presenting the case upon each of these, also submitted to the jury in language accurate in itself a hypothesis different from either and not strictly supported by the evidence, but more favorable to the defendant than the case properly warranted, is not an error of which such defendant can complain after a verdict that, in legal effect, negatived such hypothesis as well as that of the defendant.—English v. Caldwell, 30 Mich. 362.

¶ 337. A charge that a lease was terminated on the cessation of manufacturing operations for which it was made, whereas in fact it was not to terminate until the premises were restored to their original condition, is favorable to the lessee contending that it had terminated with the cessation of operations; and he cannot complain.—Stevens v. Pantlind, 95 Mich. 145.

¶ 338. In an action on a beneficial certificate, a charge to the jury requiring the defendant to establish by more than a preponderance of the evidence that the deceased was reported in open meeting for delinquent dues and at a subsequent meeting suspended is not prejudicial to defendant where the only evidence on this question is parol testimony, and where the deceased if not entitled to notice of such proceedings was at least entitled to insist on a written record of the association's action in the matter.—Wallace v. Fraternal Mystic Circle, 127 Mich. 387.

¶ 339. Where a story told by the court in its charge to the jury was of doubtful propriety, but had no tendency to injure the party complaining, it was not considered ground for reversal.—Cross v. Lake Shore & M. S. Ry. Co., 69 Mich. 363.

¶ 340. Where the conceded loss under a clause of an insurance policy exceeds the sum insured thereunder to an amount greater than the value of certain articles which the court instructs the jury plaintiff can recover for under said claim, the error, if one is committed, is not prejudicial to defendant.—Tubbs v. Dwelling-House Ins. Co., 84 Mich. 646.

¶ 341. It was harmless error to charge that by a practical construction the parties had determined that there was no absolute time limit on a contract, where it appeared that the delay was in any event not to the damage of the objecting party.—Gainor v. Cheboygan River Boom Co., 86 Mich. 112.

¶ 342. In an action for salary claimed by an insurance agent, in which the question of liability for application fees was in issue, where the court stated in the charge that in one case a certain balance would be due plaintiff, and then in stating defendant's theory told the jury "now I give you another set of figures, based on another claim on the part of the defendant," the latter statement was not prejudicial to defendant, where it was more favorable to defendant than the claim of plaintiff.—Lee v. Huron Indemnity Union, 135 Mich. 291.

¶ 343. Where the court erroneously included an item as an element of damages to be awarded in condemnation proceedings, the fact that he expressed his individual opinion that no tangible damages were shown as to this item, is not prejudicial to the party in whose favor the instruction was given.—Village of Plymouth v. Pere Marquette R. Co., 139 Mich. 347.

¶ 344. Instruction as to care and diligence required of an electric railway to prevent killing stock held sufficiently favorable to the defendant railway company, and therefore not subject to objection by it.—Airikainen v. Houghton County St. Ry. Co., 138 Mich. 194.

¶ 344a. In an action for wilfully and maliciously shooting at and wounding plaintiff error in submitting to the jury whether defendant, an officer, was negligent in shooting is favorable to defendant, where he did the shooting without intent to hit plaintiff

who was running away in the darkness, but had committed no felony or any other offense in the officer's presence, and where the officer had no warrant to arrest plaintiff.—Johnson v. Mack, 141 Mich. 99.

¶ 345. Where the proponent in a will contest case submitted to the jury the special question as to whether, when testatrix handed to P. a memorandum of her will, written in her own handwriting, and directed him how to dispose of the balance of her property, she knew what she was doing; the court's comment that he supposed that meant "was she mentally competent," was not improper, as proponent had no right to submit a question not calling for an answer which would control the main issue.—Spencer v. Terry's Estate, 133 Mich. 39.

¶ 346. An erroneous instruction that a gift by a father to his daughter (plaintiff) of a chose in action growing out of his son's (defendant) promise to pay the daughter a sum of money on the father's death is a gift in futuro subject to revocation by the father is not prejudicial to the defendant so as to reverse a judgment for the plaintiff.—Ebel v. Piehl, 134 Mich. 64.

§ 71. ——Submission of improper questions to jury.

¶ 347. In action for the price of milk cans where it would have been proper for the trial court to instruct the jury that certain representations made by a vendor were material, it is not error prejudicial to the vendor to leave the jury to determine whether the vendee deemed them to be material.—Davis v. Davis, 100 Mich. 162.

¶ 348. It was not error of which the employer could complain to leave it to the jury to say whether there was a mere postponement of the payment of $1,000 or an agreement that the salary for that year was to be only $5,000, where there was a conflict on that point, though there was an earlier agreement for $6,000 and the services had been performed thereunder.—Chamberlain v. Detroit Stove Works, 103 Mich. 124.

¶ 349. It is not prejudicial error for the court to leave to the jury the construction of a written agreement where such construction if reserved to the court should have been against the party alleging error.—Berry v. Haldeman, 111 Mich. 667.

¶ 350. In an action for breach of contract to furnish "25 carloads" of boxes in shooks in which the buyer had accepted the seller's offer to furnish the 25 carlouds, by writing which states that each car should contain 5,000 boxes, the defendant is not prejudiced by having the question of the number of boxes per car left to the jury.—Lowry v. Saginaw Specialty Co., 128 Mich. 246.

¶ 351. The fact that the court, in an action against the principal for failure to perform a substitute agreement made as alleged beyond an agent's authority, submitted to the jury the question of the agent's authority, instead of reserving to itself the construction of the writing, was not prejudicial to defendant.—Berry v. Haldeman, 111 Mich. 667.

¶ 352. Under Comp. L. 1897, chap. 129, giving a right of action to recover the proportionate share of the expense of running logs where two companies are driving in the same waters at the same time, an instruction leaving it to the jury to determine whether the defendant's services were to balance the plaintiff's or only to be offset to the extent of the value of the services is not prejudicial to the plaintiff where his services exceed the defendant's.—Bellows v. Crane Lumber Co., 126 Mich. 476.

¶ 353. Where action is brought under Act 104, P. A. 1909, How. 2nd ed., § 4110, by an employee of a common carrier railroad for injuries, defendant company is not prejudiced by an instruction that if the parties were equally negligent no recovery can be had though it seems that there is no question of degrees of negligence to submit to the jury.—Fernette v. Pere Marquette R. Co., 175 Mich. 653.

¶ 354. Allowing the jury to pass on the question of plaintiff's reliance on alleged fraudulent statements, is harmless, where there is in evidence a letter received by him imparting notice of the falsity of the statements before he had acted on them.—McEacheran v. Western Transportation & Coal Co., 97 Mich. 479.

D. IRREGULARITIES IN VERDICT, FINDINGS, JUDGMENT OR DECREE.

§ 72. In general; errors in verdict or findings.

Errors in judgment, decree or conclusions of law, see post § 73.

Findings or report of referee or commissioner, see post § 74.

Harmlessness to objector, see post § 75.

Cured or invited errors in verdict, findings or judgment, see post, III, D.

Allowing verdict to stand where interest as damages was same in amount as true measure would have been, see Damages ¶ 233.

¶ 355. A contention on appeal that the court below did not give certain evidence sufficient weight in its decision, is of no merit if that evidence was inadmissible.—Stabler v. Clark, 155 Mich. 26.

¶ 356. A judgment will not be reversed for a defect in the judge's finding which a stipulation in the record supplying the fact shows was pure inadvertence.—Sherrid v. Southwick, 43 Mich. 515.

¶ 357. A judgment will not be reversed in the supreme court because the court below, in

a special finding under Circuit Court Rule 87, neglected to pass specifically upon some points of law presented to him which were not material to the case; nor because he found incorrectly upon some preliminary propositions of law relied upon as leading to the ultimate result, where such preliminary findings worked no legal prejudice to the plaintiff in error, and the final conclusion was such as a true view of the facts and law really required.—Easton School Dist. No. 1 v. Snell, 24 Mich. 350.

¶ 358. Where findings in favor of the plaintiff on all points presented could not have established his right to a judgment, the case cannot be treated as one of mistrial for refusal to find on some of them.—Wiley v. Lovely, 46 Mich. 83.

§ 73. Errors in judgment, decree or conclusions of law.

Inapplicability of Statute of Amendments to cure want of jurisdiction to enter default, see also Defaults § 1.

Want of affidavit of default as harmless error to defendant who was in default of appearance, see Defaults ¶¶ 34, 35.

Construction of judgment containing error to ascertain if error was prejudicial, see Appeal § 338.

Omission to enter discontinuance as matter cured by Statute of Amendments, see Discontinuance ¶ 16.

Affirming lower judgment on certiorari because right in result though wrong reasons were assigned, see also Certiorari § 62.

Practice disregarding inoperative discontinuance as harmless to complainant, see also Equity ¶ 791.

¶ 359. If the findings of fact justify the judgment, it is immaterial whether specific legal conclusions are rightly drawn.—Gillam v. Boynton, 36 Mich. 236.

¶ 360. Where the facts found by the court sitting without a jury warrant the judgment rendered, it is immaterial that the court erred in its conclusions of law.—Black v. Miller, 75 Mich. 323.

¶ 361. Error in employing the word "ordered" instead of the word "adjudged," in overruling a demurrer, is harmless.—Prussian Nat. Ins. Co. v. Eisenhardt, 153 Mich. 198.

¶ 362. The objection that a judgment on a school district order embraced more interest than was allowable was not considered on error where the difference was so trifling as to be insignificant.—Bowen v. Rutland School Dist. No. 9, 36 Mich. 149.

¶ 363. Where the wrong measure of damages was given under a special count, but plaintiff would have been entitled under the common counts, on an implied promise to pay for his services outside of the contract, to recover the same damages, a judgment rendered in his favor for such value without objection to the rule of damages was not disturbed.—Burroughs v. Morse, 48 Mich. 520.

¶ 364. An error in a notice of a discontinuance of a suit "discontinuing the same with costs to the plaintiff," instead of defendant, is immaterial, as it could not mislead.—Slocomb v. Thatcher, 20 Mich. 52.

¶ 365. Where a joint defendant knew at the time a case was called for trial that a several judgment against him was the only one possible and the proofs tended to show a liability upon the part of such defendant alone, and he did not object to proceeding with the case, but only sought to be informed whether plaintiff would ask for a judgment against both defendants or against him alone, and the case was actually discontinued after the close of the proofs, any error in failing to discontinue the case at the time the case was called for trial was harmless.—Rimmele v. Huebner, 190 Mich. 247.

§ 74. Findings or report of referee or commissioner.

¶ 366. It is a mere irregularity for a referee to class his conclusion as to intent as one of law, and will not sustain error.—Ferris v. Quimby, 41 Mich. 202.

§ 75. Harmlessness to objector.

¶ 367. A plaintiff in replevin cannot complain that the court awarded nominal damages to him when the jury gave none, the error, if any, being in his favor.—Sleight v. Henning, 12 Mich. 371.

¶ 368. Defendants cannot assert error in that the jury returned a verdict for a less sum than the evidence showed the plaintiff entitled to.—Rogers v. Fowler, 151 Mich. 485.

¶ 369. On an appeal by the owner of a prescriptive right to take water from a lake by means of a pipe laid at certain level from a decree enjoining him from laying or using a pipe laid below the original pipe, it is immaterial that the decree gives such owner rights greater than he is entitled to.—Kennedy v. Niles Water Supply Co., 173 Mich. 474.

¶ 370. A judgment in ejectment allowing improvements to the defendants generally in form, when in fact only one is entitled to such claim, is not an error prejudicial to plaintiff, and therefore is not reversible.—Boucher v. Trembley, 140 Mich. 352.

¶ 371. In an action on several promissory notes, defendant is not injured and cannot complain of the verdict as a compromise because interest on the notes was not included in the verdict which was for an amount equal to the face of all the notes without

interest.—Big Rapids National Bank v. Peters, 120 Mich. 518.

¶ 372. Plaintiff is not in a position to complain of a judgment not following the verdict where the departure is in his favor. —D. M. Osborne & Co. v. Waterloo, 138 Mich. 588.

¶ 373. An insurance company sued by the administrator of the assignee of a policy, who was also liable on a mortgage for an equal amount held by the company, to declare the loss payable a fund out of which to satisfy the mortgage cannot complain that the decree did not properly adjust conflicting right between the complainant and the creditors of the estate represented by him, where the terms of the decree will in any event fully protect the defendant insurer.—Vogle v. Union Central Life Ins. Co., 147 Mich. 333.

¶ 374. A verdict in replevin for plaintiff who was the general owner of goods sold under a reservation of title to him until paid for, which verdict was improperly framed to decide the fact of a special property in or lien on the goods according to a statute, was not prejudicial to defendant, where it sufficed to dispose of all issues made in the case most favorably to him.—Guerold v. Holtz, 103 Mich. 118.

¶ 375. A purchaser of standing timber under contract reserving title in the vendor until it is paid for according to contract terms, and who therefore has no title in uncut timber, cannot complain of a decree more favorable than he could ask in that it undertakes, on a suit to enforce the contract by the vendor and to forfeit it, to fix a time within which the price may be paid and the purchaser's rights saved, alternatively decreeing that if payment be not then made the purchaser's rights save as already secured shall be forfeited. In such a suit the purchaser, having no equity in the uncut and unpaid for timber, is not as to that subject to foreclosure, and giving a time to redeem is not harmful to him.—Michigan Land & Iron Co. v. Doherty, 77 Mich. 359.

¶ 376. That the court permitted to each plaintiff a recovery of an undivided seventh instead of an undivided eighth of the land in fee cannot in any way injure the defendants, where the plaintiffs sued jointly and recovered.—Lee v. Livingston, 143 Mich. 203.

E. PERTAINING TO MOTION FOR NEW TRIAL AND SUBSEQUENT PROCEEDINGS.

§ 76. In general.

Harmlessness to party complaining, see post § 77.

Immaterial or cumulative newly discovered evidence as insufficient ground for rehearing, bill of review, or new trial, see Equity §§ 229, 241; New Trial, II, H.

¶ 377. Failure to give, upon request, a reason for denying a new trial, is harmless error not requiring reversal, where the record shows a proper exercise, in such denial, of the court's discretion.—Bowersox v. Bowersox, 115 Mich. 24.

¶ 378. Where by the record it appears that the trial court was right in refusing a new trial, it is immaterial that he failed to give sufficient reasons for such decision.—Rivers v. Bay City Traction & Electric Co., 164 Mich. 696.

¶ 379. Remarks of the trial judge interpreting the charge in the course of his overruling a motion for a new trial will not reverse a cause of action in the absence of prejudicial error in what was said and done during the trial, since it is the charge and not what the judge thought about it that is to be reviewed.—Lauer v. Palms, 129 Mich. 671.

§ 77. Harmlessness to party complaining.

¶ 380. A complainant cannot complain on appeal of the action of the court below in opening a decree by default in his favor, unless it was against his rights, whether otherwise proper or not.—Brewer v. Dodge, 28 Mich. 359.

¶ 381. Plaintiff in error cannot be deprived of the benefit of his exceptions on the ground that he was not injured by the rulings made against him unless it clearly appears that he could not have prevailed in any view of his case.—Toledo & A. A. R. Co. v. Johnson, 49 Mich. 148.

III. ERRORS CURED BY OTHER THINGS OR INVITED BY OBJECTOR.

A. IN PLEADINGS AND PRELIMINARY PRACTICE.

§ 78. In general.

[Note. Defects in process may be waived or the jurisdiction supplied by Appearance, which see, or by proceedings taken to perfect the service or amend the process (see Process). But as the error or defect is a clerical one or one by the party rather than a judicial error, it seems better to treat such matters in the topics above mentioned.]

Pleadings and rulings thereon, see post § 79.

Selection and formation of jury, see post § 80.

Invited error in general, see post § 81.

Errors in pleadings harmless in themselves, see ante, II, A.

Sufficiency of demurrer and failure to demur as waiver of errors or defects in pleadings, see Pleading, IV, XI.

Too short time to plead as harmless error where default was taken after full time indorsed on served copy of declaration, see also Defaults ¶ 5.

§ 79. Pleadings and rulings thereon.

Aider, cure and waiver of defects and objections to pleadings, see Pleading, XI.

Cure of errors in pleading by amendments, see Pleading, VI.
Aider of pleadings by verdict, see Pleading, XI.
Variance between pleadings and proof as cured by other things, see Pleading, X.
Harmlessness of mere formal or technical defects in pleadings, see Pleading, XI.

¶ 382. Whether the trial court erred in compelling an election of counts will not be examined on appeal where the plaintiff recovered as much as if no election had been ordered.—Mattice v. Brinkman, 74 Mich. 705.

¶ 383. Allowance upon appeal from claims commissioners of amendments enlarging claim is not prejudicial error if they were not considered on the trial.—Dayton v. Dakin's Estate, 103 Mich. 65.

¶ 384. A divorce decree and provision as to custody of children will not be disturbed because a condonation and the subsequent breach of its condition was not perfectly pleaded, where the appellant had the benefit of his affidavit setting up such facts and there was evidence to sustain the case.—Ferguson v. Ferguson, 145 Mich. 290.

§ 80. Selection and formation of jury.

¶ 385. A cause will not be reversed for error in excusing a juror, where a trial was had before an impartial jury.—Quay v. Duluth, S. S. & A. Ry. Co., 153 Mich. 567.

¶ 386. The act of excusing a qualified juror is not error warranting a reversal of a judgment against a defendant, on the ground that since the juror was acceptable to the defendant, he was deprived of an equal chance of securing an impartial jury, when it appears that such defendant had not exhausted his peremptory challenges, and the panel of regular jurors had not been exhausted, as in such case the defendant was not prejudiced.—Brennan v. O'Brien, 121 Mich. 491.

¶ 387. Where a juror is excused for cause, the error, if any, in the court refusing to permit a question to be asked him in his voir dire examination, is harmless.—William R. Roach Co. v. Blair, 190 Mich. 11.

¶ 388. The overruling of a challenge for cause, even if error, is harmless where only one peremptory challenge had been used when the panel was completed.—Stowell v. Standard Oil Co., 139 Mich. 18.

§ 81. Invited error in general.

Necessity of raising question in lower court, see Saving Questions, I.

¶ 389. One cannot complain of being denied the right to amend by pleading set-off, where originally relying only on failure to have a guardian ad litem, one was appointed on trial, and defendant then declined a continuance with costs or any upon terms, and refused to put in a plea instanter because proofs were not presently available.—McDonald v. Weir, 76 Mich. 243.

B. IN RULINGS ON EVIDENCE OR EXAMINATION OF WITNESSES.

§ 82. Admission cured by other evidence.

Hearsay as to matters directly proved, see post § 83.
Parol or secondary evidence of writings otherwise in proof, see post § 84.
Evidence without proper foundation, see post § 85.
Evidence of facts equally within knowledge of decedent, see post § 86.
Inadmissible conclusion or opinion cured by evidence of basic facts, see post § 87.
Conclusions and opinions later become immaterial, see post § 88.
Leading testimony as to facts in proof, see post § 89.
Introduction of like or counter evidence by objector, see post § 90.
Errors in evidence harmless in themselves or not harmful to party objecting, see ante, II, B.
Exclusion cured by subsequent admission, see post §§ 108-113.
Harmlessness of instructions dependent on existence or state of the evidence, see ante § 48.

¶ 390. The erroneous admission of testimony is without prejudice where the same testimony has already been received without objection.—Needham v. King, 95 Mich. 303.

¶ 391. Improper evidence of a fact sufficiently proved by other evidence is harmless where it was so limited that the amount of damages was not affected by it.—Grimes v. Bowerman, 92 Mich. 258; Lombar v. Village of East Tawas, 86 Mich. 14.

¶ 392. Errors as to the admissibility of evidence are harmless where the uncontradicted and unimpeached testimony is ample to sustain the findings of fact, and in such case the judgment will not be disturbed by the appellate court.—Boardman v. Boozewinkle, 121 Mich. 320.

¶ 393. Where a fact has been shown without objection it seems that further testimony on the same point will not damnify the party against whom it is given.—Woolston v. Smead, 42 Mich. 54.

¶ 394. Where actual notice of a chattel mortgage is shown, evidence of its filing, though improperly admitted, is error without prejudice.—Stanton v. Estey Mfg. Co., 90 Mich. 12.

¶ 395. Judgment affirmed on certiorari and brought up on error should not be reversed for error in receiving a deposition, where there is proof of the fact deposed to

aside from the deposition.—Wattles v. Moss, 46 Mich. 52.

¶ 396. Judgment will not be reversed for the erroneous admission of testimony which, there being abundance of other evidence to the same effect, could not have affected the verdict.—Brooks v. Taylor, 65 Mich. 208.

¶ 397. Where a cause was tried in the circuit court without a jury, and improper evidence received, and it was then taken to the supreme court for review on the whole facts on case made, it was held that that court would not reverse the judgment for the admission of improper evidence if there was sufficient of an unexceptionable character to sustain it.—Rose v. Lewis, 10 Mich. 483.

¶ 398. Where, in an action for breach of contract to cut and manufacture certain timber, there is competent evidence establishing the fact that defendant was not the owner of the timber involved, the admission of improper evidence as to such lack of title may be regarded as harmless.—Mott v. Penoyar, 153 Mich. 273.

¶ 399. Error in admitting a letter is harmless where the witness has previously testified to the same matters as are contained in it.—Weaver v. Richards, 156 Mich. 320.

¶ 400. After the amount due on open account has been proved by the debtor's admissions, it is not prejudicial error to receive in evidence, even if inadmissible, an affidavit of the amount due made and served pursuant to How. St., § 7525.—Bjorkquest v. Wagar, 83 Mich. 226.

¶ 401. A decree in chancery will not be disturbed for errors in the admission of evidence if there was enough, aside from the testimony complained of, to support the findings on which the decree is based.—Michie v. Ellair, 54 Mich. 518.

¶ 402. Where the record shows that but a small part of the evidence is contained in the bill of exceptions, and where such bill nowhere states that it sets forth all the testimony for any given point, the plaintiff in error will not be heard to complain of the admission of evidence which, as appears from a charge that was not excepted to, was rendered nonprejudicial by evidence not in the record adduced by plaintiff on the same point.—Bostwick v. Losey, 67 Mich. 554.

¶ 403. A judgment depending on proof of agency will not be reversed for the error of admitting such evidence thereof as the agent's testimony, or his admissions after the agency ended, if there is conclusive proof besides.—Shutes v. Woodard, 57 Mich. 213.

¶ 404. Upon the trial of an action for injury received from a defective walk, a resolution of the common council, adopted three years before the accident, instructing the marshal to repair the walk in question, was received in evidence against the objection that it was too remote. It was shown conclusively by other evidence that the walk was subsequently out of repair, and that the city had notice thereof. The case went to the jury upon the issue whether the walk had been repaired so soon before the accident that the city was free from negligence. Held, that the evidence objected to could not have prejudiced defendant.—Storrs v. City of Grand Rapids, 110 Mich. 483.

¶ 405. The admission of incompetent evidence is not prejudicial error when the facts are competent to be shown and are afterwards proved by competent evidence.—Lothrop v. Southworth, 5 Mich. 436; Commissioner of Highways of Township of Homer v. Riker, 79 Mich. 551.

¶ 406. The admission of evidence of subsequent repairs to prove a prior defect is not prejudicial error where the existence of such defect is abundantly shown by competent testimony.—Lombar v. Village of East Tawas, 86 Mich. 14.

¶ 407. The admission of incompetent evidence is not reversible error where competent evidence on the same issue was introduced and not controverted, and the jury could not under the evidence have rendered a smaller verdict.—Shane v. Shearsmith's Estate, 137 Mich. 32.

¶ 408. In an action for injuries sustained by a two-year-old child from placing its hand on a wire cable used in moving a house, evidence as to what the custom of defendant's employees was in protecting children. Held, not reversible error where the witnesses also testified as to what was done to protect the children on the occasion in question.—Slack v. Curry, 177 Mich. 437.

¶ 409. Where a witness has, upon his examination, testified that he owned all the property that his son had, error, if any, in a question as to what he knew of his son having deeded to him all the land held by him at a certain time, is harmless.—Buxton v. Ainsworth, 153 Mich. 315.

¶ 410. In an action for malicious prosecution arising from defendant having made complaint and caused plaintiff's arrest under a criminal charge of fraudulently disposing of a certain number of hogs covered by a chattel mortgage he had given defendant, with intent to injure and defraud, the admission of evidence as to agreement between the parties at the time of the execution of the mortgage that the hogs could be sold when in proper condition for market as bearing upon the intent of the defendant, held not prejudicial error where plaintiff himself

testified to an understanding that plaintiff would have the right to sell the hogs provided he applied the proceeds on the mortgage. Whittemore v. Walter, 193 Mich. 363.

¶ 411. In summary proceedings for the possession of land sold under an executory contract, the objection to a statement of a witness that there was a mortgage on the premises when the contract was made, which was later discharged, on the ground that it was "incompetent, immaterial, and irrelevant, not mentioned in the contract between the parties" does not state any ground affecting its admissibility, and the admission thereof was not error where the facts were otherwise proved, and are included in appellant's statement of facts and relied upon by him as an infirmity of the case of the complainants.—Gould v. Young, 143 Mich. 572.

¶ 412. An objection to showing similar acts and conduct of an agent in a suit against the principal without establishing the fact of agency in those transactions is cured by subsequent proof of such relationship.—Bullock v. Tompkins' Estate, 125 Mich. 17.

¶ 413. Plaintiff's employer rented a barn of one Crawford. Crawford terminated the tenancy and rented the barn to defendant. Plaintiff was arrested by defendant without a warrant, for breaking into the barn and taking therefrom goods belonging to defendant. In a suit for false imprisonment plaintiff was permitted to introduce evidence that after the institution of plaintiff's suit Crawford sent plaintiff's employer a notice demanding the payment of rent for the month succeeding the time that defendant entered into possession, and that plaintiff's employer sent to Crawford a check for one-half of said month's rent. From other evidence in the false imprisonment suit the facts with reference to the respective rights of plaintiff's employer and defendant to occupy the barn were clearly established. From said other evidence the fact of plaintiff's entering the barn and taking out certain goods was also clearly established. Held, the admission of the evidence concerning the notice and check did not constitute reversible error.—De Vos v. Caplan, 165 Mich. 77.

¶ 413a. In an action on an insurance policy, error in admitting incompetent testimony of ownership of the insured premises was not prejudicial where such ownership was otherwise established by competent testimony.—Kennedy v. London & L. Fire Ins. Co., 157 Mich. 411.

¶ 413b. In an action on a policy of insurance, it is not reversible error to allow the physician who attended the insured to state that her death was caused by heart disease, where it is admitted and proved by other evidence that such was the cause of her death.—Haapa v. Metropolitan Life Ins. Co., 150 Mich. 467.

§ 83. ——Hearsay as to matters directly proved.

Admission of hearsay cured by instruction to disregard, see post ¶ 513.

Hearsay harmless in itself, see ante § 32.

¶ 414. Error in receiving hearsay evidence that defendant did certain acts is rendered harmless by his testifying to the same effect.—Hendricks v. Haskins, 114 Mich. 291.

¶ 415. The erroneous admission in an action for the breach of a contract for the construction of a building, of a notice from the city building department as to its condition at a certain time, being hearsay, is not prejudicial, where the subject was fully covered by competent evidence.—Newton v. Consolidated Construction Co., 184 Mich. 63.

¶ 416. In an action, aided by attachment, to recover rent for the use of a store under a lease providing that the balance of the year's rent should be due and payable if the tenant vacated the premises before the expiration of the term, any error in the admission of evidence of statements made by clerks as to the intention of the defendant to vacate was cured where the clerks, as witnesses on behalf of the defendant, denied that they made such statements.—Spears v. Black, 190 Mich. 693.

¶ 417. The admission of hearsay evidence to prove a fact for a plaintiff which defendant's own evidence and admissions establish, does not constitute reversible error.—Weatherbee v. Byam, 160 Mich. 600.

¶ 418. Admission of a hearsay statement as to an injury is not prejudicial error where there is direct and undisputed testimony to the same specific injury.—La Duke v. Township Exeter, 97 Mich. 450.

¶ 419. The admission of hearsay inadmissible except for impeachment, with no foundation for that, is not cured by subsequently calling the person who made the declaration and asking him if he made it, it having gone to the jury when admitted without any limitation on the use of it for proof; since it could not be regarded as merely introducing it out of order.—Van Alstine v. Kanieckl, 109 Mich. 318.

¶ 420. Hearsay evidence drawn out on cross-examination will not reverse where other evidence is sufficient to establish a fact which is not disputed on the trial.—Willet v. Goetz, 125 Mich. 581.

¶ 421. In an action for personal injuries sustained in a grade crossing accident, it is harmless error to permit a passenger to testify that the railroad station agent told him the train was 23 minutes late where the engineer testifies to the same effect.—Haines v. Lake Shore & M. S. R. Co., 129 Mich. 475.

¶ 422. Testimony by plaintiff in an action for injuries caused by an automobile colli-

sion, relative to what was said by defendant's superintendent to the driver as to the force with which plaintiff's machine was struck. Held, harmless error when the superintendent testified to the same thing.—Andries v. Everitt-Metzger-Flanders Company, 177 Mich. 110.

¶ 423. Defendant in an action for fraud is not prejudiced by the erroneous admission of declarations with reference to past transactions made by other members of the alleged conspiracy where the facts shown thereby are established by his own testimony.—McDonald v. Smith, 139 Mich. 211.

¶ 424. In ejectment, the admission of improper testimony to prove declarations by plaintiff's grantor asserting his ownership of the disputed strip and that he signed a petition for a resurvey, could not be urged as error where like testimony was introduced by defendant, and defendant's counsel stated that if the court was right in admitting defendant's testimony, he should admit the testimony in question.—Miller v. Shumway, 135 Mich. 654.

§ 84. ——Parol or secondary evidence of writings otherwise in proof.

Parol or secondary evidence harmless in itself, see ante § 30.

¶ 425. The admission of parol testimony to show transfer of real property is not prejudicial where the deed is subsequently introduced in evidence.—McDonald v. Smith, 139 Mich. 211.

¶ 426. Any error in the admission of oral evidence of matters which were in writing is cured by the later admission of the writings themselves in evidence.—Gould v. Young, 143 Mich. 572.

¶ 427. Error in the admission of secondary evidence of the contents of an instrument is cured by the subsequent introduction of the original paper by the opposite party.—Emlaw v. Travelers' Ins. Co., 108 Mich. 554.

¶ 428. Admission of secondary evidence of the contents of a time book to show what work was done is not cured by the fact that the witness had testified without the aid of the copy to the date of the last day's work done, which fact it was essential for him to show in a log lien case.—Dillon v. Howe, 98 Mich. 168.

¶ 429. Mutual receipts for a nominal sum apparently meant to be conclusive evidence of a settlement, necessitate a verdict where no issue remains; hence error in admitting parol evidence to explain them cannot be prejudicial.—Pratt v. Castle, 91 Mich. 484.

¶ 430. Where a trial court, in a suit for commissions for the sale of real estate and the collection of purchase money, sustains the objection made to a question put to the plaintiff broker as to the terms of the agreement between him and defendant, but plaintiff answers said question and no motion is made to strike said answer from the record, said ruling does not constitute reversible error where the plaintiff later on testifies in full as to the terms of said agreement.—Lambrecht v. Stoepel Realty Co., 169 Mich. 81.

¶ 431. It was harmless error, if any, to admit evidence of statements made at the time of the sale showing that the parties understood the property conveyed to be 30 feet; where, in an action for breach of the covenant of warranty in a deed, it appears that the same width was shown by the abstract, and by the public advertisement of the sale.—Seitz v. People's Sav. Bank, 140 Mich. 106.

§ 85. ——Evidence without proper foundation.

¶ 432. The admission of evidence before it has been rendered competent by the admission of other evidence is harmless error, where such other evidence is subsequently introduced.—Superior Drill Co. v. Carpenter, 150 Mich. 262.

¶ 433. The error, if any, in admitting a will in evidence without having called a particular subscribing witness to prove due execution, held cured by calling him afterwards and allowing cross-examination.—Fraser v. Jennison, 42 Mich. 206.

¶ 434. In a personal injury case against a railroad company for injuries to a switchman it was prejudicial error to admit evidence of certain measurements from a spike hole made long after the accident without any showing that the condition of the track was the same as at the time of the accident; but the admission of such evidence was cured by testimony of the plaintiff subsequently introduced that he was injured by catching his shoe between a projecting fish-plate bolt and a spike in a tie, at a joint of two rails, opposite a gap in the right of way fence east of a certain box factory, so that as a result the conditions were not changed for the purpose of measurements.—Culver v. South Haven & E. R. Co., 144 Mich. 254.

¶ 435. The admission of testimony by plaintiff as to what defendant's witness had said to him, objected to because no question had been asked the witness as to the matter, is not prejudicial where its import was the same as that which the witness had denied saying.—Morin v. Robarge, 132 Mich. 837.

¶ 436. In an action against a railroad for killing cattle, it was not error to permit witnesses to state the condition of the cattle guard in question the day after the cattle were killed, where testimony was subsequently introduced tending to show that the

guard was practically in the same condition as when the cattle passed over it.—Johnson v. Detroit & M. Ry. Co., 135 Mich. 353.

¶ 437. Error in admitting in evidence a letter purporting to be signed by a person as agent of a firm, without proof of his authority, is cured by subsequent testimony of one of the partners showing such authority.—Holmes v. Kortlander, 64 Mich. 591.

¶ 438. In an action for wages defendant is not prejudiced by the introduction in evidence of a book kept by plaintiff, showing certain payments received from defendant even if it is not identified as a book of account where all of the payments have been admitted as appears from an account in defendant's books already in evidence.—Keel v. Wilson Fruit Juice Co., 176 Mich. 345.

¶ 439. It is harmless error in an action for alienation of affections to admit letters from the defendant to plaintiff's wife without legal proof that the wife received them, where defendant admitted that he wrote them and that he received replies and it appears that the correspondence was connected.—Mead v. Randall, 111 Mich. 268.

§ 86. ——Evidence of facts equally within knowledge of decedent.

¶ 440. Admission of testimony against objection that the facts were equally within the knowledge of plaintiff's intestate, is not harmful error where such testimony is confined to facts of which such intestate had no direct knowledge and where if not so confined. it was as to a fact fully proven by competent testimony.—Graham v. Alexander, 123 Mich. 168.

¶ 441. In an action by the receiver of an insolvent bank to enforce an assessment on stock against the estate of a deceased stockholder, where evidence admitted by stipulation sustains a decree that the transfer of stock was fraudulent, the fact that testimony which should have been excluded because equally within the knowledge of deceased, was admitted may be disregarded.—May v. Ullrich, 132 Mich. 6.

¶ 442. The objection that testimony called out on the redirect examination of one of plaintiff's witnesses was inadmissible because equally within the knowledge of a decedent, cannot avail on error where, were such testimony excluded, there would still be left sufficient uncontroverted testimony to have justified the circuit court in directing a verdict for plaintiff.—Michigan Sav. Bank v. Butler's Estate, 98 Mich. 381.

¶ 443. Where a witness' testimony is disqualified by the statute as matter equally within the knowledge of a decedent its admission is immaterial, when it is substantiated by another witness, and is uncontradicted.—Chamberlain v. Eddy, 154 Mich. 593.

§ 87. ——Inadmissible conclusion or opinion cured by evidence of basic facts.

Opinion evidence harmless in itself, see ante § 31.

¶ 444. Error in permitting the wife of insured to state that he came home hurt is not prejudicial, where the answer was not called out by her counsel, she was at once stopped and cautioned and afterwards testified at length as to the condition of insured and the visible evidence of injury on his body.—Thompson v. Loyal Protective Ass'n, 167 Mich. 31.

¶ 445. Where in a suit against a railroad company for injuries sustained by being thrown from a cutter, overturned by reason of the horse's running away because frightened at an approaching train, the evidence clearly shows the cause of the fright of the horse, the admission of the testimony of the driver that the horse was frightened by the train, if inadmissible, works no injury to defendant.—McCullough v. Minneapolis, St. P. & S. Ste. M. R. Co., 101 Mich. 234.

¶ 446. In an action against a township to recover damages for personal injuries sustained by plaintiff while driving over a public road, where a witness was asked whether a certain end of the road was closed from public travel on that day and answered, over objection that the question was leading and called for a conclusion, that it was not, held that admission of answer was not reversible error, the witness further testifying describing the conditions, that there was no barrier, that he traveled there, and that the track remained the same.—Long v. Township of Weare, 195 Mich. 706.

¶ 447. In an action for injury caused by a defective sidewalk, reversal will not be granted because a witness gave his opinion as to the condition of the walk, where he was at once admonished that this was not proper, and he thereupon proceeded to describe the condition of the walk.—Styles v. Village of Decatur, 131 Mich. 443.

¶ 448. In an action for damages for assault and battery the affirmative answer of plaintiff's wife as to whether plaintiff after the injury had any pain about his head was not reversible error, where the court ruled that the witness could state what she noticed, and she subsequently testified that while in bed he often moaned and groaned and rolled and tossed from side to side.—Matthews v. Lamberton, 198 Mich. 746.

¶ 449. Upon the issue whether or not plaintiff was the unconditional owner of the property insured, a question was asked plaintiff's vice president which called for a conclusion as to the legal effect of a contract. Held, however, that the error committed in allowing the question and answer did not constitute reversible error where there was

an abundance of uncontradicted testimony that the title was in plaintiff.—Brunswick-Balke-Collender Co. v. Northern Assur. Co., 150 Mich. 311.

¶ 450. It was not error to refuse to strike out as conclusions testimony that a child was in pain and that it was so great that one could hardly touch the child's injured leg, where there was other competent testimony fully establishing the fact that the child suffered great pain.—Boehm v. City of Detroit, 141 Mich. 277.

¶ 451. Whether testimony of the scrivener of a will as to the testator's intention in making certain provisions in his will is admissible or not becomes immaterial and need not be decided where the will and the antenuptial agreement entered into were read together and the provisions contained in them were carried out and resulted in an equal division of the property among those entitled thereto.—In re Gunn Estate, 146 Mich. 615.

§ 88. ——Conclusions and opinions later become immaterial.

¶ 452. In an ejectment trial a witness was allowed to fix certain measurements of which he did not show complete personal knowledge. Held, that this became immaterial when defendant on the stand admitted possession of the premises and identified them with a lease in which the description tallied with that in plaintiff's line of title.—Williams v. Towl, 65 Mich. 204.

¶ 453. In an action for damages for personal injuries received as a result of being overtaken and run into by an automobile while riding a bicycle, held that the admission of testimony of a locomotive engineer who witnessed the accident as to the speed of the engine of the automobile, as indicated by the exhaust, was harmless error where the witness did not use it to determine the speed of the car and testified that the automobile was going at a lesser speed than was indicated by the exhaust.—Harnau v. Haight, 189 Mich. 600, 13 N. C. C. A. 566.

¶ 454. Whether or not there was error in permitting a township clerk to testify that he had no authority to enter the cancellation of a certain chattel mortgage, and that the entry was made through mistake, becomes immaterial on error, where the record itself does not show that the alleged discharge was made in the manner described by How. St. § 6201.—Aultman, Miller & Co. v. Sloan, 115 Mich. 151.

§ 89. ——Leading testimony as to facts in proof.

Leading questions harmless in themselves, see ante § 35.

¶ 455. Allowance of leading questions will not work reversal where it appears that they were without substantial prejudice to plaintiff in error in view of other prior and subsequent questions.—Emlaw v. Travelers' Ins. Co., 108 Mich. 554.

§ 90. ——Introduction of like or counter evidence by objector.

Opening door to opinions as warrant for admission of counter opinion, see Evidence § 208.

¶ 456. Plaintiff sued defendant in an action of deceit for false and fraudulent representations in the sale of stock. Plaintiff's counsel in his opening statement stated that he would prove that one Dr. Kellogg, who was not a party or defendant's agent, made false representations. Plaintiff introduced evidence of such statements by said Dr. Kellogg. Upon cross-examination, defendant brought out similar evidence. Held, the error in admitting such evidence was not reversible, since defendant himself elicited like evidence to sustain his theory of the case.—Steele v. Kellogg, 163 Mich. 132.

¶ 457. Where the business books of a decedent are relied on to charge his estate, it seems to be erroneous to admit, apart from its context and as independent evidence for a particular purpose, a memorandum entry which could only be important when incorporated with the accounts of the decedent; and the false impressions so produced cannot be supposed to be done away with by the subsequent reception of the books on the part of the defense, even though they show that the entry had never entered into the accounts or been regarded in the balance.—Seligman v. Ten Eyck's Estate, 49 Mich. 104.

§ 91. Admission cured by striking out.

See also ante ¶ 67.

By striking with instruction to disregard, see post § 92.

Refusal to strike out cured by later ruling or other evidence, see post § 120.

¶ 458. Admission of an incompetent declaration of defendant's servant is cured by striking out.—Gordon v. Grand Rapids & I. R. Co., 103 Mich. 379.

¶ 459. Where the inevitable result of evidence erroneously admitted would be injurious, the error is not cured by striking out such evidence.—McDuff v. Detroit Evening Journal Co., 84 Mich. 1.

¶ 460. In an action for personal injuries against the owner of a dog which ran into the road and caused the plaintiff to be thrown from his buggy, the question as to whether the defendant came near the plaintiff at the time of the accident is improper but not reversible error where subsequently stricken.—Willet v. Goetz, 125 Mich. 581.

¶ 461. Error in receiving incompetent evidence is sufficiently cured by the court's striking it out on motion; at least where no

request is preferred for a specific instruction that it be disregarded by the jury.—Barnett v. Farmers' Mut. Fire Ins. Co., 115 Mich. 247.

¶ 462. Error in admitting a certified copy of a deed is cured by striking it out after the original is admitted.—Carpenter v. Carpenter, 126 Mich. 217.

¶ 463. Admission of photographs, if error, is cured by ruling them out.—Close v. Lake Shore & M. S. R. Co., 73 Mich. 647.

¶ 464. That immaterial evidence was received over objection and exception is not error where it was stricken as soon as its immateriality developed, there being no request for an instruction on the matter.—Pierson v. Illinois Cent. R. Co., 149 Mich. 167.

¶ 465. The striking out of a letter improperly admitted in evidence for plaintiff was not curative of error in admitting it, where it tended to libel defendant if untrue in a collateral matter.—Maxted v. Fowler, 94 Mich. 106.

¶ 466. The fact that a court sitting alone without a jury admitted certain evidence which he afterwards struck out on finding it to be incompetent is immaterial, and the objecting party cannot be prejudiced by the fact that it was not stricken out at once.—Smith v. Smith, 144 Mich. 139.

¶ 467. In a suit by plaintiff vendee of land to recover damages for false representations as to its value by defendant vendor, it is not reversible error to permit plaintiff to testify as to the amount of money expended by him in constructing a house on the land, where the court orders the testimony stricken out and plainly charges that the proper measure of damages is the difference between the actual value of the land at the time of the purchase and what its value would have been had it been of the quality and condition represented.—Yanelli v. Littlejohn, 172 Mich. 91.

§ 92. ——By striking with instruction to disregard.

¶ 468. Admission of improper testimony is cured by striking it out and instructing the jury to disregard it.—McHugh v. Fitzgerald, 103 Mich. 21.

¶ 469. In an action upon a contract for the sale of logs under which each party agreed to furnish a scale and the amount of logs scaled was to be determined by such scalers, the admission of alleged ex parte testimony as to rescaling, was not error where such testimony was struck out and the charge excluded consideration of such rescale.—Boyce v. Barker, 119 Mich. 157.

¶ 470. The error of receiving improper testimony will be cured by striking it out and cautioning the jury to disregard it, unless it clearly appears that the jury were prejudiced.—Dykes v. Wyman, 67 Mich. 236.

¶ 471. A statement by defendant, claiming the note in suit as a gift from plaintiff's testator that plaintiff, as executor, admitted, when the note was produced at his request that it belonged to defendant, does not require the reversal of a judgment in her favor, though being volunteered and improper it was erroneous, where the statement was promptly stricken out with the consent of her counsel, and the jury was cautioned against giving it consideration.—Harris v. Cable, 113 Mich. 192.

¶ 472. Error in admitting the testimony of the husband in an action for alienation of his wife's affections will be considered harmless where such testimony was stricken out by the trial court, the jury being instructed not to consider it, and where defendant was not prejudiced by the admission because the same facts were otherwise proved.—Miller v. Lachman, 117 Mich. 68.

¶ 473. In an action by the wife against a saloon keeper and his bondsmen for illegal sale of liquor to the husband, it is error to admit testimony by the wife that she has a child 3 years old which child remained in the courtroom throughout the trial and which fact was dwelt upon by the counsel for the plaintiff and such evidence is not cured by striking out the testimony and attempting to cure the error by the court's charge.—Boydan v. Haberstumpf, 129 Mich. 137.

¶ 474. Plaintiff sued defendant for trespass with intent to ravish. The court permitted over plaintiff's objection testimony as to defendant's good character. Later the court refused to let in further evidence of this kind, and on plaintiff's motion struck out all such testimony, and instructed the jury to disregard it. Held, plaintiff had no ground of complaint with respect to this evidence.—Walsh v. Gibson, 159 Mich. 312.

¶ 475. When it is clear that the jury was influenced in its verdict by testimony improperly admitted, the error cannot be regarded as having been cured by striking out such testimony and instructing the jury to disregard it.—Feiertag v. Feiertag, 73 Mich. 297.

¶ 476. The striking of testimony by the court of its own motion and directing the jury not to consider it for any purpose, cured error which might have been caused by the inadmissibility of such testimony, particularly where no further allusion was made to the testimony and no request was made for further instructions to the jury upon the subject.—McNaughton v. Smith, 136 Mich. 368.

¶ 477. In an action for a breach of contract to purchase hay wherein it was stipu-

lated in the contract that the defendant should have the right to designate which kind of hay should be first baled, the erroneous admission of evidence tending to vary the terms of the contract in this particular was not prejudicial to the defendant where it was later stricken out, and the court had instructed the jury that the defendant had the legal right to determine which hay should be first baled, and the jury's verdict of no cause of action was inconsistent with the claim that the defendant had first broken the contract by refusing to bale the clover first.—Fowles v. Rupert, 143 Mich. 246.

¶ 478. Where, in an action by a wife for injury to her means of support and to her feelings through defendant's selling liquor to her husband, testimony relative to the husband's death which took place after the action had been brought, and to his life expectancy was received, it was held that the error was not cured by an instruction that the testimony as to the cause and circumstances of the death was stricken out as hearsay, and that there could be no recovery for any injury plaintiff might have suffered by reason of the death, whatever the circumstances were.—Ford v. Cheever, 105 Mich. 679.

§ 93. Admission cured by withdrawal of counsel with consent of court.

¶ 479. Where in an action for a personal injury the declaration avers only an injury to plaintiff's spine, the admission of testimony as to uterine troubles, with which she claimed to be affected, on the supposition that they would be shown to be traceable to the injury alleged in the declaration, is not harmful error, said evidence having been withdrawn by plaintiff's counsel, by permission of the court, upon his statement that he could not furnish said connecting evidence, and defendant having shown by a medical witness that plaintiff's condition of impaired health was due, in part at least, to a uterine difficulty, with which the witness testified plaintiff was affected, and for which defendant was not responsible.—Turner v. Township of Ridgeway, 105 Mich. 409.

¶ 480. Plaintiff declared on a special contract, and also on the common counts, and gave evidence tending to establish both. The defendant offered evidence of a set-off, which was erroneously rejected. On the conclusion of the evidence plaintiff withdrew all evidence on the common counts, and the jury rendered a verdict in his favor. Held, that in the absence of any showing that the jury were instructed to disregard the evidence under the common counts, it did not appear that the error in rejecting the set-off was cured.—Kelly v. McKenna, 18 Mich. 381.

§ 94. Admission cured by instructions.

By instruction to disregard, see post § 95.

By instruction explaining or limiting, see post § 96.

Effect of delayed instruction see post § 97.

Admission cured by taking question or case from jury, see post § 98.

¶ 481. The erroneous admission of testimony which is rendered immaterial by the charge is not prejudicial.—Wreggitt v. Barnett, 99 Mich. 477.

¶ 482. An assignment that the court erred in admitting certain evidence will not be considered where the court, in his charge, took the consideration of such evidence from the jury.—Smith v. Detroit United Ry., 155 Mich. 466.

¶ 483. Error in the admission of evidence showing a changed mental condition of plaintiff after an accident, also showing loss of memory and irritable condition, there being no support therefor in the pleadings, is cured by instructions removing the consideration of such evidence from the jury.—Miller v. Michigan Cent. R. Co., 167 Mich. 21.

¶ 484. In an action of trover for cattle distrained held that the admission of evidence of the distraint proceedings taken by defendant for the purpose of showing their regularity was nonprejudicial error where the court, in its charge, told the jury repeatedly that the only question for them to determine was whether the cattle were running at large and did not submit the question of regularity of the proceedings to the jury.—Spiegel v. Straw, 196 Mich. 581.

¶ 485. The admission of testimony for plaintiff as to a certain claim, was harmless, where the court subsequently held and charged the jury against such claim.—Allington & Curtis Mfg. Co. v. Detroit Reduction Co., 133 Mich. 427.

¶ 486. In a case involving the validity of an award by arbitrators, the admission of evidence tending to show that one of the parties to the submission held a chattel mortgage against one of the arbitrators is not prejudicial, where the jury are afterwards instructed that the fact is immaterial and does not affect the validity of the award.—Mather v. Day, 106 Mich. 371.

¶ 487. In an action under the civil-damage act, any error in admitting evidence of the amount of money spent by plaintiff's husband in defendant's saloon for a period of three months prior to the acts upon which the action was based, is cured by instructions that no recovery could be had for such amount.—Manzer v. Phillips, 139 Mich. 61.

¶ 488. Any error in the admission of testimony as to the loss, after suit brought, of the use to plaintiff of an article taken from her, was rendered nonprejudicial by an instruction directing the jury to find no damages for such loss.—Blaisdell v. Scally, 84 Mich. 149.

¶ 489. An error of the court in admitting incompetent testimony on the measure of damages was not cured by a subsequent instruction in the general charge withdrawing the point from the jury's consideration; where it may have had some influence on the verdict.—Sinker, Davis & Co. v. Diggins, 76 Mich. 557.

¶ 490. In an action for selling liquor to plaintiff's minor son any error committed in allowing a witness to testify that he had drunk with the minor at a saloon other than defendant's is cured by instructing the jury that it is immaterial whether anyone else than defendant gave liquor to the minor, and that the damages to which plaintiff is entitled cannot be lessened by reason of that fact.—Sterling v. Callahan, 106 Mich. 128.

¶ 491. In a suit to recover the value of logs, some of which had been manufactured into lumber, evidence was received of the value of the lumber and also of the logs, as to which latter value there was no serious dispute, and the jury was instructed that it could only allow plaintiff the value of the logs. Held, that the jury was not prejudiced by the admission of the testimony as to the value of the lumber.—Busch v. Fisher, 89 Mich. 192.

¶ 492. Plaintiff sued defendant to recover, on the ground of fraud, money advanced to defendant under a certain contract. The court improperly admitted evidence that plaintiff relied on a certain representation, but in his charge refused to let such evidence go to the jury. Held, the error in admitting it was not prejudicial.—Ward v. Cook, 158 Mich. 283.

¶ 493. In an action for damages for the death of plaintiff's intestate by drowning as the result of his boarding a rowboat hired from the defendant at its picnic grounds, where it kept a number of such boats for hire, if the plaintiff has offered evidence tending to show that the particular boat was a defective boat, any error in admitting evidence of defects in the other boats is harmless, provided the court cautions the jury as to considering it.—Lincoln v. Detroit & M. R. Co., 197 Mich. 504.

¶ 494. That plaintiff suing for a negligent injury was asked by his counsel whether he was endeavoring at the time of the accident to use due care and caution was held not prejudicial to defendant in view of the witness' full testimony as to what he did, and of the court's charge to the jury that in determining whether plaintiff was exercising due care and caution the entire circumstances must be taken into consideration.—Gratton v. Village of Williamston, 116 Mich. 462.

¶ 495. Although the practice of admitting proof of acts and directions of a supposed agent before proving his authority was condemned, the failure to subsequently show such authority was not reversible error where the jury were instructed that such supposed agent was a fellow-servant and that the defendant was not responsible for his conduct or statement, and where in view of the smallness of the verdict the jury did not appear to have been influenced by the testimony.—Hume v. Mason & Hoge Co., 122 Mich. 346.

¶ 496. Where the court charged that a child two years old cannot be guilty of contributory negligence or charged with the negligence of others, admission of evidence that its parents intrusted it to the care of a ten-year old child, was harmless.—Slack v. Curry, 177 Mich. 437.

¶ 497. Where, in a suit for a specified commission under a contract for the sale of timber, defendant admits that the sum specified, if anything, is due, error in permitting plaintiff to testify as to the customary commission for procuring sales of timber, is cured by the court's excluding further similar testimony, and by directing the jury that plaintiff, should his version of the contract be found to be true, can recover no more than the sum stipulated.—Holmes v. Fordney, 115 Mich. 135.

¶ 498. In an action for damages for defectively constructing a building, in which the jury was instructed that if the building varied from the plans and specifications so that it would have to be rebuilt to conform thereto, the measure of damages was the difference between the value of the building if constructed according to the contract, not exceeding the contract price, and its value, as constructed, not exceeding the contract price, but that if the contract was substantially performed and the necessary changes could be made without destroying the building, that the measure of damages was the amount which would be necessary to make the particular or several items comply with the terms of the contract, held that the action of the court in allowing the answer of a witness to a question as to what was the difference between the building constructed and the one required under the specifications that it would cost a certain sum to replace the building, to stand, was not prejudicial error, in view of the charge.—Gutov v. Clark, 190 Mich. 381.

¶ 499. The admission of testimony as to what occurred on Sunday relative to a contract, is not prejudicial where the court instructed the jury that all testimony tending to establish a contract on Sunday was withdrawn from their consideration and that unless a contract made on a weekday was shown, plaintiff could not recover.—Wheeler v. Jenison, 120 Mich. 422.

¶ 500. In an action for damages for assault and battery, held that there was no

reversible error in permitting counsel for plaintiff to take an answer of plaintiff upon redirect examination as to whether he understood a question put to him by defendant's counsel, and to correct his answer where the court stated that it was for the jury to say whether he in fact misapprehended the question.—Matthews v. Lamberton, 198 Mich. 746.

§ 95. ——By instruction to disregard.

¶ 501. An improper question was asked over defendant's objection, and the plaintiff, after the answer, immediately withdrew the question upon a repetition of the defendant's objection. The court instructed the jury to disregard the testimony. Held, no error resulted.—Hurd v. Northern Acc. Co., 160 Mich. 535.

¶ 502. In an action for injuries to a servant caused by an improperly tempered tool, error in admitting testimony that a tool that was not hard would not chip was obviated by an instruction to disregard it.—Potvin v. West Bay City Shipbuilding Co., 156 Mich. 201.

¶ 503. A jury will not be regarded as having been prejudiced or misled by the admission of evidence, where the court pointedly instructed them that it should not be considered, and that it was out of the case.—Schneider v. Township of Brown, 153 Mich. 454.

¶ 504. Upon a suit on a written contract for a correspondence course, admitted by defendant to have been executed by him, it is error to admit the statements and promises of the soliciting agent, which are at variance with or additions to the contract relied upon, and such error is not cured by the later instructions of the court to disregard said testimony.—International Text-Book Co. v. Roberts, 168 Mich. 501.

¶ 505. The erroneous admission of testimony held cured by the court's instructing the jurors that they were to disregard the testimony objected to.—Butler v. Detroit, Y. & A. A. Ry., 131 Mich. 617.

¶ 506. In a suit under the death act for the death of plaintiff's husband, a locomotive engineer in the employ of defendant, through the settling of an embankment across a ravine, the trial court admitted plaintiff's evidence of a violent storm shortly preceding the accident and of the failure of defendant's section men to inspect the track in question after such storm and prior to the accident. At the close of plaintiff's evidence, the court instructed the jury that he had reached the conclusion such evidence was inadmissible and expressly directed them to disregard it. Held, the error in admitting such evidence was cured by such instruction.—Stolz v. Detroit, G. H. & M. Ry. Co., 167 Mich. 300.

¶ 507. In a civil case, after incompetent testimony had been admitted, the court instructed the jury to disregard it wholly as not relevant to the issue and to disabuse their minds of it entirely. Held, that the error in receiving the testimony was cured by the instruction.—Tolbert v. Burke, 89 Mich. 132.

¶ 508. In an action by a tenant against the owner for injuries due to defects in the premises leased, the admission of improper evidence as to the owner's absence from the state at the time of the trial was held harmless where the court instructed the jury that defendant's absence was a matter of no consequence and was not to be considered by them.—Nutter v. Colyer, 180 Mich. 107.

¶ 509. In an action by a trustee in bankruptcy against a preferred creditor to recover a preference, any error in allowing the record of bankruptcy proceedings to be read in the presence of the jury is cured where the court informs the jury that they need not consider any documentary evidence coming from the United States court except as he should permit them to do so later on in the charge.—Johnson v. Gratiot County State Bank, 193 Mich. 452.

¶ 510. Prejudicial error cannot be imputed to the admission in evidence of certain receipts in a case where the court afterwards practically directed the jury that they should not be considered.—Mallory v. Ohio Farmers' Ins. Co., 90 Mich. 112.

¶ 511. The admission of testimony as to an item of damage that is inadmissible under the declaration is not prejudicial error where the charge to the jury confines the recovery to other items.—Schneider v. City of Detroit, 72 Mich. 240.

¶ 512. It is not prejudicial error in an action for personal injuries to ask a witness concerning his statement to the effect that he heard the plaintiff got a verdict for $2,500 and that he did all he could to prevent a verdict and that he received $10 and expenses for attending court and testifying, where the court immediately informed the jury to disregard the result on former trial and counsel for the plaintiff stated that that was not the amount of the previous verdict.—Leach v. Detroit Elec. Ry., 129 Mich. 286.

¶ 513. The admission of hearsay evidence held not to be cured by instructing the jury to disregard it; the case being such that it would be likely to influence them.—Detroit & M. R. v. Van Steinburg, 17 Mich. 99.

¶ 514. An instruction to the jury to disregard mischievous and improper testimony will hardly cure the error of allowing it to remain in the case until the close of the trial; and if so allowed the trial judge should remedy the injustice on motion for new trial.—Taylor v. Adams, 58 Mich. 187.

§ 96. ——By instruction explaining or limiting.

¶ 515. It will not be decided whether it was error to admit parol evidence in explanation of a deed, where the entire transaction, written and oral, was placed before the jury under instructions and it allowed some at least of the claims of the plaintiff in error.—Forbes v. Forbes, 112 Mich. 630.

¶ 516. In an action for damages for selling intoxicating liquor to plaintiff's husband, it is prejudicial error to admit testimony as to pain and suffering resulting from injuries received by the husband while intoxicated, though a charge is given to the effect that such evidence bears only on his ability to perform labor.—Spencer v. Johnson, 176 Mich. 278.

¶ 517. There is no reversible error in the allowance of a hypothetical question not reduced to writing where the facts are complicated and confusing, where the jury is instructed that before they can consider a hypothetical question and its answer they must find that the assumed facts have been established by a preponderance of the evidence.—Matthews v. Lamberton, 198 Mich. 746.

¶ 518. In an action of trover for goods seized under a disputed chattel mortgage the admission of testimony of a sale under the mortgage, if erroneous, was cured by an instruction that the measure of damages, if any, would be the value of what was taken, with interest from the time of taking it, less the actual amount of the mortgage.—Doyle v. Mizner, 42 Mich. 332.

¶ 519. The erroneous admission of evidence of the defective condition of other row boats of defendant, in an action against the letter for hire of a row boat for death of an occupant, alleged to be due to the sinking of the boat because of its defective condition, held not cured by the giving of a cautionary instruction.—Clark v. Detroit & M. Ry. Co., 197 Mich. 489, 15 N. C. C. A. 1033.

¶ 520. Where in a suit for the negligent killing of plaintiff's intestate, the court erroneously admits evidence as to the contribution of money made by the deceased to the support of his father, such error is cured by an explicit instruction in the precise language of defendant's request to the effect that the money so paid could not be regarded as a contribution to the support of the family.—McDonnell v. Central Drug Co., 170 Mich. 291.

¶ 521. Where evidence has been wrongfully received, and has been dwelt upon by counsel in his argument, a mere statement in instructions given by the court, that the jury is not to consider such testimony, is not sufficient to cure the error in actually receiving the testimony, where the charge also states that the judge's recollection is that he had sustained an objection to such evidence, and that it had not been admitted.—Hyman v. Kirt, 153 Mich. 113.

¶ 522. Error in permitting plaintiff, in an action for the purchase-price of logs, to testify that the scale was one agreed upon by the scaler and himself, was cured by a charge that it was not competent for them to agree on a scale which would bind defendant.—Malone v. Gates, 87 Mich. 332.

¶ 523. An erroneous ruling that the defendant was not entitled to charge plaintiff interest on 90-day instalments under the contract in question, and the admission in evidence of an improper computation of interest was mischievous error, although the court properly stated the rule as to computation in the charge.—Foley v. Comstock, 122 Mich. 349.

¶ 524. In a suit involving the bona fides of an assignment of an insurance policy, the erroneous admission of the declarations of the assignor, made subsequent to the transfer, tending to show that the policy had not then been assigned, and of further statements tending to show that the policy had been placed beyond the reach of creditors, is cured by an instruction that the undisputed testimony shows the assignment to have been made, and that, if given to secure an honest debt, it was valid.—Muncey v. Sun Ins. Office, 109 Mich. 542.

¶ 525. In an action to recover damages for the sale to plaintiff of certain corporate stock by fraud and deceit, and also a mortgage bond of the corporation, error in receiving evidence as to the value of real estate given for such stock and bond some time after the stock sale and after the company's factory had closed, was not cured by the court's charge that the price then obtained was not a true criterion of value, but might be considered making allowance for changed conditions.—French v. Fitch, 67 Mich. 492.

¶ 526.—In an action for personal injuries against the owner of a dog which ran into the road and caused the plaintiff to be thrown from his buggy, where testimony as to the reputation of the horse is excluded but subsequently admitted in another form, the error if any, is cured by an instruction making it clear to the jury that the plaintiff cannot recover if the habit and disposition of the horse was the approximate cause of the injury.—Willet v. Goetz, 125 Mich. 581.

¶ 527. In an action for selling liquor to plaintiff's husband, an instruction calling the jury's attention to the necessity of tracing intoxication to defendant's conduct was held to have obviated the error of admitting testimony tending to show merely that the buyer had been in the habit of returning home with whiskey after being gone about long enough

to have visited defendant's neighboring saloon.—Kehrig v. Peters, 41 Mich. 475.

¶ 528. The erroneous admission of statements by a partner who has defaulted to prove the partnership relation in an action against the partners is cured by instructions that such statements are not binding on the other partner.—Scholtz v. Freud, 128 Mich. 72.

¶ 529. An instruction limiting plaintiff's claim to moneys arising out of the assignment of a particular contract prevents the admission of evidence of the assignment of other contracts—which evidence is immaterial—from being prejudicial to plaintiff.—Mitts v. McMorran, 85 Mich. 94.

¶ 530. Admission in evidence of tables of mortality showing plaintiff's expectancy of life, in an action to recover damages for personal injuries, where there was evidence tending to show such injuries were permanent and his physical condition, and the jury were instructed not to consider the tables unless they were convinced to a moral certainty that a permanent injury was received, held not to be reversible error.—Jacobs v. Hagenbeck-Wallace Shows, 198 Mich. 73, 16 N. C. C. A. 535.

¶ 531. The improper admission of evidence as to an oral agreement to lease premises to a tenant for a term of years upon the erection of a new building in an action by a tenant against the landlord to recover damages for injury to his business as the result of rendering the premises untenantable in the process of moving the building to the new location is harmless error where the jury were instructed that such agreement was void and that there could be no recovery on that branch of the case.—Kezeli v. River Rouge Lodge, No. 410, Independent Order of Odd Fellows, 195 Mich. 181.

¶ 532. In an action for lumber sold and delivered, any error in permitting the introduction of plaintiff's books of account to show that the lumber was charged to the defendant owner, instead of a contractor, was cured by an instruction to the effect that the fact that the charge was made to the defendant was only important in case the jury should find that it was so charged by authority or with assent of the defendant.—Temple v. Goldsmith, 118 Mich. 172.

¶ 533. There was no prejudicial error by the court where in an action of trespass for the taking of a piano, where the defendant's counsel objected to any testimony as to the loss of the use of the piano after suit, the court said he would take the testimony subject to the objection and cover it with the charge, and if not admissible he would strike it out on motion, and he in his instructions directed the jury to find no damages for the loss of the use thereof.—Blaisdell v. Scally, 84 Mich. 149.

¶ 534. On appeal from disallowance of a claim by commissioners which claim was for services rendered to decedent under an implied promise to pay their reasonable value, error in admitting evidence of declarations and instructions for the making of provision by will, not only to prove that there was an expectation to pay, but also to show that they were worth the amount of the proposed gift or legacy, is not cured by a charge that they are to be considered only as bearing on the intent to pay for the services, when coupled with other expressions from which the jury might have considered them admissible on the question of value; and especially where there was a total lack of direct testimony as to their value.—Luizzi v. Brady's Estate, 140 Mich. 73.

¶ 534a. Where a policy contained a clause of forfeiture for additional insurance, evidence that such insurance was obtained because the insured understood that the original policy was invalid was held irrelevant in an action on the policy. But the error of admitting such evidence was held to have been cured by an instruction that the policy was avoided by the additional insurance unless the breach of the condition had been waived.—Pennsylvania Fire Ins. Co. of Philadelphia v. Kittle, 39 Mich. 51.

§ 97. ——Effect of delayed instruction.

¶ 535. Plaintiff sued defendant for assault and battery. A doctor who examined plaintiff the day before the trial for a skull fracture, testified that the fracture was the cause of plaintiff's stammering. Defendant moved to strike out this testimony on the ground that it did not connect the assault with the fracture or show that the stammering resulted from the fracture. The motion was overruled, and five days later the court, being of opinion that the evidence was improper, directed the jury to disregard it. Held, that the instruction, so long afterwards, did not cure the error of admitting the improper evidence.—Sulkowski v. Zynda, 160 Mich. 7.

§ 98. Admission cured by taking question or case from jury.

See also ante ¶¶ 482, 484.

¶ 536. The erroneous admission of testimony is cured by the withdrawal from the consideration of the jury of the question to which it relates.—Bamlet Realty Co. v. Doff, 183 Mich. 694.

¶ 537. It was error, if any, without prejudice to admit testimony as to intent on defendant's part to injure plaintiff by setting out fire on defendant's own land, where the question of intent was taken from the jury by an instruction that it was immaterial, though the declaration alleged that it was "willfully" lighted and allowed to escape.—Bolton v. Calkins, 102 Mich. 69.

¶ 538. The error in the admission, in an action for negligence, of evidence of an insufficient ground of recovery, is cured by the court's withdrawal of such ground from the jury.—Johnson v. Union Carbide Co., 181 Mich. 403.

§ 99. Admission cured by verdict, finding or judgment.

By determinative finding not based on evidence questioned, see post § 100.

By amount of verdict or judgment, see post § 101.

¶ 539. Where evidence improperly admitted is evidently not considered by the jury, the error does not require a reversal of judgment.—Drysdall v. Smith, 44 Mich. 119.

¶ 540. To admit in action on an account stated an account showing dealings covered thereby, if error, is harmless, where plaintiff had judgment.—Albrecht v. Gies, 33 Mich. 389.

¶ 541. The improper admission of a note in evidence is harmless where no recovery was allowed on it.—McDonald v. Smith, 139 Mich. 211.

¶ 542. Erroneous admission of testimony as to special damages is non-prejudicial error where jury's finding excludes them.—Mason v. Partrick, 100 Mich. 577.

¶ 543. A judgment will not be reversed because of the admission of incompetent evidence where it does not appear that the jury was influenced by it.—Busch v. Fisher, 89 Mich. 192.

¶ 544. An order dissolving an attachment will not be reversed because of the admission of immaterial evidence where the judge in his findings states that such testimony was not considered by him in reaching a conclusion.—Dimmock v. Cole, 130 Mich. 601.

¶ 545. The admission of the conclusions of a witness in regard to documentary evidence introduced is not error requiring reversal, where it appears from the record that the findings of the court were based upon his own deductions from such documents, and not upon those of the witness.—Hanish v. Kennedy, 106 Mich. 455.

¶ 546. The error of admitting irrelevant evidence tending to show that a conveyance under which plaintiff claimed was obtained by fraud is not cured by the jury's declaring that they cannot answer the question, "Were said sale and conveyance fraudulent in fact?" This finding is not against fraud, is simply equivalent to "not proved," and, thus guardedly expressed, shows that the testimony on this point somewhat influenced the jury.—Crane v. Reeder, 25 Mich. 303.

¶ 547. Where testimony has been admitted over objections but the admission of the evidence had neither the tendency to divert the attention of the jury from the real issue or to lead them to an erroneous decision on that issue, such rulings were not prejudicial.—Barschow v. Lake Shore & M. S. R. Co., 147 Mich. 226.

§ 100. ——By determinative finding not based on evidence questioned.

¶ 548. The admission of irrelevant testimony is no ground for reversing a judgment rendered upon a finding of facts in no way based upon such improper testimony.—Delta Lumber Co. v. Williams, 73 Mich. 86.

¶ 549. The admission of secondary evidence of the execution and contents of an alleged lost written contract before its loss was shown, held not erroneous, where a verdict was rendered on an implied and not on the express agreement.—Case v. Rudolph Wurlitzer Co., 186 Mich. 81.

¶ 550. The admission in evidence of a circular pertaining to a special contract, held not erroneous, where a verdict was based on an implied and not the express agreement.—Case v. Rudolph Wurlitzer Co., 186 Mich. 81.

¶ 551. A determination by the jury that the city was not negligent in an action for injury alleged to have been caused by falling into a hole in a cross-walk, renders it unnecessary to consider assignments of error as to the admission of testimony of oculists in regard to the condition of plaintiff's eyes at the time of the injury, since such assignment of error could not affect the finding that the city was not negligent which was conclusive of the case.—Scheel v. City of Detroit, 130 Mich. 51.

¶ 552. In an action on a contract tried by the court, if an item is allowed to be proved which is not within the contract, this will not be sufficient reason for reversing the judgment if it expressly appears that such item was rejected in making up the judgment.—Turner v. City of Grand Rapids, 20 Mich. 390.

¶ 553. Admission of expert testimony as to the portion of loss due to explosion was harmless, even if error, where the jury found that a fire caused the fall of the building and rendered the loss total.—N. & M. Friedman Co. v. Atlas Assur. Co., 133 Mich. 212.

¶ 554. The admission of evidence as to the price at which cattle which were distrained were sold in an action of trover for animals distrained is not prejudicial error where the question of the value of the animals is not reached by the jury.—Spiegel v. Straw, 196 Mich. 581.

¶ 555. Where the issue was as to whether plaintiff or defendant first broke the contract the admission of hearsay evidence on

behalf of plaintiff on the issue was harmless error where the jury found that plaintiff was the one who had broken it.—Fowles v. Rupert, 143 Mich. 246.

§ 101. ——By amount of verdict or judgment.

Amount of verdict as indication of prejudice or harmlessness, see ante § 6.

¶ 556. Where the finding of the jury in an action of replevin confines the damages awarded to defendant to the value of the property, as specifically found by them, the erroneous admission of testimony upon the subject of special damages to defendant resulting from the seizure of the property is error without prejudice.—Mason v. Partrick, 100 Mich. 577.

¶ 557. A verdict for $1,000 damages in favor of an estimable young woman whom defendant's newspaper had libelously charged with gross immorality was sustained in view of the smallness of the award, notwithstanding the erroneous admission of evidence showing defendant's financial condition.—Farrand v. Aldrich, 85 Mich. 593.

¶ 558. Where in trover by a mortgagor for a steam threshing machine, seized under the insecurity clause in the mortgage and sold to the mortgagee, plaintiff recovers judgment for less than the difference between the unpaid part of the purchase price and the sum received on a resale of the machine by the mortgagee, the admission on the trial of incompetent testimony as to the value of the machine, and its depreciation in value on account of its use by the mortgagor, is nonprejudicial error.—Woods v. Gaar, Scott & Co., 99 Mich. 301.

¶ 559. Admission of evidence of loss of trade in a libel suit, as against objection that the names of the customers were not given in the bill of particulars, was not harmful in view of the amount of the verdict and where the court instructed the jury that no damages could be awarded for loss of trade as there was no specific data upon which the jury could base a verdict in that particular.—Field v. Magee, 122 Mich. 556.

¶ 560. Error in the admission of evidence where the issue was as to whether plaintiff's leg was broken, is not prejudicial where the smallness of the verdict shows that the jury did not find that the leg was broken.—Weitzel v. Village of Fowler, 143 Mich. 700.

¶ 561. In an action for libel where the verdict was so small that the erroneous admission of evidence concerning defendant's pecuniary circumstances could not be said to have prejudiced him, judgment was not reversed.—Farrand v. Aldrich, 85 Mich. 593.

¶ 562. In an action against a liquor seller by the wife of one whose earning capacity has been impaired by a person intoxicated by reason of the defendant's selling, although evidence that plaintiff has children is inadmissible for the reason that they may sue on their own account, yet the admission of such evidence is not ground for reversal where the verdict is less than the actual damages shown.—Thomas v. Dansby, 74 Mich. 398.

¶ 563. The permitting of proof, in an action by an administratrix for the death of her minor child under Comp. L. 1897, § 10427, How. St., 2nd ed., § 13702, of specific instances of indebtedness owed by the beneficiaries was not reversible error where the amount of the verdict was such that the testimony could not have had any appreciable effect upon it.—Peklenk v. Isle Royale Copper Co., 187 Mich. 644.

¶ 564. In an action for damages for failure to deliver steel as per contract the admission of evidence as to bids received two months before the time of delivery and breach of the contract held not prejudicial error where the recovery was considerably less than the amount paid by plaintiff to another.—Sauer v. McClintic-Marshall Const. Co., 189 Mich. 577.

¶ 565. It is not assignable error to admit testimony of a witness as to the value of a colt even though the witness is not competent to express an opinion, where such testimony was cumulative and it appears from the amount of the verdict rendered that the testimony did no harm.—Dorris v. Rice, 145 Mich. 216.

¶ 566. No reversible error results from the improper admission of evidence as to a particular item of a defendant's set-off, where by their verdict it appears the jury have rejected said item.—Holser v. Skae, 169 Mich. 484.

¶ 567. Where, in a suit to recover for an elevator destroyed by sparks from a locomotive, the court properly limits the amount of recovery in its charge, the jury is well informed as to the situation, use, age, condition, etc., of the building and its equipment, and the verdict does not appear to be excessive, the judgment will not be reversed, although counsel for both sides include improper elements of damage in their questions put to expert witnesses.—Close v. Ann Arbor R. Co., 169 Mich. 392.

¶ 568. Admission of improper testimony on the question of damages was held not reversible error, where the plaintiff suffered a broken ankle and the verdict was for only $1,000.—Kopelka v. City of Bay City, 125 Mich. 625.

¶ 569. Any error in the admission of evidence on behalf of plaintiff in an action to recover the purchase price of storage eggs was immaterial where plaintiff recovered no more than the contract price.—E. P. Stacy & Sons v. Moher, 200 Mich. 81.

§ 102. Admission cured by comment or argument of opposing counsel.

¶ 570. The introduction in evidence by defendant of plaintiff's bill of particulars cannot be regarded a prejudicial error, inasmuch as defendant's counsel has a right to read and comment upon it to a jury.—Stevens v. Pendleton, 94 Mich. 405.

§ 103. Questions reacting to injury of party asking.

¶ 571. A woman appearing as complaining witness in a case of alleged indecent assault was required to state that she had been undergoing treatment at a medical college. Held, that she ought not to have been asked whether it was in the presence of a class, but that the error of allowing the question was probably cured by the sympathy the jury would naturally feel for her if she were compelled to answer so outrageous a question.—Derwin v. Parsons, 52 Mich. 425.

§ 104. Ruling for admission cured by nonintroduction of evidence.

¶ 572. A ruling that certain records might be admitted is harmless, if erroneous, where the record on error shows that they were not introduced.—Michigan Paper Co. v. Kalamazoo Valley Elec. Co., 141 Mich. 48.

¶ 573. Where a ruling upon evidence is wrong, it is nevertheless harmless unless testimony is given in accordance with it.—Friend v. Dunks, 39 Mich. 733.

§ 105. Premature reading of documents cured by their admission.

¶ 574. The error, if any, in permitting foreign documents to be translated in the jury's hearing before the court has decided on their admissibility, is cured when the court afterwards admits them in evidence.—Hutchins v. Kimmell, 31 Mich. 126.

§ 106. Defective stipulations of facts otherwise proven.

¶ 575. Efforts of counsel to have an oral stipulation admitting the genuineness of certain signatures, are harmless where the fact was otherwise proven and was apparently undisputed.—Sudworth v. Morton, 137 Mich. 575.

§ 107. Hearing unsworn witnesses or going outside of evidence.

¶ 576. Upon a petition by a divorced husband to have the custody of minor children transferred to him, neither the fact that the court examined the children unsworn nor the fact that he is influenced by the conduct of the complainant in or out of court, will justify the reversal of a decree which is plainly right as shown by the record alone.—Stone v. Stone, 161 Mich. 565.

§ 108. Excluded evidence afterwards received.

Effect of later reception as "matter of grace," see post § 109.

Exclusion cured by admission of other evidence, see post §§ 110-113.

Exclusion cured by inability of witness to answer, see post § 114.

Exclusion cured by ruling, instruction or directed verdict, see post § 115.

Exclusion cured by finding, verdict or judgment, see post § 116.

Exclusion cured by stipulation or admission of counsel, see post §§ 117, 118.

Curing restriction of cross-examination by offer to allow it if there was doubt, see also Examination of Witnesses ¶ 196.

¶ 577. Where evidence erroneously rejected is afterwards received and the facts are fully shown, the error is cured.—Cool v. Snover, 38 Mich. 562; McCormick Harvesting Mach. Co. v. McKee, 51 Mich. 426; Kendrick v. Towle, 60 Mich. 363; Stanton v. Estey Mfg. Co., 90 Mich. 12; Wilkins v. City of Flint, 128 Mich. 262; Dailey v. McCarthy, 180 Mich. 473; Luckhurst v. Schroeder, 183 Mich. 487.

¶ 578. Striking out certain testimony of a witness is not prejudicial where the same witness was later permitted to testify to practically the same effect.—Brown v. Harris, 139 Mich. 372; Antosik v. Michigan Alkali Co., 166 Mich. 415.

¶ 579. Error in excluding a witness' answer to a question is cured where the answer is afterwards elicited by further interrogatories.—Ellis v. Whitehead, 95 Mich. 105; Mason v. Partrick, 100 Mich. 577.

¶ 580. Where upon cross-examination, the trial court improperly refuses to permit a certain question, the error is not reversible if the witness in fact answers the question.—Jackson v. Detroit & M. Ry. Co., 161 Mich. 163.

¶ 581. The exclusion for informality of a hypothetical question put to a medical witness is not prejudicial where the subject-matter is left open to inquiry, and such information as the witness possesses is obtained through another form of question.—Lamb v. Lippincott, 115 Mich. 61.

¶ 582. The fact that a part of a question on cross-examination was stricken out can furnish no ground for objection, where the same statement was made, and in even fuller terms, on redirect examination.—Bartlett v. Jenkins, 150 Mich. 682.

¶ 583. The erroneous exclusion of questions put to plaintiff on cross-examination is not prejudicial where he is asked the same questions when called in rebuttal, and the answers desired by defendant to the excluded questions are drawn from the witness.—Rice v. Rankans, 101 Mich. 378.

¶ 584. The exclusion of an impeaching question based on the contents of a letter

is harmless where the letter is later put in evidence and contains no such impeaching statements.—Burt v. Long, 106 Mich. 210.

§ 109. ——Effect of later reception as "matter of grace."

¶ 585. Where competent testimony was excluded but subsequently was admitted upon the suggestion of plaintiff's counsel that while it was incompetent, it was better to put it in and be safe, and the court made comments indicating to the jury that it was admitted as a matter of grace, it is doubtful whether the admission of the testimony would cure the error.—Beard v. Hill, 131 Mich. 246.

§ 110. Exclusion cured by admission of other evidence covering excluded matters.

By subsequent testimony of same witness, see post § 111.
By testimony of other witnesses, see post § 112.
Curing exclusion of proper cross-examination by offer to allow full inquiry in chief, see also Examination of Witnesses ¶ 582.
Admission of expert testimony of cost to cure error in excluding evidence of actual cost, see also Damages ¶ 1129.

¶ 586. The exclusion of evidence is not prejudicial error if its substance is afterwards allowed to be fully inquired into and shown by other evidence.—Locke v. Gross, 48 Mich. 266; Stansell v. Leavitt, 51 Mich. 586; Waldo v. Waldo, 52 Mich. 94; Burt v. Long, 106 Mich. 210; Michigan Shoe Co. v. Paul, 149 Mich. 695.

¶ 587. Though erroneous for the circuit judge in chancery to exclude offered evidence, it is harmless where other testimony clearly shows that no injustice resulted.—Merson v. Merson, 101 Mich. 55.

¶ 588. Error in improperly ruling out a cross-question asked of a witness for complainant which had no relevancy except to show bias of the witness, is harmless, where the interest and bias of the witness were otherwise shown.—Landry v. Landry, 119 Mich. 68.

¶ 589. Rulings to exclude evidence offered to prove agency become immaterial where the agency is afterwards proved by the introduction of the written agreement of agency, which is not disputed.—Reynolds v. Continental Ins. Co., 36 Mich. 131.

¶ 590. In a will contest held that the rejection of evidence of a conversation with a child that a preferred son asked testator about making a will and as to how testator came to talk with witness about the matter, was harmless error in view of convincing and undisputed evidence as to testator's mentality and state of mind at the time he made the will and evidence as to capacity before and after making the will.—In re Fay's Estate, 197 Mich. 675.

¶ 591. In an action for damages for delaying freight in transit, error in the admission of bills of lading to show the date of the reception of such freight by defendant without first proving the genuineness of such bills is cured where freight bills accompanying such bills of lading, receipted in full by defendant, are admitted in evidence without objection, such freight bills covering substantially the same matters included in the bills of lading.—Fremont Canning Co. v. Pere Marquette R. Co., 180 Mich. 283.

¶ 592. Where undisputed testimony in an attachment proceeding showed that defendant had reduced stock and placed the money where it could not be reached by garnishee process, it is not prejudicial error to exclude other testimony tending to establish the same fact.—Dimmock v. Cole, 130 Mich. 601.

¶ 593. Sustaining an objection to a cross-question asking witness if he had not made the remark that he was not clear and definite as to a certain matter when he testified before the justice, is not prejudicial where it already sufficiently appeared that he was not clear and definite as to that matter.—Brown v. Harris, 139 Mich. 372.

¶ 594. In assumpsit for services performed and moneys expended the exclusion of checks not included in the defendant's bill of particulars, and the defendant declining to amend his bill of particulars to make them admissible, is not prejudicial error where they were present and the plaintiff was examined at length concerning most of them. —Stoner v. Riggs, 128 Mich. 129.

¶ 595. The striking out of a witness' answer, though improper, is held not to be error where the ground of the evidence stricken out is substantially covered by other testimony in the case, and it does not appear that the party complaining of it was injured by the ruling.—Chambers v. Hill, 34 Mich. 523.

¶ 596. The refusal of the court to allow a witness to testify as to the contents of a letter is harmless error where the latter was subsequently put in evidence.—Rogers v. Detroit Sav. Bank, 146 Mich. 639.

¶ 597. In an action on a promissory note, where plaintiff claimed that an agreement was made for the exchange of such note for two smaller notes, and that such agreement was invalid because made on Sunday, and that he returned such smaller notes to the defendants, and defendants claimed that the agreement was made after midnight, and denied that such smaller notes were returned, but claimed that they were subsequently paid, held that the exclusion of self-serving statements in a letter from plaintiff to one of the defendants as to why he returned such smaller notes was harmless error, where the vital part of the letter, to-wit, that he

inclosed such smaller notes, was admitted in evidence.—Prussia v. Bailey, 193 Mich. 77.

¶ 598. In a suit by a plaintiff on promissory notes purchased from a company, no error was committed in refusing defendant's demand that the articles of association of the company to whom the notes were given be produced, where the court permitted defendant to introduce secondary evidence of their contents.—People's Building & Loan Ass'n Co. v. Rutz, 158 Mich. 440.

¶ 599. In an action for a breach of contract to furnish all the tin cans necessary to the plaintiff's business for a given time, it is not prejudicial error to refuse to permit a witness to testify as to the extent of increased capacity of the plaintiff's canning factory where the changes in the factory were described in detail, the number of cans used before and after the contract was shown, and the plaintiff's books showing its sales were in evidence.—E. G. Dailey Co. v. Clark Can Co., 128 Mich. 591.

§ 111. ——By subsequent testimony of same witness.

¶ 600. The error, if any, in excluding questions, is cured where the witness is subsequently allowed to testify fully upon the subject-matter of such inquiries.—Pigott v. Engle, 60 Mich. 221.

¶ 601. The exclusion of evidence is harmless where the witness was permitted to show the same fact sufficiently by his other testimony.—Stowell v. Standard Oil Co., 139 Mich. 18.

¶ 602. Exclusion of a cross-question calling for matter which the witness subsequently gave is harmless.—Ellis v. Whitehead, 95 Mich. 105.

¶ 603. Where cross-examination has been unnecessarily restricted, but full investigation has been obtained before the witness is dismissed, there is no prejudicial error.—Edwards v. Heuer, 46 Mich. 95.

¶ 604. In replevin against an officer who has attached mortgaged goods, it is error to refuse to allow him to answer whether plaintiff's attorney demanded joint possession of the goods, but such error is cured by his giving subsequently all the conversation with the attorney and testifying that no demand was made before the writ issued.—Rosenfield v. Case, 87 Mich. 295.

¶ 605. Error in refusing to allow a leading question to be asked on cross-examination is cured by the immediate allowance of full cross-examination on the whole transaction.—McBride v. Wallace, 62 Mich. 451.

¶ 606. The exclusion of a question is not reversible error where the answer sought is subsequently substantially obtained on cross-examination.—Airikainen v. Houghton County St.-Ry. Co., 138 Mich. 194.

¶ 607. The exclusion of evidence as to the rental value of property to show its value, is not error that requires reversal, where the witnesses whose answers are excluded are permitted to testify to the actual value.—Byrnes v. Palmer, 113 Mich. 17.

¶ 608. Error in refusing to permit a defendant to cross-examine his employee who was called by the plaintiff under Pub. Acts 1907, Act. 307, How. 2nd Ed., § 8834, is harmless where answers to the questions are later elicited from the witness.—Seebach v. Michigan United Rys. Co., 177 Mich. 1.

§ 112. ——By testimony of other witnesses.

¶ 609. Error in overruling a question to a witness in an action on the case was afterwards cured by permitting the same question to be put to several other witnesses.—O'Connor v. Hogan, 140 Mich. 613.

¶ 610. Where a question put by a party to his own witness is erroneously overruled, the error is not cured by his being allowed afterwards to put the same question to the witness of the other party on cross-examination.—Flanigan v. Lampman, 12 Mich. 58.

¶ 611. Error in excluding a question put to one of the parties on cross-examination is rendered non-prejudicial where both parties are subsequently permitted to testify upon the subject and opportunity for cross-examination afforded.—Daggett v. Hayward, 95 Mich. 217.

¶ 612. Erroneous exclusion of evidence of the cost to plaintiff of completing a contract after breach by the contractor is not cured by subsequent admission of expert opinions on that point.—Friedland v. McNeil, 83 Mich. 40.

¶ 613. The exclusion of a letter as evidence in behalf of a plaintiff containing nothing more than the plaintiff had been permitted to testify to without objection is not prejudicial error.—Mears v. Cornwall, 73 Mich. 78.

¶ 614. Sustaining of objection to certain questions asked an expert witness, in an action to contest a will on the ground, in part, of mental incompetency of the testator, as to the sufficiency of memory and understanding of a person suffering from senile dementia to make a discriminatory will, held not reversible error, in view of the extended examination of the witnesses permitted.—In re Walsh's Estate, 196 Mich. 42.

¶ 615. Where a plaintiff's testimony shows a certain fact, error cannot be predicated by defendant upon the exclusion of evidence to prove that fact.—Welsh v. Michigan Maple Co., 161 Mich. 16.

§ 113. Exclusion as opinion or conclusion cured by other evidence.

¶ 616. The rejection of the opinion of a witness, in an action for negligence, that a bridge was in good repair, is not prejudicial error where the testimony of the same witness placed before the jury all the facts upon which the opinion would have been based.—Merkle v. Township of Bennington, 68 Mich. 133.

¶ 617. In an action by a bicycle rider against the driver of an automobile to recover damages for personal injuries sustained in a collision at a street intersection, the exclusion of the answer to a question whether defendant had his car under control, on the ground that it called for a conclusion, is harmless error, where, in later examination, the witness states that the car did not run more than six feet after the collision and that defendant put his foot on the brake and the clutch at the same time and stopped the car almost instantly.—Vezina v. Shermer, 198 Mich. 757.

¶ 618. The exclusion of opinion evidence that special assessments were made according to frontage, instead of according to benefits, in an action of assumpsit by a city to collect a special assessment tax is harmless error where the proceedings show affirmatively that the assessments were according to benefits and the witness has no knowledge himself of how they were prepared.—City of Sault Ste. Marie v. Minneapolis, St. P. & S. S. M. Ry. Co., 192 Mich. 65.

¶ 619. The rejection of questions calling only for the witness' inferences from the facts he has testified to is not error where no facts upon which an opinion could be based are excluded, and where the inference sought to be raised is one the jury could draw as well as the witness.—Whittemore v. Weiss, 33 Mich. 348.

¶ 620. That proper questions propounded to an expert were excluded is not prejudicial where the facts sought to be shown were otherwise established.—Pierson v. Illinois Cent. R. Co., 149 Mich. 167.

¶ 621. In an action against a city for injuries alleged to have been caused by falling over a loose plank in the sidewalk, the city is not injured by rulings of the court which attempt to exclude the opinion of witnesses as to the safety of the walk but to admit their testimony in so far as it tended to show the true condition of the walk, where the testimony admitted fairly covered the latter ground.—Brown v. City of Owosso, 130 Mich. 107.

§ 114. Exclusion cured by inability of witness to answer.

¶ 622. A party cannot be injured by the exclusion of a question which his witness, before the objection is made, says he cannot answer.—Miller v. Sharp, 65 Mich. 21.

¶ 623. There is no error in excluding the answer to a question calling for knowledge on a subject and asked for the purpose of refreshing the witness' memory, where he subsequently testifies that he has told all he knows about the matter.—Ellis v. Whitehead, 95 Mich. 105.

§ 115. Exclusion cured by ruling, instruction or directed verdict.

¶ 624. The error of excluding competent testimony may sometimes be cured by treating it in an instruction as if it were in evidence.—Smith's Appeal, 52 Mich. 415.

¶ 625. An erroneous ruling excluding evidence offered to prove a custom as immaterial is held cured by a charge recognizing a general custom of the same character, under limitations as favorable to the party complaining as he was entitled to claim.—Clark v. Cox, 32 Mich. 204.

¶ 626. Where testimony offered to show the real character of an ambiguous instrument might have aided the jury to a better understanding of the matters involved, the erroneous exclusion thereof is prejudicial, even though the court in its charge to the jury subsequently adapts the construction claimed for such instrument by the party who offered the testimony.—Germain v. Central Lumber Co., 116 Mich. 245.

¶ 627. In an action for removing wood from land of which the ownership is disputed by the parties in consequence of a disagreement as to the boundary, rulings relating to the ownership of the land or of the wood, or excluding documentary proof of land contracts under which defendant claimed, become immaterial under a charge that the plaintiff cannot recover if the boundary is where defendant claims it to be.—Beeman v. Black, 49 Mich. 598.

¶ 628. An erroneous rejection of testimony is cured by the withdrawal from the jury of the question to which it pertains.—Bamlet Realty Co. v. Doff, 183 Mich. 694.

¶ 629. Where a question is answered under objection, and the answer is afterwards stricken out on motion of the objecting party, and the charge to the jury is such as to exclude from their consideration the subject-matter of such question and answer, the plaintiff in error has no ground for complaint, whether the exclusion of the evidence was proper or not.—Hill v. Robinson, 23 Mich. 24.

¶ 630. In a former suit against defendant for injury, plaintiff had alleged in his declaration certain permanent injuries. Plaintiff recovered in that suit, but the court directed the jury not to allow damages for the permanent injuries alleged. In the present suit for injury on a different occasion the court allowed defendant to introduce the declaration of the former suit to conclude the

plaintiff as to allegations of permanent injury made in that declaration, and refused to permit plaintiff to show that he had no personal knowledge of the contents of said declaration. Held, that in view of the fact that the court made it clear to the jury in the present case that the plaintiff did not recover for the alleged permanent injuries in the former case, the rulings were not prejudicial error.—Beattie v. Detroit United Ry., 158 Mich. 243.

¶ 631. In replevin by a wife, of property seized on execution against the husband, the erroneous exclusion of the record of the suit against the husband and the execution and levy thereunder, was without prejudice where the jury was expressly charged that plaintiff could recover only such things as she had proven to be her property.—Vicborn v. Pollock, 133 Mich. 524.

¶ 632. Defendant, seeking to show that certain logs taken over by him were of no value for the purpose of raising an inference that he did not make a contract for which they were a consideration, is not harmed by exclusion of cross-examination tending to show that they were cut in an unworkmanlike manner and exclusion of his own direct testimony as to how many logs he got, where the court afterward recalled its ruling and signified that the evidence would be admitted, which the defendant's counsel did not follow up.—Howe v. Morey, 141 Mich. 388.

¶ 633. Where a son about to file a claim for services against his father's estate changed it by attempting to erase certain items and did not make affidavit as to such items, in an action on a rejected claim, refusal of the court to permit the erased claim to be read to the jury as showing a different value placed on the services is not reversible error in view of an offer of the court to permit counsel to show any statement made by claimant at other times.—Abel v. Roosenraad, 173 Mich. 93.

¶ 634. It is not material error to strike out evidence if the court afterwards correctly directs a verdict.—Larkin v. Mitchell & Rowland L. Co., 42 Mich. 296.

§ 116. Exclusion cured by finding, verdict, or judgment.

¶ 635. The exclusion of testimony to a certain fact is harmless error where the verdict shows the jury reached the conclusion desired by the party offering such testimony.—Brockway v. Patterson, 72 Mich. 122.

¶ 636. The error, if any, of excluding testimony to impeach a witness who seeks to show that defendant did not act in good faith, is cured by a verdict finding that he did act in good faith.—Clark v. Field, 42 Mich. 342.

¶ 637. Plaintiff's assignment of error, in an action to recover damages for personal injuries sustained by plaintiff by derailment of one of defendant's street cars at a certain switch, on exclusion of testimony that defendant's cars had been derailed at this switch in a similar manner on former occasions, offered to show defendant's knowledge and negligence, held disposed of by verdict in plaintiff's favor.—Griggs v. Saginaw & F. Ry. Co., 196 Mich. 258.

¶ 638. The exclusion of testimony offered in favor of one who has presented a claim against the estate of a deceased person for services rendered, cannot constitute reversible error where the verdict was found for claimant, and a verdict for a larger amount would have been set aside as excessive.—In re McNamara's Estate, 155 Mich. 585; McNamara v. Michigan Trust Co., Id.

¶ 639. Where an objection has been sustained to a question which was put with the view of establishing a fact which the court afterwards found in favor of the party who puts the question, that ruling becomes immaterial and will not be reviewed.—Webber v. Donnelly, 33 Mich. 469.

¶ 640. If testimony goes not to the right but to the extent of recovery, its exclusion is not prejudicial error where the jury finds no cause of action.—Manning v. Bresnahan, 63 Mich. 584.

¶ 641. Where the jury finds for defendant in an action for damages, the contentions of plaintiff that the court erred in excluding testimony which tended to enhance damages, will not be considered in this court.—Hammond v. Porter, 150 Mich. 328.

¶ 642. It is not prejudicial error to refuse offers of evidence to show good faith where such evidence had already been admitted and the jury had found the fact.—Clark v. Field, 42 Mich. 342.

¶ 643. In trover for the conversion of timber evidence that defendant, before cutting the timber, bought the land from one claiming to have a tax-title, was offered to show that defendant in cutting the timber honestly supposed that he owned the land and was acting in good faith. Held that, as punitive damages were not sought or given, but only the value of the logs at the place to which defendant took them, the rejection of such evidence could do no harm.—Grant v. Smith, 26 Mich. 201.

¶ 644. A specific finding that there had been a settlement renders it harmless error to exclude evidence not bearing on that question.—Stevens v. Beardsley, 134 Mich. 506.

¶ 645. The exclusion of cross-examination of the defendant as to her nonperformance of an alleged collateral agreement is not

error where the jury subsequently finds that no such agreement existed.—Richmond v. Nye, 126 Mich. 602.

¶ 646. The erroneous exclusion of a letter offered in evidence by plaintiff becomes harmless when the jury finds against the only defendant against whom it would have been competent.—Schloss v. Estey, 114 Mich. 429.

¶ 647. Exclusion of evidence that an insolvent debtor had settled another small claim on a small percentage is harmless to sellers claiming fraud against a bona fide purchaser from the buyer, where the good faith of the purchase by the latter for value is established by the verdict.—Schloss v. Estey, 114 Mich. 429.

¶ 648. In an action for instalments due on a contract to sell all rights in a secret society wherein the plaintiff agreed to translate the ritual into English the exclusion of cross-examination as to the plaintiff's ability to translate ritual is not harmful where the jury must have found that the defendant never offered the plaintiff an opportunity for such translation.—Burt v. Greene, 125 Mich. 328.

§ 117. Exclusion cured by stipulation or admission of counsel.

By withdrawal of theory or evidence, see post § 118.

¶ 649. The exclusion from evidence of a contract that is legally admissible is harmless error where its provisions are fully covered by the admitted facts.—Ellis v. Whitehead, 95 Mich. 105.

¶ 650. Any error in the exclusion of testimony in a personal injury case, as to plaintiff's earning power, was eliminated by the concession of defendant's counsel that plaintiff had been able to work every day up to the time of the accident.—Hamilton v. Michigan Cent. R. Co., 135 Mich. 95.

§ 118. ——By withdrawal of theory or evidence.

See also ante ¶ 628.

¶ 651. Declaration upon special contract and on common counts; evidence tending to establish both; error in rejecting defendant's offer to show set-off held not cured by plaintiff's withdrawing all evidence under common counts.—Kelly v. McKenna, 18 Mich. 381.

§ 119. Failure of proof cured by verdict or findings.

¶ 652. The absence from the record of any showing of the amount due on a writ of attachment, under which a sheriff claimed to hold property replevied from him by a vendee of the attachment debtor, is immaterial where the case is submitted to the jury upon the question whether or not the transfer was fraudulent as against creditors, and the jury find that it was not so fraudulent.—Partlow v. Swigart, 90 Mich. 61.

§ 120. Refusal to strike out cured by later ruling or other evidence.

¶ 653. Error in a bastardy trial in refusing to strike out testimony is cured by subsequent ruling striking out such testimony.—People v. Keefer, 103 Mich. 83.

¶ 654. Error in refusing to strike out an answer of a witness as to a matter of which he had not shown full personal knowledge was rendered immaterial where the objecting party's testimony admitted the fact as set forth in such answer.—Williams v. Towl, 65 Mich. 204.

¶ 655. It was not prejudicial to refuse to strike out testimony as to a memorandum of an oral contract made by one of the parties at the time, where the terms of the contract were otherwise proved by two uncontradicted witnesses.—Robinson v. Lake Shore & M. S. R. Co., 103 Mich. 607.

¶ 656. It is harmless error to refuse to strike out the answer of a witness as being a conclusion of law, and will not cause a reversal where the subject was fully covered by the same witness showing in detail the circumstances summarized by him and which was technically a conclusion of law.—Churchill v. Mace, 148 Mich. 456.

§ 121. Erroneous questions and rulings cured by answers.

By negative or noncommittal answers, see post § 122.

By failure or refusal to answer, see post § 123.

Erroneous question cured by answer favorable to party objecting, see ante § 46.

Irresponsive answer as harmless in view of other testimony, see also Examination of Witnesses ¶ 157.

¶ 657. Where, in answer to an erroneously allowed question concerning remote expressions of pain, the witness did not testify to such expressions but merely described her appearance and condition, the error was not prejudicial.—Laughlin v. Grand Rapids Street R. Co., 80 Mich. 154.

¶ 657a. Error in asking a witness, not shown to have had any knowledge on which to predicate an opinion as to the soundness of a boy's mind, what the witness believed on that subject is harmless, where the answer simply states that at times he "appeared to be" bright and other times not as bright as other children.—Keyser v. Chicago & G. T. R. Co., 66 Mich. 390.

¶ 658. Where it is not disputed that plaintiff's right to commissions depends upon the law of custom, evidence as to what is a fair

and reasonable compensation is not prejudicial, if admitted, where the answer fixed the same compensation as established by the custom.—Obenauer v. Solomon, 151 Mich. 570.

¶ 659. In an action for trespass on land by cutting timber, held that the asking of a question whether the construction of a logging road was a damage or benefit to the tract was not prejudicial error where the answer of the witness was that it would depend upon circumstances whether the prosective landowner intended to log his land and how he intended to log it and whether the logging road there was a good one or a poor one, and the answer to the other question was that the damage to the land would be the amount of the value of the timber that had been cut in logging the road.—Connor v. McRae, 193 Mich. 682.

¶ 660. In an action of trespass vi et armis, a question put to a medical witness—"if the plaintiff is now suffering pain, etc., what would you say is the cause, which he did not have before this injury"—is cured of its fault in invading the province of the jury by an answer that an injury to the ankle of that kind would cause pain and much weakness for much time and might cause other pains.—Noller v. Wright, 138 Mich. 416.

¶ 661. In an action by a bank against its president for negligence in loaning the bank's funds, it is not prejudicial to ask the borrower, who was the cashier of the bank, why he did not apply to the full board for the loan where he answers that it was customary to discount nearly all paper before the board knew anything about it.—Commercial Bank of Bay City v. Chatfield, 127 Mich. 407.

¶ 662. A medical witness' answer that the injury he found plaintiff suffering from "could be produced" by the cause sued on cures any error in remarking as part of a ruling that the witness might state whether it "would be likely" to produce the injury or "would be natural to contribute to" it.—Boehm v. City of Detroit, 141 Mich. 277.

¶ 663. Judgment will not be reversed for permitting a question to be asked a witness, where the record does not contain the response given, for there is no error if the answer to such question was not prejudicial.—Crane Lumber So. v. Otter Creek Lumber Co., 79 Mich. 307.

§ 122. ——By negative or noncommittal answers.

¶ 664. Where an objection to a question is improperly overruled, and the witness in reply to it says, "I can't say," the answer renders the question immaterial, and an exception to the ruling cannot be sustained on error.—Peck v. Snyder, 13 Mich. 21.

¶ 665. In an action of trespass on land for cutting timber where it appeared that the defendant cut a logging road over defendant's tract to a lake, held that the propounding of question to the plaintiff upon cross-examination as to whether he had any sinister motive in wishing to prevent the defendant from transporting the timber from the shore of lake and whether he wanted to harass them or prevent them from marketing the timber, was harmless error where the witness answered in the negative.—Connor v. McRae, 193 Mich. 682.

¶ 666. Where defendant is cross-examined as to an alleged conversation with plaintiff, and denies the conversation, the questions can do him no harm.—Keables v. Christie, 47 Mich. 594.

¶ 667. Where a booming company was sued for the damages caused by its flowing lands, it was held that it could not have been prejudiced by, and could not complain of the allowance on the cross-examination of its president of, the question whether the company had not paid claims against them for flowing lands, when the answer negatived any such compromise.—Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308.

¶ 668. Where, against objection, an answer is permitted to a question which is objectionable only because it is calculated to draw out incompetent testimony, if the witness knows nothing on the subject, or if his answer is beneficial to the objecting party, it is not an error for which judgment will be reversed even though the ruling be incorrect.—Hill v. Robinson, 23 Mich. 24.

§ 123. ——By failure or refusal to answer.

¶ 669. Where questions are not answered at all, or are answered in a way favorable to the party complaining, no harm can result from their being allowed.—Bartlett v. Jenkins, 150 Mich. 682.

¶ 670. Permitting a question to be put to a witness is not prejudicial error where the question remains unanswered.—Church v. John Davis & Co., 93 Mich. 477.

¶ 671. Where an improper question is asked and objection to it overruled, no error is committed if the witness makes no answer. Larson v. Home Tel. Co., 164 Mich. 295.

¶ 672. In an action for damages for assault and battery, where plaintiff claimed to have sustained a hernia, the putting of a question to a physician as to whether in the treatment which he was required to give plaintiff it was necessary that he make any investigation as to whether or not a patient had a hernia and its answer were not reversible error where the objectionable part of the question, as to whether it was necessary to make such investigation, was not answered.—Matthews v. Lamberton, 198 Mich. 746.

§ 124. Invited errors in evidence.

Necessity of raising question in lower court, see Saving Questions, I.

¶ 673. A party who first inquired as to the contents of a memorandum cannot complain that the other party was permitted to show what it contained.—Robinson v. Lake Shore & M. S. R. Co., 103 Mich. 607.

¶ 674. In a suit by plaintiff vendee of land to recover damages for false representations made by defendant vendor to the effect that the land was valuable and suitable for farming and for a home and that a living could be made by suitable cultivation thereof, it is proper to receive evidence not only of climatic or frosty conditions of the farm, but also of other land similarly situated in the neighborhood, and to show that whole sections of land in the vicinity, including the land in question, were so poor in quality as to be abandoned for farm purposes, especially when these questions are gone into by both parties and defendant is treated impartially. —Yanelli v. Littlejohn, 172 Mich. 91.

¶ 675. The defendant cannot complain of the admission of testimony by the companion of the plaintiff in an action for sidewalk injury to the effect that after the accident she stated that she was not thinking of the condition of the walk, where it is brought out on redirect examination consisting of a part of the conversation drawn out by the defendant on cross-examination.—Wilkins v. City of Flint, 128 Mich. 262.

¶ 676. On a contract to sell lambs at a price sheared or a greater price unsheared, the buyer to have the option and the sale having been made unsheared, it is not open to the seller to complain of the refusal to strike out his testimony on cross-examination in the buyer's action as to the amount received for the wool, where he himself went into that matter on his direct examination.—Aulls v. Young, 98 Mich. 231.

C. IN INSTRUCTIONS, ARGUMENTS AND TRIAL PRACTICE.

§ 125. Instructions cured by other instructions.

[Note. There are numerous decisions in terms that an error in one part of the charge is cured by other parts of the charge. These decisions have been treated as precedents on the rule that the charge will be construed as a whole and taken to have carried to the jury such meaning as its entirety conveys. See Instructions, II, C.]

Instruction specifically corrected or retracted, see post § 126.

Failure or refusal to charge, see post § 127.

Erroneous evidence cured by instruction, see ante, III, B.

Instruction as to necessity of certificate to constitute one member in benefit society, rendered harmless by subsequent instruction, see Fraternal Associations § 79.

¶ 677. If an instruction is erroneous, the fact that other instructions are inconsistent with it will not cure the error, as it cannot be known which the jury followed.—Brown v. Marshall, 47 Mich. 576.

¶ 678. Where the jury apparently accepted and acted upon an erroneous instruction given by the trial judge on his own motion, it was none the less damaging error because accompanied by an opposing instruction given on request of one of the parties.—Sterling v. Callahan, 94 Mich. 536.

§ 126. ——Instruction specifically corrected or retracted.

¶ 679. An error in a detached portion of a charge may be specifically corrected by an instruction subsequently given substantially as asked.—Dresser v. Blair, 28 Mich. 501.

¶ 680. One is not injured by the court's incorrectly stating, in the charge to the jury, his theory of the case, where, on attention being called to the matter, the erroneous statement is at once corrected and made to correspond substantially to such theory.—Blumeno v. Grand Rapids & I. R. Co., 101 Mich. 325.

¶ 681. A charge stating the elements of damage for personal injury, and including among others expense of medical treatment and nursing, loss of earning power, etc., which belong to the husband, is purged of the error; where, on being reminded by counsel that plaintiff is a married woman, the court retracts that portion of the charge and tells the jury not to consider it, and restricts the damages to compensation.—Atherton v. Bancroft, 114 Mich. 241.

¶ 682. Where, in an action to recover damages for injury to machinery in removing it from a mill, the jury has been instructed that defendant should have removed the machinery in such a way as not to cause any injury, a further instruction that defendant is only liable if he removed the machinery so improperly that it was injured, prevents misapprehension.—Wreggitt v. Barnett, 99 Mich. 477.

¶ 683. A statement in the charge, that it is the contention of plaintiff that he went to defendant and made a designated statement, is not available error; where the court, on objection being made, withdraws the statement as made in that language and says that the contention of plaintiff is that that was the effect of what was said between the parties.—Wenzel v. Johnston, 112 Mich. 243.

¶ 684. The erroneous statement in a charge that a party claimed a certain thing to have occurred was held not misleading where it was immediately corrected by the court.—Chaddock v. Tabor, 115 Mich. 27.

¶ 685. A correct instruction as to the liability of a member of a nontrading firm with

respect to commercial paper executed by his copartner will not cure the error of the circuit judge in ignoring, in the charge as a whole, the distinction between trading and nontrading firms in such manner as to allow the jury to find liability as in case of a trading partnership.—McPherson v. Bristol, 115 Mich. 258.

¶ 686. In an action for libel for publishing that defendant was a thief, the court erroneously instructed the jury that the burden was on plaintiff to prove the falsity of the words complained of. After the jury had been out two and one-half hours, the court called them in and attempted to correct the charge by referring to detached portions thereof. Held, the court's course did not cure the error.—Schattler v. Daily Herald Co., 162 Mich. 115.

¶ 687. In an action for a sidewalk injury, an instruction charging that the city is bound by law to use all reasonable care and caution to keep its streets and sidewalks safe for travel, is cured by a further specific instruction that the law only imposes upon the city the duty to keep its sidewalks reasonably safe for travel.—Gilson v. City of Cadillac, 134 Mich. 189.

¶ 688. An error in a charge, which was subsequently corrected by further instructions so that the jury could not have been misled thereby, is not ground for reversal.—Whoram v. Township of Argentine, 112 Mich. 20.

¶ 689. An instruction explaining preponderance of evidence as meaning that the testimony shall weigh more, is not prejudicial error as making evidence and testimony synonymous where immediately cured by the court's statement that the verdict must be found from the preponderance of the evidence.—Padgett v. Jacobs, 128 Mich. 632.

¶ 690. Where, upon failure of the jury to agree, the special instructions given them are recalled, and, being charged to find for the defendant, they return a verdict accordingly, the special instructions are superseded and will not be reviewed on error; as the verdict was not found on them, they do not prejudice the plaintiff.—Kelly v. Hendrie, 26 Mich. 255.

¶ 691. Where, after giving an erroneous instruction in the words of a request, the court immediately proceeds to explain what is meant by such instruction, so modifying it that the jury cannot fail to understand correctly the law applicable to the case, the error is cured.—Westra v. Westra's Estate, 101 Mich. 526.

¶ 692. In an action by a son on a claim for labor and services against his father's estate, the court in his charge to the jury inadvertently made reference to a certain sum of money that tended to operate as suggesting a verdict to the jury. The remark was corrected at once, and in other parts of the charge the amount to be found, if any, was fully left to the jury. Held, the remark was not reversible error.—Abel v. Roosenraad, 173 Mich. 93.

§ 127. ——Failure or refusal to charge.

[Note. The rule, so stated, that erroneous refusal of a request is cured by giving the substance of it in a correct charge is treated as merely an equivalent of the rule that it is sufficient to give the substance of a request without giving it in the exact words requested. The cases representing the doctrine will be found in Instructions, III.]

¶ 693. The error committed in refusing a request to charge is not cured by an instruction which is so far argumentative as to be well calculated to impress upon the jury the views of the trial judge upon the question of fact involved in the request.—Warren v. Carpenter, 99 Mich. 287.

¶ 694. Where a request for a proper instruction has been refused and one given which might tend to the very error the requested instruction was designed to avoid, the error is not cured by giving the matter in another part of the charge disassociated from the theory under which requested, unless it also clearly appears that the jury could not have been misled.—McDonald v. City Elec. Ry. Co., 137 Mich. 392.

¶ 695. In a suit to enforce an insurance policy the failure of the court to state to the jury what facts would constitute a waiver, and permitting them to find it as matter of fact from insufficient evidence, is nonprejudicial error, where, the facts being undisputed, the jury should have been charged that waiver was shown.—Towle v. Ionia, Eaton & Barry Farmer's Mut. F. Ins. Co., 91 Mich. 219.

§ 128. Instructions cured by correction of counsel.

¶ 696. Where the court in its charge to the jury makes an incorrect statement which is corrected by counsel and the court subsequently falls into the same error without its attention being called thereto, it cannot be said that this is reversible error when the former correction was fresh in the minds of all concerned.—Houser v. Carmody, 173 Mich. 121.

§ 129. Instructions cured by verdict, finding or judgment.

By amount of verdict or judgment, see post § 130.
By determinative finding independent of the instruction, see post § 131.
Refusal or failure to instruct cured by verdict or finding, see post § 132.

¶ 697. Error in submitting an issue to the jury is cured by a verdict in favor of the

objecting party on that point.—Gates v. Detroit & M. R. Co., 147 Mich. 523.

¶ 698. Judgment will not be reversed for erroneous instructions to the jury cured by the verdict.—Clark v. McGraw, 14 Mich. 139.

¶ 699. Language in instructions, though improper, which in view of the whole charge and the evidence and the verdict did not appear to have improperly influenced the jury will not work a reversal.—People ex rel. Esper v. Detroit & S. Plank-Road Co., 131 Mich. 30.

¶ 700. Where the verdict shows that the jury could not have applied an instruction which was alleged to have been erroneous the supreme court will not review on appeal the correctness of the instruction.—Major v. Brewster, 148 Mich. 623.

¶ 701. Where the question of the negligence of a street car company in an action brought by the parents for damages for the death of a child was one for the jury, and they found for the plaintiff, he cannot complain of the charge given, as the error, if any, was harmless.—Sceba v. Manistee Ry. Co., 189 Mich. 308.

¶ 702. The proof of loss stated that one cause of death of the insured was a self-inflicted wound. The court instructed that this admission was an item of evidence to bind the plaintiff, widow of the insured, but did not bind the minor son, who was also a beneficiary. The jury found for the plaintiff. Held, that the instruction, though erroneous, was harmless error, since the jury held that the admission did not prove the suicide of the insured.—Ferris v. Loyal Americans of the Republic, 152 Mich. 314.

¶ 703. The court's omission to limit recovery to cash value of property insured, that being limit of insurer's liability under its charter, in a suit upon an insurance policy, is error without prejudice where value specially found by jury necessitates verdict for insurance and interest.—Russell v. Detroit Mut. Fire Ins. Co., 80 Mich. 407.

¶ 704. Where defendants to an action on a note relied upon the recoupment of damages for an alleged breach of warranty, and there was no evidence to show a warranty, and the jury did not find that there was any, a modification of the defendant's request to charge on the subject of damages was immaterial.—Worth v. McConnell, 42 Mich. 473.

¶ 705. On writ of error by plaintiff in an action of assumpsit for money had and received, it being alleged that, of $1,500 admittedly turned over by plaintiff to defendant for the purchase of a saloon, defendant paid only $1,200 therefor, held that the trial court might properly have directed a verdict for defendant, and, as the jury found for the latter, any errors in the court's charge could not be said to have been prejudicial.—Hauser v. Goebel Brewing Co., 199 Mich. 168.

¶ 706. An erroneous instruction on the burden of proof as to the delivery of a deed by a deceased grantor to the defendant in an action of ejectment does not constitute a miscarriage of justice so as to authorize a reversal of the case under Pub. Acts 1915, No. 89, and Pub Acts 1915, No. 314, where a verdict was rendered for defendant, and, if a verdict had been rendered for plaintiff, it would have been necessary to set it aside as against the great weight of testimony.—Barras v. Barras, 192 Mich. 584.

¶ 707. A judgment will not be reversed on the ground that the charge of the trial court obscured the issue and presented improper theories of recovery, where the issues were simple and were argued to the jury; where both parties refrained from suggesting amendments; and where the verdict was not clearly against the weight of the evidence.—Baxter v. Cowhey, 168 Mich. 144.

¶ 708. Plaintiff having been injured on the evening of December 10, because of the removal of a plank from a sidewalk, of which defect it was not claimed defendant city had notice, the court as requested by defendant should have instructed the jury that if the plank was in place December 8 or 9, verdict should be for defendant; but as the jury, in answer to a special question, found that the plank was not in place on either of the days named, the error was without prejudice.—Germaine v. City of Muskegon, 105 Mich. 218.

¶ 709. An erroneous charge cannot be treated as harmless because of a special finding negativing the contract which was the subject of the charge, where the finding itself may have been influenced by the error. Letts v. Letts, 91 Mich. 596.

¶ 710. Errors in the charge will not be considered, where on plaintiff's own showing a verdict should have been directed for the defendant and the jury arrived at the correct conclusion under the instructions given.—Jensen v. Michigan Cent. R. Co., 102 Mich. 176.

¶ 711. In a suit over a disputed account, plaintiff cannot predicate error on the remarks of the court about certain items where those items are determined in plaintiff's favor.—Harper v. Concrete Pub. Co., 166 Mich. 429.

§ 130. ——By amount of verdict or judgment.

Amount of verdict as indication of harmlessness, see ante § 6.

¶ 712. A jury will not be deemed to have been misled by an instruction open to the construction that it permitted a recovery for loss of earning capacity where, from the

amount of the verdict, it is apparent that such loss of earning capacity was not considered.—Buxton v. Ainsworth, 153 Mich. 315.

¶ 713. A judgment for plaintiff in an action of trespass on the case will not be reversed because of an erroneous instruction allowing exemplary damages, where it is clear from the testimony that the verdict does not exceed plaintiff's actual damages.—Durfee v. Newkirk, 83 Mich. 522.

¶ 714. A widow's damages for loss of support by reason of her husband's death cannot be measured solely by her expectancy of life without considering his life expectancy and his ability to support her during the time he might have lived; but a charge which failed to make this clear to the jury was not deemed prejudicial where the verdict was so small that it was evident that the probabilities of the husband's life must have been considered in fixing the amount.—Brockway, v. Patterson, 72 Mich. 122.

¶ 715. The giving of erroneous instructions permitting a recovery for improper items is harmless error under Pub. Acts 1915, No. 89, where the verdict of the jury is for a sum equaling, if not exceeding, the amount to which plaintiff is entitled.—Montgomery v. Montgomery's Estate, 191 Mich. 398.

¶ 716. An instruction that a farmer was entitled to the usual commission of real estate agents in the vicinity for selling a neighbor's farm, when the measure of damages should have been the reasonable value of his services, is harmless error, where the amount awarded was less than such commission would have been, and the defendant did not offer to show that it was worth less than what the plaintiff claimed.—Morehouse v. Shepard, 183 Mich. 472.

¶ 717. In an action on rescission of a sale of horses the fact that an instruction, after correctly stating the rule as to the defendant's liability, erroneously describes the measure of damages is not prejudicial where the verdict is for the purchase price thus showing rescission found by the jury and the purchase price as the measure of damages.—Housding v. Solomon, 127 Mich. 654.

¶ 718. In an action of trespass where plaintiff was only entitled to the value, with interest, of the article wrongfully converted, an erroneous instruction as to the damages on account of the loss of the use of the article was not considered ground for reversing a judgment amounting to a less sum than competent testimony showed the value to be.—Blaisdell v. Scally, 84 Mich. 149.

¶ 719. Any error in giving an instruction giving the impression that the jury might be governed by sympathy in reaching a verdict, held harmless error in view of the character of the injury and amount of recovery.—Pool v. Township of Montague, 194 Mich. 476.

¶ 720. Erroneous instruction allowing exemplary damages is not ground for reversal where it is clear from the testimony that verdict did not exceed plaintiff's actual damages.—Durfee v. Newkirk, 83 Mich. 522.

¶ 721. In trespass by an electric street railway company against a railroad company for cutting plaintiff's wires, defendant is not prejudiced by the court's mentioning in its instructions the inconvenience that resulted to the public from the cutting and stoppage of car traffic, the jury giving no damages to the public but simply allowing plaintiff's items as claimed.—Saginaw Union Street v. Michigan Cent. R. Co., 91 Mich. 657.

¶ 722. In an action for conversion of corporate stock, an instruction as to the measure of damages was held not error where it led to a recovery no greater than would have followed had the rule been laid down that plaintiff could recover the highest price reached by the stock within reasonable time after he had learned of the conversion, and within which he could go into the market and repurchase it, with interest.—Hubbell v. Blandy, 87 Mich. 209.

¶ 723. Where, in an action for assault and battery, the declaration alleges an assault without cause, provocation, or excuse, and the damages awarded are only a moderate compensation for the injuries suffered, a failure to instruct against the recovery of punitive damages is not reversible error.—Robinson v. Stimer, 154 Mich. 244.

¶ 724. Erroneous instruction for nominal damages held not prejudicial where substantial verdict returned.—Hitchcock v. Supreme Tent of Knights of Maccabees, 107 Mich. 391.

¶ 725. Any error in an instruction allowing interest in addition to the amount claimed in the declaration is harmless where a verdict is rendered for the amount claimed in the declaration.—Miller v. Du Val, 191 Mich. 386.

¶ 726. Any error in the charge of the court in an action on a fire insurance policy was harmless where the amount of the verdict was less than the proofs showed the loss to have been.—Veenstra v. Farmers' Mut. Fire Ins. Co. of Ottawa and Allegan Counties, 195 Mich. 55.

¶ 727. In a suit for injuries by an automobile the trial court instructed that plaintiff was entitled to recover damages for the loss of sense of smell and taste during the rest of her life, where there was evidence of said loss at the time of the trial, but none that said loss would be permanent. Plaintiff recovered only a small verdict, and the testimony clearly indicated that the dam-

ages were not excessive. Held, said instruction, not having resulted in injury to defendant, did not constitute reversible error.—Bouma v. Dubois, 169 Mich. 422.

¶ 728. An erroneous instruction authorizing a verdict for nominal damages is not prejudicial, where a verdict is returned for a substantial amount.—Hitchcock v. Supreme Tent Knights of Maccabees, 107 Mich. 391.

¶ 729. Error in charging that in slander for imputing larceny from defendant's premises the jury should be careful to avoid awarding "excessive" damages, if only a trespass was imputed as the words were understood, which charge might have induced the jury to give some damages where none was allowable, is not ground for reversal; where a charge that the words were actionable per se would have been justified, and where only $60.00 was allowed.—Hinchman v. Knight, 132 Mich. 532.

§ 131. ——By determinative finding independent of the instruction.

¶ 730. Instructions to the jury are rendered immaterial where the jury find that the case does not turn upon the matters discussed.—Marcott v. Marquette, H. & O. R. Co., 49 Mich. 99.

¶ 731. An instruction in an action for false imprisonment against two defendants, that the jury would be limited in its award of exemplary damages to such sum as would constitute a just verdict against the least culpable, is harmless where the jury found in favor of one of the defendants and assessed damages only against the other.—Love v. Halladay, 139 Mich. 575.

¶ 732. Where the jury finds for defendant in an action for damages, the contentions of plaintiff that the court erred in charging the jury respecting the measure of damages will not be considered in this court.—Hammond v. Porter, 150 Mich. 328.

¶ 733. Error in instructions on the liability of defendant for treble damages for cutting timber is harmless where the jury relieved the defendant from liability beyond single damages.—North Michigan Land & Live Stock Co. v. Kneeland, 149 Mich. 495.

¶ 734. An erroneous instruction that is rendered unimportant by jury's finding upon a special question of fact is error without prejudice.—Cook v. Canny, 96 Mich. 398.

¶ 735. A charge erroneously ascribing to an agent the power to extend the liability of the principal on a lease is harmless where the jury found that the alleged act of the agent did not extend it but disclaimed any authority to do so and left the lease in force.—Stevens v. Pantlind, 95 Mich. 145.

¶ 736. If no negligence is found the question of contributory negligence, raised on the instructions, is immaterial.—Scheel v. City of Detroit, 130 Mich. 51.

¶ 737. A defendant in replevin is not prejudiced by an instruction which, as he claims, fixes the value of the property as the measure of plaintiff's damages, where the jury assess no sum as damages.—Guerold v. Holtz, 108 Mich. 118.

¶ 738. Where the jury found the full amount of defendant's claim of set-off, an erroneous instruction allowing a certain deduction from such claim became error without prejudice.—Gutta-Percha & Rubber Mfg. Co. v. Wood, 84 Mich. 452.

¶ 739. An instruction that under an agreement for the purchase of an interest in a patent defendant must pay a certain sum whether the invention is a practical success or not is rendered non-prejudicial by the jury's finding that the invention is such a success.—Cook v. Canny, 96 Mich. 398.

¶ 740. A determination by the jury that the city was not negligent, in an action for injury alleged to have been caused by falling into a hole in a cross-walk, renders it unnecessary to consider assignments of error as to instructions on the measure of damages, contributory negligence and the cause of the injury, since none of such assigned errors could affect the finding that the city was not negligent which was conclusive of the case.—Scheel v. City of Detroit, 130 Mich. 51.

¶ 741. An instruction as to the measure of damages even if erroneous is not prejudicial to the plaintiff where the verdict shows the jury found no cause of action.—Sterling v. City of Detroit, 134 Mich. 22.

¶ 742. Errors in charging as to alleged fraudulent representations on the part of the owner of a farm, in an action for breach of contract of purchase, are harmless, where, the jury find that the representation upon which defendant relied was as a matter of fact true.—Calbeck v. Ford, 140 Mich. 48.

¶ 743. The fact that the instructions authorized the jury to find in favor of the plaintiff notwithstanding that the mortgage under which plaintiff claimed the property was seized was fraudulent is of no importance where the record shows that the jury found specially that the mortgage was not fraudulent.—Curtiss v. Curtiss, 143 Mich. 676.

¶ 744. In trover for property seized to satisfy a tax, the court charged that the defendant was entitled to seize the property if it belonged to the third person whose tax it was taken to satisfy but that if plaintiff was owner at the time of the seizure he was entitled to recover, held that the ver-

dict for the defendant was conclusive against the ownership of plaintiff and that any error in the ruling or charge of the court as to rights of the third person was immaterial, if erroneous, and was of no effect as to plaintiff's rights.—Sutton v. Green, 51 Mich. 118.

¶ 745. In an action to recover on a policy of insurance where it was contended that there was misrepresentation as to the state of the assured's health, and the evidence showed that assured was in good health at the time of signing the application, unless she had heart disease, and the jury found she did not have heart disease, it was harmless error for the court to instruct the jury in substance that if the deceased at the time of making the warranty of sound health, did not know of her unsoundness and answered the question honestly it would not avoid the policy where he also explicitly charged that if the assured was not in sound health, if she had any disease when she made the warranty that affected her general health, it would be a breach of warranty and would avoid the policy.—Perry v. John Hancock Mut. Life Ins. Co., 147 Mich. 645.

§ 132. Refusal or failure to instruct cured by verdict or finding.

¶ 746. Refusal to charge on an issue found by the verdict for appellant is harmless.—Schloss v. Estey, 114 Mich. 429.

¶ 747. Where the court has failed to instruct the jury that the burden of proof is on defendant to prove a set-off, its omission is not prejudicial error when such set-off has not been allowed by the jury.—American Seed Co. v. Cole, 174 Mich. 42.

¶ 748. It is harmless error to have refused to give requested instructions where the jury reached the desired result without hearing them.—Fowles v. Rupert, 143 Mich. 246.

¶ 748a. A refusal to charge a correct abstract proposition is cured by the refusal of the jury to find any fact to which it could relate.—Gallaway v. Burr, 32 Mich. 332.

¶ 749. Where the only instruction as to damages was that if the jury considered the question of damages, they should award plaintiff such an amount as would fairly compensate him for the injuries resulting from the accident, error if any in refusing an instruction that the jury should not include any amount for loss of earning power, because it did not appear that plaintiff's injuries had affected his ability to earn money, is not prejudicial, where the amount awarded by the jury is not an unreasonable compensation for plaintiff's injuries, aside from any loss of earning power.—Clemens v. Gem Fibre Package Co., 153 Mich. 495.

¶ 750. In an action against a city for damage to a foundation to a building caused by a pressure of an embankment, a refusal to instruct that the plaintiff cannot recover for the cost of a new brick foundation is not prejudicial where the court did instruct the jury to consider two elements, the damage to the building and the loss of rents, and the verdict shows that the cost of a new foundation was not taken into consideration.—Abrey v. City of Detroit, 127 Mich. 374.

¶ 751. Refusal to charge in an action under the Civil Damage Act on the question of exemplary damages is harmless where the verdict under proper instructions that plaintiff was entitled to no damages at all has found for defendant.—Johnson v. Johnson, 145 Mich. 586.

¶ 752. In an action for criminal conversation the plaintiff is not prejudiced by a refusal to instruct the jury that collusion could not be inferred from certain facts where the instruction made the whole case turn on the sole question of whether the defendant was guilty of the act of intercourse and the defendant disclaimed any theory of conspiracy, and the jury had found for the plaintiff.—Smith v. Hockenberry, 146 Mich. 7.

¶ 753. Refusal of the court to strike out an item of damage is not prejudicial where the verdict shows that the jury disregarded it.—Commercial Bank of Bay City v. Chatfield, 127 Mich. 407.

¶ 754. Where the jury has found a fact adversely to the plaintiff, a refusal of the trial court to give a requested instruction that plaintiff is entitled to recover if said fact is found in his favor, is harmless error.—Belknap v. Township of Benton, 169 Mich. 58.

¶ 755. In an action for negligent injury, testimony that defendant refused to go with plaintiff to a surgeon after the accident was introduced without objection. Held, that a refusal to instruct the jury that this was immaterial could not be considered prejudicial error where the damages were not excessive and were for the same amount upon two trials of the cause.—Kinney v. Folkerts, 84 Mich. 616.

¶ 756. The refusal of a request that knowledge of facts sufficient to put an ordinarily prudent man on inquiry as to fraud would be sufficient to avoid a sale without active participation in the fraud by the purchaser, is not harmful error where the general charge covered the question and the jury would not have arrived at the verdict which it gave without finding that the sale in question was not fraudulent.—Gordon v. Alexander, 122 Mich. 107.

¶ 757. In a suit to recover against defendant for negligently permitting fire to escape upon plaintiff's premises, the failure of the trial court to instruct fully as to the rule of damages involved is not prejudicial error

where no request for such a charge is made by defendant and where the verdict is many times smaller than the total value given to the property destroyed in the testimony of the plaintiff.—Ripley v. Priest, 169 Mich. 388.

¶ 758. Error in refusing requests on phases of want of probable cause in an action for malicious prosecution is not cured by verdict for defendant after submission of the question of malice, which if found lacking would have disposed of the case, where after charging on advice of counsel as a factor in malice the court so charged on the rights of the prosecuting complainant as to indicate a criminal infraction of right amounting to probable cause. The effect of so charging was that the jury might have found probable cause and no liability, though they also found that the advice of counsel was not made on such a disclosure as to eliminate malice.—Tryon v. Pingree, 112 Mich. 388.

¶ 759. The refusal of an instruction in an action against a township for personal injuries sustained by falling upon a defective bridge, stating that if a large majority of the people of the township who passed over the bridge did not observe any defect, it could not be said that the defect was so apparently visible as to give the township notice of its existence, and the giving of an instruction warranting the jury to find defendant liable for a latent defect, was not harmful even if erroneous, where the jury by answers to special findings found that the defect was visible to persons traveling over the bridge, and was generally known to the township prior to the accident in question.—Pearl v. Township of Benton, 136 Mich. 697.

¶ 760. In an action on a policy providing for nonliability for explosion unless fire ensued and then for the damage by fire only, the question whether the evidence warranted the submission of plaintiff's claim that the building in question fell in consequence of an explosion, did not require discussion, where the verdict was for a proportion of the entire amount and not the proportion of a smaller amount, as it would have been had the jury found that the building fell because of an explosion.—N. & M. Friedman Co. v. Atlas Assur. Co., 133 Mich. 212.

¶ 761. In an action for personal injuries to a passenger on a street car where there was nothing in the record outside of the declaration to indicate that the plaintiff was claiming for a permanent injury, held that though it would have been well for the court to have told the jury that there was no evidence of permanent injury it was not reversible error not to do so, it being apparent that the verdict would not have been less if the charge had been given.—Jozefiak v. Detroit United Ry., 193 Mich. 318.

§ 133. Submission or withdrawal of question cured by finding or verdict.

Submission or withholding of exhibits cured by other things, see post § 134.

¶ 762. It is not error to submit a case to the jury, which finds in favor of plaintiff, where the trial court might have directed a verdict for plaintiff.—Gallant v. Miles, 200 Mich. 532.

¶ 763. In an action for breach of contract it was harmless error in submitting plaintiff's claim to the jury where the verdict was one of no cause of action.—Fowles v. Rupert, 143 Mich. 246.

¶ 764. Where a rule of law is in accord with the finding of a jury the verdict may be allowed to stand even though the question was improperly left to them.—Allen v. Duffie, 43 Mich., 1.

¶ 765. The error of the trial court in submitting contracts to the jury for construction is harmless where the jury construes them rightly and renders a verdict in favor of the party entitled thereto.—Cutler v. Spens, 191 Mich. 603.

¶ 766. In an action against a carrier to recover damages for injury to a car of horses held that the submission of the question of whether a provision in the contract for the verification of the claim for damages was waived to the jury was harmless error where the jury found for the plaintiff and the court could have disposed of the question adversely to defendant on the ground that defendant did not plead plaintiff's failure to give such notice in accordance with the contract.—Slider v. Pere Marquette R. Co., 194 Mich. 581. (Ostrander, J., dissenting.)

¶ 767. In a will contest it is harmless error to submit the question of undue influence to the jury, in the absence of evidence warranting such submission, where the jury makes a special finding of mental incompetency.—In re Thayer's Estate, 188 Mich. 261.

¶ 768. The error of leaving the legal effect of a written instrument to be determined by the jury will not warrant reversal if a proper construction of the instrument in the light of the other facts determined by the verdict must lead to the same result.—Stadden v. Hazzard, 34 Mich. 76.

¶ 769. Leaving to the jury as a disputed fact, the question of compensation for certain extra articles, which plaintiff had conceded to be a proper charge, was not reversible error, where the verdict showed that the item was allowed.—Allington & Curtis Mfg. Co. v. Detroit Reduction Co., 133 Mich. 427.

¶ 770. One cannot complain of action by which he has not been injured; as where a defendant corporation's claim that it cannot be sued for false pretenses has been left to the jury which finds no cause of action. —McEacheran v. Western Transp. & Coal Co., 97 Mich. 479.

¶ 771. Error in submitting to the jury the question of defendant's negligence in the use of water in putting out a fire in a carload of matches when discovered, was harmless, in an action against a carrier for damages to such goods while in transit, it appearing that the fire was caused by the rough handling of the car, and that an excessive amount of water was used in extinguishing such fire, where the jury did not award damages for negligence in such use of the water. —Modern Match Co. v. Baltimore & O. R. Co., 140 Mich. 570.

¶ 772. In an action for damages for alleged illegal sales of intoxicating liquors to an habitual drunkard, it cannot be urged that the question of exemplary damages was erroneously submitted, though the court read the statute providing for such damages to the jury, where no mention was made of exemplary damages in the instructions, and such damages were not allowed.—Spencer v. Johnson, 176 Mich. 278.

¶ 773. In an action on a series of three notes claimed to be in the hands of a bona fide holder, the action of the court in withdrawing the note maturing first from the jury on the ground that it was not transferred until after maturity, if error, cannot be said to be prejudicial where the jury found as to the other two that plaintiff was not a bona fide holder.—Westinghouse Co. v. Gainor, 130 Mich. 398.

§ 134. Submission or withholding of exhibits cured by other thing.

¶ 774. It is not prejudicial error for the court to refuse to allow exhibits to go into the jury room where their contents were plainly produced before the jury upon large sheets of manila paper in heavy writing hung upon a blackboard, so that the jury fully understood them, and one of the attorneys devoted the time allowed him for argument to a discussion of such exhibits.—Silverstone v. London Assurance Corporation, 187 Mich. 333.

§ 135. Failure to direct verdict cured by verdict.

¶ 775. The failure of the court to decide the question of probable cause where the facts were undisputed in an action for damages for false imprisonment, instead of submitting it to the jury, is harmless error where a favorable verdict is returned.—Schneider v. Shepherd, 192 Mich. 82.

¶ 776. A judgment for plaintiff upon verdict directed by the court will not be disturbed on error if his case at least entitled him to go to the jury, and where the only assignment of error relates to the refusal of the court to direct a verdict for defendant.—Michigan Mut. Life Ins. Co. v. Mather, 113 Mich. 357.

¶ 777. Where a plaintiff is entitled to a directed verdict, the errors, if any, contained in the charge of the court, are without prejudice, the jury having found in her favor.—Carver v. Sherman, 172 Mich. 264.

§ 136. Cure of irregularities or misconduct in trial.

Continuances and refusals to continue or adjourn, see post § 137.
Of improper comments or remarks by court, see post § 138.
Of improper admonition to jury after retirement, see post § 139.
Manner, course and conduct of trial in general, see Trial, II.

¶ 778. The conduct of the plaintiff, a woman, in a personal injury action, after she has left the stand and cross-examination has been finished, in screaming in the hall outside the court room, to which she immediately goes upon leaving the stand, so as to attract the attention of the court and jury, and that of the next witness, a trained nurse, in leaving the stand at request of plaintiff's counsel to attend plaintiff, is not ground for reversal because of a miscarriage of justice, where the court carefully instructs the jury to give no attention to anything that happened outside the court room, and the verdict was not excessive.—Goldman v. Detroit United Ry., 200 Mich. 543.

¶ 779. On appeal from a decree properly dismissing a bill for want of jurisdiction, questions of regularity of practice will not avail the appellant.—Attorney General ex rel. Foster v. Lake County Sup'rs, 33 Mich. 289.

¶ 780. If it is clear that a decree is not too large the appellate court will not consider the data and the mode of computation used in the court below.—Chadwick v. Chadwick, 59 Mich. 87.

§ 137. ——Continuances and refusals to continue or adjourn.

¶ 781. The action of the court, in an action by an insurance company to compel a railroad company to reimburse it for the amount paid on fire insurance policies on buildings alleged to have been destroyed by fire originating from one of defendant's engines and due to the failure of defendant to keep the engine and machinery in repair, in refusing to grant an adjournment on the ground of surprise, upon application of defendant, because of an amendment to the declaration so as to allege negligent operation of the engine, is harmless error where

the plaintiff offers no proof of negligent operation, and does not finally claim it.—Michigan Mut. Home Ins. Co. v. Pere Marquette Ry. Co., 193 Mich. 429.

§ 138. ——Of improper comments or remarks by court.

¶ 782. On the record of a trial of an action of trover brought by an administrator against his decedent's father for the value of property alleged to have been wrongfully converted by defendant, it appeared that much bitterness and hard feeling existed between the parties, and during the cross-examination of one of the parties the court remarked. "Now, this is not a very pleasant affair. Taking the thing altogether, it is a shocking affair—an unpleasant affair on both sides." Held, that while this remark was uncalled for, it could not be deemed prejudicial, especially as the court in charging the jury explained that what he said did not indicate that he had any feeling on either side, but merely that it was sad to see such bitterness between relatives, and stated that the controversy was perfectly legitimate.—Ransom v. Bartley, 70 Mich. 379.

¶ 783. In an action for personal injuries improper remarks of the court held to be harmless error where no injury to the defendant was apparent in the verdict, and none was pointed out.—Murphy v. Manistee Ry. Co., 194 Mich. 595.

¶ 784. Interruption by the court of argument of defendant's counsel held not prejudicial where the only question was as to the amount of damages and the verdict was for only $33, in an action to recover damages for illegal arrest and imprisonment.—Larson v. Feeney, 196 Mich. 1.

§ 139. ——Of improper admonition to jury after retirement.

¶ 785. The action of a trial court, after a jury, which had been out thirty-six hours without being able to reach a verdict, announcing that they are unable to agree, in reminding the jury of the cost of trials to the county and sending them back to consider the case again, as the result of which they reached a verdict, held not to constitute a miscarriage of justice under the Judicature Act, Pub. Acts 1915, No. 314, chap. 50, § 28, so as to necessitate a reversal of such case, in view of the size of the verdict.—Snowden v. Detroit & M. Ry. Co., 194 Mich. 87.

¶ 786. The statement of the court after the jury had agreed as to the defendant's liability but not as to the amount of damages to be awarded, that they should compromise their differences if possible, is not reversible error, although the use of the word "compromise" was unfortunate, where the verdict rendered does not seem to have been the result of compromise, or that any attempt was made to induce a change of judgment of the jurors against their judgment.—Richardson v. Detroit & M. Ry. Co., 182 Mich. 206.

§ 140. Argument or misconduct of counsel cured by ruling or instruction.

See also ante ¶ 68.
Misleading or irrelevant argument, see post § 141.
Argument discussing inequalities of parties, see post § 142.
Improper criticism of opposing party, counsel or witness, see post § 143.
Objectionable remarks during examination of witnesses, see post § 144.
Erroneous statement of law or facts, see post § 145.
Argument or misconduct provoked by opposing counsel, see post § 146.
Arguments withdrawn or explained by counsel, see post § 147.
Argument or misconduct of counsel cured by verdict, see post § 148.
Misconduct of counsel harmless in itself, see ante §§ 66-69.

¶ 787. Objectionable argument by counsel is not ground for reversal where the court instructs the jury to give no consideration to it.—Jackson v. Haverford Cycle Co., 194 Mich. 286.

¶ 788. Where an improper statement is made by counsel in his argument to the jury, it is not reversible error where it had been withdrawn and corrected by the court.—Pruner v. Detroit United Ry., 173 Mich. 146.

¶ 789. Improper conduct and remarks of plaintiff's attorney during the trial does not amount to reversible error where the court promptly interfered and reprimanded him, and did not allow him to complete his statement, and in his charge to the jury instructed it to disregard the remarks of the attorney.—Brockmiller v. Industrial Works, 148 Mich. 642.

¶ 790. Argument of counsel not clearly improper, and which, at the time it was made, occasioned a statement by the trial court to the jury that it was improper and that counsel should not have made it, will not be considered on error.—Robbins v. Magoon & Kimball Co., 193 Mich. 200.

¶ 791. Where improper statements, made by counsel in argument before the jury, are immediately corrected and censured by the court, the injurious effect is counteracted.—Township of Deepriver v. Van Antwerp, 174 Mich. 19.

¶ 792. On appeal to the circuit court from a justice of the peace a remark of counsel as to judgment below is not ground for reversal where an objection was sustained by the court before the sentence was completed.—Millspaugh v. Schultz, 180 Mich. 310.

¶ 793. Where the trial court by addressing the jury corrects specifically the improper

argument of plaintiff's counsel and the reviewing court is not convinced that defendant was in any way prejudiced, no reversal can be had.—Rivers v. Bay City Traction & Electric Co., 164 Mich. 696.

¶ 794. Even if the counsel for plaintiff in an action by a switchman against a railroad for personal injuries is guilty of misconduct in referring to the fact that certain persons were fortunate enough to receive their pay from the railroad company, meaning plaintiff's attending physician in particular, such misconduct is not ground for reversal, where the testimony, relating to who had paid plaintiff's medical bill, on which the statement was based, was stricken out by the court and the jury instructed to disregard it.—Sergeant v. Grand Rapids & I. Ry. Co., 198 Mich. 885.

¶ 795. Plaintiff's counsel in an action for libel was allowed, under objection, to read in his opening to the jury various articles which had appeared at different times in the paper that had published the alleged libel, the purpose being to introduce them as tending to show malice. Some of these, being afterward so introduced, were excluded from evidence; others were not offered at all. The judge charged that counsel had, "in his opening, read several articles which at the trial were finally excluded. These should also be withdrawn from your consideration." Held, that the charge was insufficient, as, in saying nothing of the articles which had been read, but not afterward offered in evidence, the jury were left to give them such weight as they chose; and, as extrinsic matters not properly before them, they vitiated the verdict.—Scripps v. Reilly, 35 Mich. 371.

§ 141. ——Misleading or irrelevant argument.

¶ 796. A charge was held insufficient to cure the error of permitting improper matters to be read to the jury by counsel during his opening of the cause.—Scripps v. Reilly, 35 Mich. 371.

¶ 797. An intemperate argument by plaintiff's counsel in an action under the Civil Damage Act, calculated to inflame the jury against the defendant, held cured by the admonition of the court.—Spencer v. Johnson, 185 Mich. 85.

¶ 798. Reversal cannot be had on the ground of remarks of counsel addressed to the court urging the admissibility of a certain line of evidence, where the evidence itself is excluded.—Pelton v. Mayhew, 166 Mich. 546.

¶ 799. Though counsel in opening refers to evidence which was held to be improperly admitted on a former trial, the error is cured where the court warns the jury to disregard such statements.—B. Marx & Son v. King, 177 Mich. 662.

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¶ 800. The error committed in permitting counsel in opening his case to read to the jury publications not afterwards offered in evidence, and not admissible, is not cured by subsequent instructions to the jury to disregard them.—Scripps v. Reilly, 35 Mich. 371.

¶ 801. The improper conduct of counsel for plaintiff, in an action by a tenant against his landlord for damages for obtaining possession after termination of the tenancy, under an unlawful writ, in stating to the jury in his argument that plaintiff must have more than $100 damages, for in case he did not get that much, costs would be charged against him and he would obtain nothing, is not reversible error, where objection was made to the argument at the time, and the court immediately stated that the jury should not consider the argument and should not take into consideration the costs or who were to pay them, and also likewise covered the question in his general charge.—Gallant v. Miles, 200 Mich. 532.

¶ 802. In an action by an employee for personal injuries, a statement by plaintiff's counsel in his opening to the jury that he proposed to prove that defendant did not go near plaintiff after the accident, as bearing on the measure of damages, and a subsequent offer of testimony to that effect, are not error requiring reversal, where the court in both instances promptly held the proposed testimony to be incompetent, and nothing appears to show that counsel did not act in good faith.—Hoffman v. Adams, 106 Mich. 111.

¶ 803. The statement of plaintiff's counsel in his opening address to the jury, that the plaintiff had recovered in justices' court, is not reversible error, where the court instructed the jury that the case must be decided from the proof before them, and that they were not to be governed by what occurred in the lower court.—Crawl v. Dancer, 180 Mich. 607.

¶ 804. Erroneous argument imputing to defendant's medical witness craft and unfairness in taking from the womb of an injured woman a sample of pus, and needlessly examining it under the microscope in order to find out if she had any venereal diseases, and imputing to him a reluctance on the stand to admit that such was his real purpose, such argument being wholly unwarranted by the facts and nothing having occurred to direct attention to those diseases, was held not to have been cured by the court's admonition to the offending counsel and such counsel's request that the jury be charged in accordance with the ruling, and the court's reply that he had said all that he deemed essential.—Remey v. Detroit United Ry., 141 Mich. 116.

¶ 805. The statement of counsel for plaintiff in his argument in a personal injury

case in the form of a question as to whether there was "a gentleman on this jury who would take that for all the money that could be given" was not reversible error, where the court, at the time the statement was made, stated that the argument was improper, and directed the jury to pay no attention to it, and correctly charged them as to the measure of damages.—Goldman v. Detroit United Ry., 200 Mich. 543.

¶ 806. Where plaintiff called defendant as a witness under the statute, held that the action of counsel for plaintiff in his argument in asking the jury what the inference would be due to the failure of counsel for defendant to call defendant to testify on his own behalf was not reversible error where the court stated that there was no obligation on the part of counsel for defendant, after examining defendant when called by plaintiff, to call him again as a witness.—Buell v. Siderman, 197 Mich. 126.

¶ 807. In a suit for personal injuries against the owner of a building for a failure to provide automatic gates at the elevator shaft, plaintiff's counsel stated in his opening that he would prove defendant painted the elevator shaft and provided an automatic gate after the plaintiff's injury. The statement was excepted to and plaintiff's counsel stated that it would not be proper as bearing upon the question of defendant's negligence but would be offered to prove where the legal duty rested. The court excluded the evidence when offered. Held, defendant was not prejudiced by the statement or by the offering of the testimony in view of the subsequent action.—Barfoot v. White Star Line, 170 Mich. 349.

¶ 808. In an action by a street car passenger against a street car company for damages for personal injuries alleged to be due to the negligent starting of the car, after it had come to a full stop, while plaintiff was in the act of alighting, a statement by counsel for the plaintiff that in all his forty years' experience during which he had tried many cases for a certain railroad company he had never known of a single instance where the conductor and brakeman admitted that they had been at fault if an injury occurred because of their negligence, held to be highly prejudicial where there was a sharp conflict in the evidence, especially where the court refused to rule upon the objection at the time, and not to have been cured by the court in his charge to the jury.—Seabury v. Detroit United Ry., 194 Mich. 423.

¶ 809. Where, in a minor's action for an injury inflicted upon him by defendant, plaintiff's counsel, in opening to the jury and in offering testimony, says that the subject-matter of the suit was submitted to arbitration by plaintiff's father and defendant, and that a certain compensation to plaintiff was agreed upon, the exclusion of testimony to such effect, and the court's instruction that the jury must not take the matter into account, must be regarded as preventing the jury's being influenced improperly.—Talmage v. Smith, 101 Mich. 370.

¶ 810. In an action to recover for the services of physicians in attending victims of a wreck on defendant's railroad, the statement of plaintiff's attorney in referring to the wreck, that some one had blundered, did not constitute error, where the court stated that the remark was improper, and counsel who made the remark withdrew it and asked the jury not to consider it.—McKnight v. Detroit & M. Ry. Co., 135 Mich. 307.

¶ 811. An improper statement of counsel for plaintiff in his opening argument to the jury, in an action against a city for injuries to a traveler from a defective street, that he could not show to the jury the scene of the accident, as such defective street had been closed since the time of the accident and had been filled in at the defective place, was not ground for a new trial, where the court reprimanded such counsel by saying that he should not state anything to the jury he considered incompetent to prove, and where, opposing counsel, although objecting to such improper statement, made no request for further instructions.—Warn v. City of Flint, 140 Mich. 573.

¶ 812. A judgment against a street-railway company for injuries received while alighting from a car will not be reversed because of a statement by plaintiff's counsel in his closing argument, that, as to defendant's conduct of its business, one would break his wagon in going across a certain street at any place, where the court at once rebuked counsel for making the statement.—Tunnicliffe v. Bay Cities Consol. R. Co., 107 Mich. 261.

¶ 813. For counsel for plaintiff, in an action to recover from a hotel keeper for valuables stolen while a guest, to remark to the jury that they know that if a robbery is committed in a house, nine times out of ten the person who did it is a servant or agent in the house is uncalled for and improper, but is not reversible error where there was testimony indicating the culpability of the servants.—Kerlin v. Swart, 143 Mich. 228.

§ 142. ——Argument discussing inequalities of parties.

¶ 814. A statement by defendant's counsel that "defendant is a poor man, and he has been obliged to mortgage his home, all the property he has in the world to pay for this piano," is error, where the action is replevin for the piano sold reserving title and paid for to one with no authority, but not ground for a reversal, where the court sharply rebuked counsel for his conduct, and instructed the jury to disregard the statement.—Warren v. Halley, 107 Mich. 120.

¶ 815. In a suit for lumber sold and delivered, plaintiff's counsel in his argument to the jury stated that the case was one of the many where lumber corporations delay payment in order to compel jobbers to settle at their own terms. Exception was taken to this remark, and plaintiff's counsel asked the jury to disregard it. Plaintiff stated at another point that his client was not asking aid because he was hard up and poor. The court in his charge referred to some of these prejudicial remarks, and directed that all such statements should be disregarded. Held, the improper remarks of plaintiff's counsel did not constitute reversible error.—Person v. J. H. Worden Lumber & Shingle Co., 160 Mich. 1.

¶ 816. In a suit against defendant saloon keeper and his bondsman for the death of plaintiff's husband from intoxication, an assignment of error merely alleged that the plaintiff's counsel in his argument to the jury spoke of a "bond of a $500,000 corporation," giving nothing more of the context. Plaintiff's counsel also asked the jury to deal with the widow as they would have their daughters or wives dealt by. The court immediately corrected the latter statement and in his charge told the jury to disregard the former one. Held, these remarks did not constitute reversible error.—Merrill v. Tinkler, 160 Mich. 575.

¶ 817. Where counsel for plaintiff in his closing argument remarks that defendant can spare the amount of a judgment better than the plaintiff can, the remark is improper, but is cured by a charge of the court coming immediately afterwards which rebukes counsel, and directs the jury to disregard the remark.—Beauerle v. Michigan Cent. R. Co., 152 Mich. 345.

¶ 818. Error on the part of counsel for plaintiff in a personal injury action in his argument in referring to plaintiff as a man who had hewn his way out of a forest and stating that he would give him more consideration than a man born with a silver spoon in his mouth, who had perhaps a college education, is cured when the court instructs the jury to disregard such argument. —Kasprzak v. Chapman, 197 Mich. 552.

¶ 819. In an action against a railway company for personal injuries it is improper for counsel to urge the jury not to defeat the honest claim of a poor man by a corporation which will resort to lies and perjury to maintain their case, and to censure defendant for making a motion to take the case from the jury, and where such improper argument is persisted in against the admonition of the court, the mischief is not cured though the court admonished counsel and stated that defendant had a perfect right to make the motion.—Hillman v. Detroit United Ry., 137 Mich. 184.

¶ 820. For counsel in a personal injury case against a city to draw the attention of the jury to the contrast between the financial situation of the parties is objectionable but cannot be considered reversible error where the court counteracted it by a charge that the parties must be regarded as upon an equal footing.—Davis v. City of Adrian, 147 Mich. 300.

§ 143. ——Improper criticism of opposing party, counsel or witness.

¶ 821. The fact that on the trial, plaintiff's counsel called defendant a liar, does not constitute a good cause for reversal where it appears that counsel was reprimanded, and specific remedial instructions were given the jury.—Muncie Wheel & Jobbing Co. v. Finch, 150 Mich. 274.

¶ 822. Reversal will not be had for improper remarks about opposing counsel made in argument, where a rebuke was administered by the court and where the record contains only detached statements, leaving it impossible for the reviewing court to determine whether such remarks were provoked or were on the whole prejudicial.—In re Du Bois' Estate, 164 Mich. 8.

¶ 823. A remark of counsel that considering the smallness of the amount involved on an appeal from justices' court, the plaintiff's counsel was consuming too much time, held not prejudicial, where the court admonished the jury to disregard such remark.—Brown v. Mitts, 187 Mich. 469.

¶ 824. In an action for malicious prosecution, where defendant upon being asked how many acres were in a farm which was being testified about and which he had owned for many years, stated that he did not know, disparaging comments by plaintiff's attorney upon such want of knowledge of his own farm were not harmful, where defendant subsequently explained that he could not remember accurately the number of acres, because it bordered on a lake and was fractional.—Gould v. Gregory, 133 Mich. 382.

¶ 825. In a breach of promise suit, plaintiff's counsel in his argument to the jury referred to his client as a poor woman, and to the defendant as a villain, a cur, and a libertine. There was no evidence of these imputations. Held, the language constituted error, despite the fact that the court sustained objections thereto, and asked the jury not to consider it.—Spencer v. Simmons, 160 Mich. 292.

¶ 826. The fact that plaintiff's counsel, in his closing argument, improperly criticised the witnesses for the defendant, does not require a reversal, where the court stated in his charge that the defense made was legitimate, and that there was no occasion for the criticism.—Phippen v. Bay Cities Consol. R. Co., 110 Mich. 351.

§ 144. ——Objectionable remarks during examination of witnesses.

¶ 827. A statement of counsel to a witness that he must have rehearsed his testimony held not reversible error where immediately ordered stricken out by the court, though counsel making it was not rebuked as requested by opposing counsel.—Collin v. Kittelberger, 193 Mich. 133.

¶ 828. Remarks of counsel characterizing the witnesses as cattle were held not prejudicial in the light of a rebuke retraction and remedial remarks by the court and associated counsel.—Leslie v. Jackson & Suburban Traction Co., 134 Mich. 518.

¶ 829. The supreme court declined to reverse a judgment because of objectionable remarks of counsel, made in the course of the examination of witnesses and the argument to the jury, where the trial court promptly informed counsel that the remarks were improper and should not have been made.—Ford v. Cheever, 113 Mich. 440.

¶ 830. Improper language or aspersion used by counsel in cross-examination is not ground for reversal where upon objection counsel was reprimanded and the jury instructed not to consider the objectionable language.—Grenier v. Hild, 124 Mich. 222.

¶ 831. A judgment will not be reversed for offers of testimony by counsel and remarks in his argument, where the testimony was promptly ruled out and the improper argument was stopped and counsel reprimanded. —Hume v. Mason & Hoge Co., 122 Mich. 346.

¶ 832. The fact that counsel, in offering incompetent testimony, makes highly improper statements of his purpose is not ground for a reversal, where the testimony is promptly excluded, and it appears improbable that the jury were prejudiced by the remarks.—Provost v. Brueck, 110 Mich. 136.

§ 145. ——Erroneous statements of law or facts.

¶ 833. Where plaintiff's counsel in a personal injury suit makes erroneous statements to the jury on points of law, reversible error is not committed where the court promptly corrects the same.—Reese v. Detroit United Ry., 159 Mich. 600.

¶ 834. On action by an employee under Act No. 104, § 2, Public Acts 1909, providing that contributory negligence of an injured employee of a common carrier railroad does not bar recovery where the negligence of the employee was less than that of the company, against a carrier to recover for an injury received while he was in a cinder pit because of the alleged moving of an engine without ringing the bell, alleged improper remarks of counsel tending to inflame the jury against a railroad company and in stating that the plaintiff's negligence did not bar recovery unless grosser than that of the company, will not reverse where the remarks were withdrawn on objection and the jury was charged that if the plaintiff's negligence was equal to or greater than that of the company, its officers, agents or employees, he cannot recover.—Bruce v. Michigan Cent. R. Co., 172 Mich. 441.

¶ 835. Misconduct of plaintiff's attorney in making improper use, as an admission of liability, of a notice given by the defendant to the mail agent to the effect that his negligence in throwing a mail bag caused the action against the defendant and he would be held responsible and tendering him control of the suit, will not reverse where the court in its charge took pains to remove any false impression from the minds of the jury. —Shaw v. Chicago & Grand Trunk R. Co., 123 Mich. 629.

¶ 836. Any error in an erroneous argument to the jury that the expert witness for the defense, in an action for injuries sustained by an employee from the explosion of a boiler, had never seen a boiler, was cured by the admonition of the court that the jury would remember what the facts were.— Eberts v. Mt. Clemens Sugar Co., 182 Mich. 449.

¶ 837. A statement by plaintiff's counsel, in his argument to the jury in an action for negligence, that "we know that the accident occurred, from defendant's own agent," although not warranted by the testimony, is not prejudicial error where the fact of the occurrence of the accident is not disputed.—Harris v. Detroit City R. Co., 76 Mich. 227.

¶ 838. In an action for slander in which it is shown that the plaintiff was conducting business in his wife's name, remarks by counsel in argument that the plaintiff is prevented from recovering on account of a technicality, etc., if erroneous, are cured by an instruction that there can be no recovery for injury to the business when the verdict shows affirmatively that no damage was given for such injury.—Savlan v. Ayer, 129 Mich. 545.

§ 146. ——Argument or misconduct provoked by opposing counsel.

Invited error in misconduct of counsel, see post § 149.

¶ 839. Remarks of counsel provoked by opposing counsel held not to justify a reversal in the light of explicit instructions by the court.—Hammond v. Pullman, 129 Mich. 567.

¶ 840. Argument of counsel in an action for personal injuries urging the jury not to reduce the amount of their verdict in order to keep defendant from appealing, will not be held reversible error where the trial court

called attention to the impropriety of such argument, and it appeared that the jury were properly instructed and heeded the instructions.—Quirk v. Rapid Ry., 137 Mich. 493.

¶ 841. In an action for personal injury the remark of counsel in argument to the jury that "you, gentlemen of the jury stand between this plaintiff and the poorhouse" is improper but not reversible error where the defendant's argument may be said to have encouraged such remarks and the jury is instructed to disregard them.—Leach v. Detroit Elec. Ry., 125 Mich. 373.

¶ 842. Argument of counsel based on matters outside the record, while reprehensible, is not sufficient ground for reversal where at least in part provoked by opposing counsel and where the court told counsel of its impropriety whereupon the remarks were withdrawn.—Wheeler v. Jenison, 120 Mich. 422.

¶ 843. Improper conduct and argument by counsel cannot be complained of by opposing counsel who was equally at fault in the same particulars, where the court rebuked both during the trial and instructed the jury not to consider the prejudicial statements.—Brown v. Evans, 149 Mich. 429.

¶ 844. Action of counsel in accusing witness of falsifying about a material fact held cured by the action of the court in rebuking counsel, particularly where the accusation was brought upon the witness by his own conduct.—Grimme v. General Council of Fraternal Aid Ass'n, 167 Mich. 240.

¶ 845. Improper argument to the jury which is to a degree elicited by the irritating manner of opposing counsel, which is immediately corrected by the trial judge, and later referred to in his charge, and upon which the opposing counsel requests no particular instruction, does not constitute reversible error.—O'Connor v. City of Detroit, 160 Mich. 198.

§ 147. Arguments withdrawn or explained by counsel.

¶ 846. A judgment will not be reversed because of the remarks of the counsel in argument to the jury, where they are not of such a nature as to be prejudicial, and where the counsel has made an honest attempt to correct any wrong impressions which his remarks might have made.—Groat v. Detroit United Ry., 153 Mich. 165.

¶ 847. In an action for labor done and material furnished an unwarranted remark of plaintiff's counsel, in his argument to the jury, "he sends to the slums down here and gets his bond," having been immediately withdrawn, and the record failing to show in what connection it was made, it was held not ground for reversal.—Evans v. Montgomery, 95 Mich. 497.

§ 148. Argument or misconduct of counsel cured by verdict.

¶ 848. Any error in the argument of counsel for plaintiff in an action on a fire insurance policy held harmless where the amount of the verdict was less than the proofs showed the loss to have been.—Veenstra v. Farmers' Mut. Fire Ins. Co. of Ottawa and Allegan Counties, 195 Mich. 55.

¶ 849. Improper remarks in the argument of counsel in regard to the testimony of one opposing witness and usurping the function of the trial judge in stating the law of the case, held not prejudicial in the light of immediate rebuke and correction by the trial judge, a very lucid, clear and full statement of the law by him and a verdict showing that the jury followed the directions of the court.—Glasier v. City of Ypsilanti, 127 Mich. 674.

¶ 850. The plaintiff's counsel, in an action for personal injuries, may not, in his argument to the jury, make reference to the amount of damages allowed in another action; but the reference is not ground for reversal where the amount of the verdict indicates that the jury was not influenced by it.—Finn v. City of Adrian, 93 Mich. 504.

¶ 851. The fact that after counsel has made an erroneous argument as to the elements of damages and the court has corrected him, he continues in such a way as to intensify rather than to abate any prejudice which his former argument had created, will not require a reversal where the verdict does not appear from the evidence to be excessive.—Bates v. Kitchel, 166 Mich. 695.

¶ 852. The conduct of counsel in making an improper argument to the jury in an action for damages for personal injuries is not reversible error where the jury is cautioned by the trial court, and the verdict is not excessive.—Rogers v. Ford, 188 Mich. 62.

¶ 853. Misconduct of plaintiff's counsel in making intemperate and ill-chosen remarks in the argument, and failure of the court to interfere will not reverse where plaintiff was clearly entitled to recover and the only question was the amount of damages and these were not large as determined by the verdict.—Chamberlain v. Lake Shore & M. S. R. Co., 122 Mich. 477.

§ 149. Invited error.

Argument or misconduct provoked by opposing counsel, see ante § 146.

Necessity of raising question in lower court, see Saving Questions, I.

¶ 854. Remarks of the trial judge cannot be urged as error where they are in confirmation of statements made by complaining counsel.—Huff v. Cole's Estate, 127 Mich. 351.

¶ 855. Plaintiff in error cannot complain of an instruction given in language substantially like an instruction requested by himself and given.—Alberts v. Village of Vernon, 96 Mich. 549.

¶ 856. Error cannot be assigned on a charge that is given as desired, or on a detached portion of a charge, the error in which is specifically corrected by an instruction subsequently given substantially as asked.—Dresser v. Blair, 28 Mich. 501.

¶ 857. A party cannot complain of a part of a charge that is identical with an instruction requested by him.—Silsby v. Michigan Car Co., 95 Mich. 204.

¶ 858. An instruction that, if defendant was negligent in any of the particulars charged in the declaration, plaintiff should recover, cannot be complained of where defendant has submitted requests upon that theory which have been given.—Needham v. King, 95 Mich. 303.

¶ 859. Appellant cannot complain of an instruction which is in accordance with his contention.—Mt. Clemens Sugar Co. v. Grand Trunk Ry. Co., 200 Mich. 33.

¶ 860. Where an instruction asked for was given with a modification containing an element of error, the request containing precisely the same error, the court did not reverse the judgment on an exception to the modification made by the party who had asked the charge, it being unlikely that it could have misled the jury.—Continental Ins. Co. v. Horton, 28 Mich. 173.

¶ 861. It is not reversible error for the trial court in bastardy proceedings to submit to the jury the question of the residence of the child without explaining the facts that they should first find to constitute such residence and the law in relation thereto, where the defendant presents no request to the court to instruct the jury as to the essential elements of residence.—People v. Oppenheimer, 170 Mich. 595.

¶ 862. A plaintiff in ejectment, claiming under an assignee in bankruptcy, gave such proofs of title as he chose. Defendant, claiming as bona fide purchaser by a later deed from the alleged bankrupt, and also as a holder of tax-titles, proved his purchase and his occupancy in good faith. Before attempting to show that the tax-titles were invalid, plaintiff requested the court to pass upon his own proofs of title, and the court instructed the jury that he had made no case. Held, bad practice to pass on plaintiff's case by itself after defendant's proofs were in, but as plaintiff had asked the court to do so he could not complain.—Wisner v. Herring, 49 Mich. 626.

¶ 863. In an action by the receiver of a bankrupt estate to recover the value of goods sold by the bankrupts to defendant, held that argument of counsel for the plaintiff that the bankrupts were indicted evidently for the purpose of endeavoring to dispose of their stock to defraud creditors and, referring to the sale, whether, if a "man came to your house in this mysterious way, having said nothing about it prior to that time" it would not call for an investigation of his financial circumstances, was not reversible error, where the evidence as to the indictment got into the case by concession of counsel and the evidence was contradictory as to what was said when the goods were sold.—Buell v. Siderman, 197 Mich. 126.

D. IN VERDICT OR FINDINGS, AND JUDGMENT OR DECREE.

§ 150. In general.

Errors in assessment of damages, see post § 151.

Invited findings, see post § 152.

Errors in verdict or judgment harmless in themselves or harmless to objector, see ante II, D.

Instructions, argument or trial practice cured by verdict or judgment, see ante III, C.

Failure of proof cured by verdict or findings, see ante § 119.

Erroneous admission of evidence cured by verdict, finding or judgment, see ante §§ 99-101.

¶ 864. A special finding of the jury contrary to undisputed testimony becomes immaterial where the charge makes the liability of defendant turn on a question independent of the answer found, and the verdict follows the charge.—Botsford v. Plummer, 67 Mich. 264.

¶ 865. If the judge fails to make a finding of facts, but the record shows that no possible finding could have been of service to the plaintiff in error, judgment will not be reversed.—Slocomb v. Thatcher, 20 Mich. 52.

¶ 866. A party to a case tried by a judge without a jury is not damnified by the rulings of the judge upon separate questions of law if the findings of fact do not entitle the party to relief.—Kane v. Stowe, 50 Mich. 317.

¶ 867. Where, upon a trial by the court without a jury, judgment has passed for defendant, and it appears from the facts found that plaintiff was not entitled to recover, the reasons stated by the court for its conclusions become immaterial.—Botsford v. Simmons, 32 Mich. 352.

¶ 868. Where a special finding has been filed in a trial before the court without a jury, error in the reasons assigned, among the conclusions of law, for giving judgment for defendants, will not warrant a reversal

of the judgment when the facts found are not sufficient to support a judgment for the plaintiff.—Hamblin v. Warner, 30 Mich. 95.

§ 151. Errors in assessment of damages.

¶ 869. Technical errors in the assessment of damages are cured after judgment by the statute of amendments, Comp. L. 1871, ch. 190 (How. St. § 7635).—Whittemore v. Stephens, 48 Mich. 573.

§ 152. Invited findings.

Necessity of raising question in lower court, see Saving Questions, I.

¶ 870. Plaintiff invested money in a "business" which he did not at the time know to be incorporated. He sued to recover the money on the ground of having been fraudulently induced to invest it. The defendants, in making their defense, testified and claimed throughout the trial that the plaintiff bought an interest in the corporation. Held, they could not complain that the jury believed them, although he did not in fact know there was a corporation, it being known to all as a "business."—Massey v. Luce, 158 Mich. 128.

E. IN SUBSEQUENT MOTIONS AND PROCEEDINGS.

§ 153. In general.

Errors, defects and objections invalidating execution sales, see Executions, VII, F.

Errors constituting ground for vacation or relief from judgment, see Judgments, V.

Defects and errors sufficient to make judgment collaterally assailable, see Judgments, VII.

F. REMISSION OF EXCESS OR DISCLAIMER TO CURE ERROR ON TRIAL.

§ 154. In general.

Remission upon application for new trial, see post § 155.

Cure by affirmance on conditions, see post V.

Remission of part of recovery to avoid reversal, see Appeal § 485.

Exclusion of items from judgment on labor claim as removing objection going to such item, see also Corporations ¶ 1264.

¶ 871. Where a count under Comp. Laws 1897, § 5254, How. St., 2nd Ed., § 6699, for the statutory penalty for failure to announce a station, submitted to the jury in connection with a common-law count for damages caused by the exposure of a passenger to the elements as the result of carrying her past her destination, the remission of the statutory penalty on a motion by the defendant for a new trial, cures any error.—Duffiny v. Detroit & Mackinac Ry. Co., 186 Mich. 40.

¶ 872. Plaintiff sued as administrator for the death of his child, twenty-seven months of age, under the Survival Act, Comp. L. 1897, § 10117, and recovered a verdict of $3,850. Motion for new trial was denied upon plaintiff's consent to remit $850. Under section 7220, Comp. Laws 1897, a mortality table giving no expectancy of life for any age under ten years was introduced to show the probability of life on the part of the child after reaching twenty-one years of age. The trial court recognized the error in admitting said table and attempted to cure same by ordering the remission of $850 from the verdict. Held, said error was not cured by said reduction of the verdict since in making said reduction the trial court was invading the province of the jury.—Morse v. Detroit, G. H. & M. Ry. Co., 168 Mich. 99.

¶ 873. In an action for negligent injury under the Survival Act, Comp. L. 1897, § 10117, it is harmless error to introduce evidence that the deceased had a family in view of a disclaimer of damages upon that ground and a very careful charge by the court.—Olivier v. Houghton County St. Ry. Co., 138 Mich. 242.

¶ 874. Error in submitting to jury count for statutory penalty with common-law count, held cured by remission of judgment for the penalty.—Duffiny v. Detroit & Mackinac Ry. Co., 186 Mich. 40.

¶ 875. Failure to instruct the jury that in case they found for plaintiff in an action on an insurance policy they should deduct the amount tendered into court, is harmless and the credit may be given on appeal.—Thompson v. Loyal Protective Ass'n, 167 Mich. 81.

¶ 876. In an action upon a promissory note defendant was not allowed to prove a part payment of the note because it was not contained in his bill of particulars of set-off. Held, that this error was not cured by permitting plaintiff, after recovering judgment, to remit the amount of such payment from the judgment; for defendant had, in effect, been denied the right of proving any payment without notice, and it could not be said what other payments might have been excluded by this ruling.—Olcott v. Hanson, 12 Mich. 452.

§ 155. Remission upon application for new trial.

See also ante ¶ 871.

Sufficiency of error to warrant granting of new trial, see New Trial, II.

Mode and sufficiency of objections on motion for new trial, see Saving Questions, II, B.

¶ 877. The admission in an action of assault and battery of evidence as to the number and age of plaintiff's children is not reversible error, where it could have no

bearing except upon the measure of damages and the trial judge, upon an application for a new trial required a reduction in the amount of the judgment.—Gungrich v. Anderson, 189 Mich. 144.

IV. WANT OF OBJECTION OR EXCEPTION, WAIVER AND INSUFFICIENCY OF RECORD TO SHOW ERROR.

§ 156. In general.

Necessity of raising question in lower court, see Saving Questions, I.
Waiver of objections and exceptions after taking, see Saving Questions, V.
Necessity and sufficiency of a ruling, see Saving Questions, III.
Restriction of record on appeal to questions saved, see Appeal, XII, B.
Who entitled to urge errors on appeal, see Appeal, XI, D.
Requisites and sufficiency of record on appeal to show errors, see Appeal, XI.
Necessity and sufficiency of exceptions, see Saving Questions, IV.
Mode and sufficiency of objection, see Saving Questions, II.
Saving questions for review in condemnation proceedings, see Eminent Domain §§ 126-128.
Presumption that timely amendment or proof would have been supplied on due objection, see Appeal §§ 353-360.
Presumption as to harm from accepting or rejecting juror, see Appeal § 357.
Presumption as to prejudice or harmlessness of error, see Appeal §§ 353-360.

§ 157. Errors which might have been corrected if challenged.

¶ 878. Defendant in error cannot urge in support of a verdict and an order denying a new trial that certain evidence essential to plaintiff's case was ineffectual, after obtaining a directed verdict on a specific ground which passed over such objection, which might have been met if seasonably made.—Wineman v. Fisher, 135 Mich. 604.

V. CURE BY AFFIRMANCE ON CONDITIONS.

§ 158. In general.

Affirmance on condition, see Appeal §§ 483-485.
Consent to correction to secure affirmance, see Appeal § 484.
Modification or correction of judgment on appeal, see Appeal §§ 520-528.
Cure by remission or disclaimer of excess, see ante III, F.

HAWKING to HEAD OF FAMILY.

Cross-References.

Hawking and Peddling—
Licenses as interstate commerce regulations, see Commerce § 9.
Hay—
As an emblement, see cross-references under Crops; Emblements.
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In insurance, see Insurance.
Taking risks or assumption of risk, see Negligence, IV; Master and Servant, III; and other topics treating of negligence.
Business risk as consideration for interest beyond legal rate, see Usury.
Head of Family—
Within homestead and exemption laws, see Exemptions; Homesteads.

HEALTH.

TREATS of laws relating to public health and sanitation.

Analysis.

§ 1. Public health and sanitary regulations.
§ 2. Penalties for violation.
§ 3. Actions for penalties.
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§ 8. Infirmaries and pesthouses.
§ 9. Destruction and abatement of unwholesome conditions.
§ 10. Compensation for destruction or loss.
§ 11. Liability for services or expense.
§ 12. ——Claims for services rendered to board of health.
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§ 14. Record and statement of claim.
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§ 18. Remedy on claim by action or appeal.

Institutions for care of the sick, see Asylums and Hospitals.
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§ 1. Public health and sanitary regulations.

Penalties and penal actions, see post §§ 2, 3.
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Regulations affecting commerce, see Commerce.
Detention of person by quarantine as false imprisonment, see False Imprisonment § 18.
Certificates of birth or death as part of public statistics, see Census and Statistics.
Animal health and quarantine, see Animals §§ 21, 22.
General provisions of statute relative to public health, see Comp. L. 1915, chaps. 94-96.
Powers of councils of fourth class cities, see Comp. L. 1915, § 3038 et seq.
Powers of villages, see Comp. L. 1915, §§ 2640, 2686 et seq.
Quarantine and detention of infected or exposed persons, see Comp. L. 1915, § 5055 et seq., § 5067 et seq.
Offenses against public health, see Comp. L. 1915, § 15123 et seq.

¶ 1. The legislature may confer large discretionary powers on boards and commissions charged with the protection of the public health.—City of Detroit v. Village of Highland Park, 186 Mich. 166. (Equally divided court.)

¶ 2. A rule of the state board of health which does not make it a prerequisite to the inspection authorized by Laws 1893, Act No. 47, amendatory of Laws 1885, Act No. 230, that the baggage in course of transportation comes from a locality where the dangerous, communicable disease exists, as ascertained either by the board or inspector, is broader than the statute, and cannot be sustained.—Hurst v. Warner, 102 Mich. 238.

§ 2. Penalties for violation.

Actions for penalties, see post § 3.

¶ 3. Comp. L. 1897, § 4453, requiring physicians to report cases of diseases which are dangerous to public health, includes cases of consumption if such disease is in fact dangerous to public health.—People v. Shurly, 131 Mich. 177.

¶ 4. A delay of eight days by a physician in reporting a case of diphtheria to the proper health officer is unreasonable.—People v. Brady, 90 Mich. 459.

§ 3. Actions for penalties.

Judicial knowledge of communicableness of diseases, see Evidence § 2, ¶ 14.
General law relative to penal actions, see Penalties and Forfeitures.
Indictments or informations and procedure thereon, see Indictment.

¶ 5. An action in justice's court against a physician to recover the penalty imposed by How. St. § 1676, for neglecting to notify the health officer of dangerous diseases, etc., is properly brought by the prosecuting attorney "on behalf of the people."—People v. Brady, 90 Mich. 459.

¶ 6. In a prosecution for failure of a physician to report a case of consumption it is error to permit an inquiry as to whether patients afflicted with consumption would be likely to give their consent to having their cases reported, since this opened up a question having no bearing upon the issues being tried.—People v. Shurly, 131 Mich. 177.

¶ 7. In a prosecution for failure of a physician to report a case of consumption, it is error to instruct the jury that the statute generally prohibits a physician from disclosing any information acquired while attending a patient, since such statute could furnish no defense in such prosecution.—People v. Shurly, 131 Mich. 177.

¶ 8. Where in a prosecution under Comp. L. 1897, § 4453, which requires physicians to report cases of diseases dangerous to public health, for failing to report a case of consumption, the jury found that consumption is a disease dangerous to public health, it was error to submit to the jury whether such disease should be classified with smallpox, scarlet fever, cholera, etc., since if the disease is contagious and dangerous to public health, the law classifies it and requires that it be reported.—People v. Shurly, 131 Mich. 177.

¶ 9. In a prosecution for failure to report a case of consumption, it is misleading to instruct the jury that a verdict for the people meant that the statute had been "enlarged" to include consumption, since if the latter is a disease dangerous to public health, it is within the statute as enacted by the legislature.—People v. Shurly, 131 Mich. 177.

¶ 10. In a prosecution against a physician for failing to give notice to the public

health officer of a case of consumption under Comp. L. 1897, § 4453, requiring the giving of notice in cases of enumerated diseases or "any other disease dangerous to the public health," the question whether consumption was a disease dangerous to public health was to be determined by the evidence and should have been submitted to the jury.—People v. Shurly, 124 Mich. 645.

¶ 11. The existence of diphtheria is sufficiently shown in a prosecution to recover the statutory penalty imposed upon physicians for failing to report its existence by the physician's admission that certain children he was attending had diphtheria, and the testimony of the fathers of the children to such attendance, and that defendant, as well as the witnesses, who described the disease as attacking the throat, pronounced it diphtheria.—People v. Brady, 90 Mich. 459.

§ 4. Health boards and officers.

Particular powers and duties, see post §§ 5-9.
Employment of member as physician, see post § 6.
Participation by member in settling claim in which he is interested, see post § 16.
Mode of election or choice of commissioners, see also Constitutional Law § 265.
Health board as party to suit to enforce rights in cemetery held in trust for township, see Cemeteries ¶ 6.
Statutory officers and their duties and powers, see Comp. L. 1915, chaps. 94-96.

¶ 12. The Health Board of the City of Detroit is a state agency.—Detroit Civil Service Commission v. Engle, 184 Mich. 269.

¶ 13. Since the Board of Health of Detroit is a state agency, the control thereof was not conferred on the city by sections 21 and 22 of art. VIII of the Constitution of 1909, so as to bring its employees within the civil service laws of the city.—Detroit Civil Service Commission v. Engle, 184 Mich. 269.

¶ 14. Laws 1895, Act No. 10, entitled "An act to establish a board of health for the city of Detroit," is not open to the objection that it fails to provide for the means of carrying out its requirements, or for any revenue for the board, since, under section 3 of the act, the board is to prepare annual estimates of its expenditures, and file the same with the city controller, and when such sums "are raised as provided in this act," they are to be appropriated by the board. Under the charter of the city (Local Acts 1887, No. 488, chap. 8, § 1), in the light of which said section 3 must be construed, the controller is to report such estimates to the common council, to go, subject to revision and alteration by that body, into the budget for that year.—Davock v. Moore, 105 Mich. 120.

¶ 15. Where a city charter provides for a board of health, the provisions of Comp. L. 1871, §§ 1702, 1740, How. St. §§ 1643, 1681, as to destruction of nuisances by the township board of health, and as to who shall constitute the board in a city, do not apply.—Shepard v. People, 40 Mich. 487.

¶ 16. Township boards of health have large discretionary powers, the exercise of which will not be interfered with until a clear case is made out. It must be intended until the contrary is shown that they are acting in good faith and in the line of their duty.—Upjohn v. Richland Tp. Board of Health, 46 Mich. 542.

¶ 17. Any action of the board of health of a city is not affected by a change of personnel of its members.—Dawe v. Board of Health of City of Monroe, 146 Mich. 316.

§ 5. Clerks and subordinate employees.

Civil service system, see ante ¶ 13.
Employment of physicians and nurses, see post § 6.

¶ 18. The Detroit charter of 1893, § 382, gave to the local board of health exclusive power to appoint clerks for the health office, and to prescribe their duties and determine their compensation. The regular hours of work in such office, as fixed by the health commissioner, were from 8 a. m. to 4 p. m. Relator, who was accustomed to work after 4 o'clock and into the evening, was told by the commissioner that he should be paid for his extra services. At the expiration of his term of employment, he sought to compel the board of health to make such payment. Held, that the board was not bound by the action of the commissioner.—Goodson v. Detroit Board of Health, 114 Mich. 345.

§ 6. Employment of physicians and nurses.

Liability for services, see post § 11 et seq.
Power of board to employ and charge county, city or township, see post § 12.
Keeping record and statement of claims incurred, see post § 14.
Making and approval of contracts, see post § 15.
Necessity of performance of physician's contract with board in person, see also Contracts ¶ 907.

¶ 19. Whether a township board of health can employ one of its own members as physician and fix conclusively the salary to be paid him by the county, quære.—Farnsworth v. Kalkaska County Sup'rs, 56 Mich. 640.

¶ 20. By the employment of the word "nurses" in Comp. L. 1897, § 4424 as amended by Pub. Acts 1903, No. 7, requiring the employment of nurses and providing other assistance to persons quarantined with dangerous communicable diseases, is not meant that more than one nurse must be employed in every case, but the board of health is given a discretion as to number and occasion.—Rohn v. Osmun, 143 Mich. 68.

¶ 21. The duty of providing nurses and assistance, imposed upon the board of health, to persons quarantined with dangerous and communicable diseases as prescribed by Comp. L. 1897, § 4424 as amended by Pub. Acts 1903, No. 7, is a quasi judicial power, and the neglect of such duty does not entitle a party injured by negligent action in the matter to an action, so long as the officer is acting within his jurisdiction, and is not guilty of an invasion of private rights, and is not acting from corrupt motives.—Rohn v. Osmun, 143 Mich. 68.

§ 7. Medical treatment at public charge.

Liability for failure to provide treatment, see ante § 6.

Liability for services supplied or expense incurred, see post § 11 et seq.

Treatment for rabies, see Comp. L. 1915, § 5122.

Public care and support of poor persons, see Poor Persons.

§ 8. Infirmaries and pesthouses.

Statutory provisions as to hospitals and pesthouses, see Comp. L. 1915, § 5075 et seq.

¶ 22. Under the charter of the city of Detroit, § 178, providing that the council shall have power to provide for the preservation of the general health of the inhabitants of the city, to make regulations to secure the same, to prevent the introduction or spread of contagious or infectious disease, and suppress disease generally, and to establish a board of health and prescribe its duties, the city had power to authorize the board of health to hire a steamboat for use as a quarantine station for a rental of $5,000 for two years and to agree to keep it insured for the benefit of the lessor, and such power was not limited by section 240, providing that no contract shall be let or entered into for the construction of any public work to be done, or for the purchase or furnishing of supplies for the city, and no such public work, performance, purchasing or supplying shall be commenced until approved by the council, and until the contract therefor has been duly approved and confirmed by the council, and section 241, providing that no contract for the purchase or furnishing of any material, printing or supplies, if the purchase of such material or supplies shall exceed $200 shall be let or entered into except to and with the lowest bidder with adequate security.—City of Detroit v. Grummond, 216 Fed. 273.

§ 9. Destruction and abatement of unwholesome conditions.

Compensation of owners, see post § 10.

Judicial notice of tendency of organic matter to decay and emit noisome odors, see Evidence § 8, ¶ 20.

Abatement of nuisances in general, see Nuisances.

Powers and duties of local health officers, see Comp. L. 1915, § 5048 et seq.

¶ 23. Proceedings of a board of health to abate a ditch as a nuisance are ineffective where the record contains no action upon a petition to the board other than a motion directing that notice to abate the nuisance created by the drain be served, which notice was never served on one of the owners.—Chase v. Middleton, 123 Mich. 647.

¶ 24. The State Board of Health has power under Act No. 98, Pub. Acts 1913, to make an order which is enforceable by a court of chancery, requiring the abatement of a nuisance by compelling the enlargement of an inadequate sewer maintained by the City of Detroit, into which the Village of Highland Park is entitled to cast its sewage.—City of Detroit v. Village of Highland Park, 186 Mich. 166. (Equally divided court.)

¶ 25. An order made by the State Board of Health requiring the abatement of a nuisance consisting of an inadequate sewer of the City of Detroit, into which the Village of Highland Park was entitled to cast sewage, held properly enforced by a court of chancery after a full hearing, by requiring the city to enlarge the sewer.—City of Detroit v. Village of Highland Park, 186 Mich. 166. (Equally divided court.)

§ 10. Compensation for destruction or loss.

Liability for cost of articles to replace those destroyed, see post ¶ 44.

General law of condemnation and appropriation of property for public use and right to compensation for property, see Eminent Domain.

Liability of city for rental of house as pesthouse obtained by trick on part of health officer, see also Eminent Domain, ¶ 125.

Damages for loss of animals destroyed to prevent spread of rabies, see Comp. L. 1915, § 5114 et seq.

¶ 26. Local Acts of 1893, No. 403, prescribing the powers and duties of the board of health of the city of Detroit, provides: "In case of pestilence or epidemic disease, it shall be the duty of the board of health to take such measures, and to do and order and cause to be done such acts, for the preservation of the public health, as they may in good faith deem the public safety and health to demand." Held, that it was the duty of the board to award compensation for damages directly arising from its action in using a hotel for a hospital during an epidemic of smallpox among the inmates, and in causing the destruction of infected property.—Safford v. Detroit Board of Health, 110 Mich. 81.

¶ 27. A city board of health is not compelled to allow compensation for losses of rent and cost of renovation and chattels destroyed occasioned by the quarantining and disinfecting of premises wherein smallpox has broken out, if the only use made of the premises was such as was necessary for the

proper care of the patients who were found there suffering from the disease.—Webb v. Detroit Board of Health, 116 Mich. 516.

¶ 28. If the officers of a city board of health are so negligent in the matter of disinfecting property as to cause unnecessary damage, they as individuals, and not the city, are liable if any liability attaches.—Webb v. Detroit Board of Health, 116 Mich. 516.

¶ 29. A city is not liable for the negligence of its board of health whereby one who had been exposed to smallpox was allowed to go without being placed in quarantine, and so was received into a boarding-house occasioning loss and damage to the proprietor.—Gilboy v. City of Detroit, 115 Mich. 121.

Liability of city or county for negligent acts of health officers, see note 11 N. C. C. A. 406-413.

§ 11. Liability for services or expense.

See also ante ¶ 14.
Stating and recording claim, see post § 14.
Presentment and audit of claim, see post § 16.
Proper remedy or procedure to enforce and collect, see post § 18.

¶ 30. When the board of health of a township necessarily incurs expenses in providing for the protection of its inhabitants against a sickness dangerous to the public health by the removal of persons infected to a building provided for them, such expenses are a charge against the county which it is the duty of the board of supervisors to allow. People ex rel. Bristow v. Macomb County Supervisors, 3 Mich. 475.

¶ 31. The charter of Flint (L. 1867, Act No. 372, § 19), requires the common council to take measures for the preservation of the public health. Pub. L. 1879, Act No. 145, (How. St. § 1681), makes the council the board of health where no other board is appointed. Held, that a nurse employed by the council to care for smallpox patients was entitled to compensation primarily from the city, even where the patient was of sufficient ability to pay for the service himself; and Comp. L. § 1706 (How. St. § 1647), making the cost of services rendered to such persons an individual liability, does not exempt the city from the immediate liability, if, indeed, it applies at all in cases of public emergency.—Rae v. City of Flint, 51 Mich. 526.

¶ 32. The authority of a township board of health, under How. St. § 1647, to guard against smallpox, extends to making contracts for the nursing of patients and to destroying infected clothing. And when it has allowed the accounts for such services rendered and property destroyed, the board of supervisors must pass such accounts; they cannot refuse on the ground that the patients were themselves able to pay, or that sundry taxpayers considered the charges extortionate.—Elliott v. Kalkaska Sup'rs, 58 Mich. 452.

¶ 33. Where a health officer has been called in consultation by another physician to determine whether the patient is infected with a disease dangerous to the public health and renders his services as health officer under Comp. L. 1897, § 4460 and not section 4424, he is, therefore, entitled to compensation from the city or village under section 4462 and not from the county under section 4424.—Browne v. Board of Supervisors of Livingston County, 126 Mich. 276.

¶ 34. Under Comp. L. 1897, § 4424 providing that expenses incurred by boards of health in segregating and caring for persons infected with any disease dangerous to the public health, may be recovered from the proper county, a village cannot recover an amount paid to its health officer as a donation in excess of the charges presented by him for his services.—Village of Durand v. Shiawassee County Sup'rs, 132 Mich. 448.

¶ 35. Under Comp. L. 1897, §§ 4460, 4462, making it the duty of a health officer to disinfect rooms, clothing, and premises likely to be infected, and entitling him to receive from the township, city or village of which he is an officer, compensation at not less than two dollars per day, services rendered by a health officer in disinfecting and fumigating houses in which persons having contagious and communicable diseases had been confined are ordinary services required of the officer, and covered by the salary paid such officer by the city, and he is not entitled to compensation therefor from the county, as provided for in certain cases by Comp. L. 1897, § 4424.—Tabor v. Board Sup'rs Berrien Co., 156 Mich. 176.

§ 12. ——Claims for services rendered to board of health.

Liability as between several counties or townships, see post § 13.
Liability of county for services to local board by physician under annual contract, see post ¶ 54.
Presentment and audit of claims, see post § 16.
Conclusiveness of amount allowed by health board, see also post § 17.

¶ 36. Where the obligation of a board of supervisors to allow a claim for removing an infected person, or for medical attendance upon a sick person, depends upon the person's inability to pay, such inability is a question of fact to be passed upon by the board.—People ex rel. Bristow v. Macomb County Sup'rs, 3 Mich. 475; Farnsworth v. Kalkaska County Sup'rs, 56 Mich. 640.

¶ 37. The board of health of a township has power, and it is its duty, during the

prevalence of a contagious disease, if necessary, to employ a physician, and the township is primarily liable in the premises, and such physician is not bound to look anywhere else for payment, his contract being with the township.—Wilkinson v. Township of Long Rapids, 74 Mich. 63.

¶ 38. Within reasonable bounds at least, the health officers' conclusion that a disease is communicable, and a menace to public health, must be conclusive on the county in the matter of allowance of claims for expenses incurred in the treatment of such diseases.—Township of Cedar Creek v. Wexford County Sup'rs, 135 Mich. 124.

¶ 39. The services of a person employed by the board of health as a quarantine guard to prevent the spread of a contagious disease, are a proper claim against the board of supervisors, under Pub. Acts 1903, No. 7, since such services are usual and absolutely necessary in such cases.—Bishop v. Ottawa County Sup'rs, 140 Mich. 177.

¶ 40. A board of supervisors has no authority to disallow part of a physician's charges as allowed and certified by a township board of health, for services rendered under the direction of the latter board in the time of an epidemic, upon the ground that some of the patients were financially able to pay for such services.—McKillop v. Cheboygan County Sup'rs, 116 Mich. 614.

¶ 41. A physician employed by the agent of a township board of health to treat scarlet fever patients, under a resolution of the board authorizing such agent to quarantine the patients until the danger of communicating the infection had passed, and during such time to provide for their wants, is entitled to recover from the township the reasonable value of his services rendered under such employment.—Wilkinson v. Township of Long Rapids, 74 Mich. 63.

¶ 42. A county is liable for extraordinary services performed by a village health officer, under arrangement with the local board of health, in suppressing an epidemic of smallpox, the persons afflicted being in indigent circumstances, under How. St. §§ 1647, 1648, 1681, making it the duty of boards of health, in case of infectious disease, to provide for the safety of the inhabitants by isolating the infected person, and providing assistance and necessaries, "at the charge of the person himself * * * if able, otherwise at the charge of the county," although the statute (sections 1681b, 1681d), prescribing the duties of the local health officer in such cases, provides that he shal be entitled to compensation from the village of which he is officer.—Village of St. Johns v. Clinton County Sup'rs, 111 Mich. 609.

¶ 42a. A claim for nurse hire and supplies furnished to persons ill with infectious disease, at the direction of a village health board and allowed by such board, was properly presented to the board of county supervisors under Comp. L. 1897, § 4424, as an original claim against the county, and it was the duty of such supervisors to pay the bills, the same having concededly been reasonable and contracted in good faith, and they could not defend on the ground that the afflicted persons were residents of other counties.—Zimmerman v. Cheboygan Co. Sup'rs, 133 Mich. 494.

¶ 43. A druggist furnishing to a city board of health formaldehyde for fumigating and disinfecting residences where indigent persons infected with smallpox had lived, may recover the amount of his claim therefor from the county, under 2 Comp. L. 1897, § 4424.—Baar v. Board Sup'rs Ottawa Co., 151 Mich. 505.

¶ 44. One who furnishes indigent persons articles of furniture to take the place of furniture which has been destroyed by order of a city board of health, in order to prevent the spread of disease, cannot enforce a claim for such furniture against the county, under 2 Comp. L. 1897, § 4424.—Baar v. Board Sup'rs Ottawa Co., 151 Mich. 505.

¶ 45. A county's liability to a physician for services rendered during an epidemic under direction of the board of health includes services for patients who were financially able to pay for treatment.—McKillop v. Cheboygan County Sup'rs, 116 Mich. 614.

§ 13. ——As between several counties or townships.

¶ 46. A board of supervisors to whom claims for nurse hire and supplies furnished to persons ill with infectious disease, allowed by a village board under Comp. L. 1897, § 4424 had been properly presented, were required to pay the claims, and they had the right thereafter to pursue the claims against any other county they deemed liable therefor, by reason of such persons having been residents of such other county.—Zimmerman v. Cheboygan Co. Sup'rs, 133 Mich. 494.

¶ 47. One county may maintain an action in assumpsit against another county for the expenses incurred in caring for an indigent smallpox patient under Comp. L. 1897, § 4424 making such an expense a charge upon the county where he belongs where neither he nor other persons liable for his support can pay, without presenting its claims for audit to the board of supervisors of the other county as required by Const. art. 10, § 10 inasmuch as the county rendering the care is in the first place liable for the services rendered and the payment therefor was not a voluntary one.—Arenac County Sup'rs v. Iosco County Sup'rs, 144 Mich. 52.

¶ 48. Where a local board of health of one county supplies relief and care to a patient while in that county, who is a resident of

another county, the allowance of the account by the board of supervisors of the former county does not create any legal liability on the part of the latter county.—Board Sup'rs Arenac Co. v. Board Sup'rs Iosco Co., 158 Mich. 344.

¶ 49. Under 2 Comp. L. 1897, § 4424, where the local board of health of a county allows an account for relief furnished, the decision is binding upon the board of supervisors of both that county and the county in which the patient resides, as respects the character of the disease, the necessity for relief, and the services rendered.—Board Sup'rs Arenac Co. v. Board Sup'rs Iosco Co., 158 Mich. 344.

§ 14. Record and statement of claim.

Mandamus to compel certification of claim to auditing officers, see post ¶ 73.

¶ 50. The proviso to Comp. L. 1897, § 4424 added by Pub. Acts 1895, No. 97, which requires that the statement of expenses incurred by boards of health in caring for persons sick with smallpox or other diseases dangerous to the public health, and presented to the board of supervisors of the proper county, shall be itemized, is mandatory.—Village of Durand v. Shiawassee County Sup'rs, 132 Mich. 448.

¶ 51. The proviso to Comp. L. 1897, § 4424, requiring township boards of health to keep and present an itemized statement of articles and services furnished to each person taken in charge pursuant to such act, was met when the board in question had before them and allowed such itemized accounts and rendered such an account.—Township of Cedar Creek v. Wexford Co. Sup'rs, 135 Mich. 124.

¶ 52. The requirement that the local health board shall keep and render an itemized and separate statement of expenses incurred in caring for each person, sick with a contagious disease (Pub. Acts 1895, No. 97), was sufficiently met, where, it appeared that such board had before them an itemized account, and certified thereto, and the question of whether or not such board kept a book for such records is immaterial.—Township of Cedar Creek v. Board of Sup'rs of Wexford Co., 135 Mich. 124; Bishop v. Ottawa County Sup'rs, 140 Mich. 177.

§ 15. Contract or approval of employment or contract.

¶ 53. The fact that the board of health of a village, during an epidemic of smallpox, employed one of its members, the local health officer, to render extraordinary services, and fixed the compensation therefor, does not preclude the village from recovering from the county the sum so paid, if the officer took no part in fixing such compensation, and it was reasonable in amount.—Village of St. John v. Clinton County Sup'rs, 111 Mich. 609.

¶ 54. A board of county supervisors which made a year's contract with a physician for care and treatment of all indigent persons within the county afflicted with diseases dangerous to public health, was not separately liable to such physician for services performed at the direction of a village health board to persons afflicted with an infectious disease, although such health board allowed the bill as a claim against the county.—Zimmerman v. Cheboygan Co. Sup'rs, 133 Mich. 494.

¶ 55. The allowance to the health officer of a township, for attendance upon patients and consultations with other physicians was sustained where, although no express direction to perform such services was given by the board of health, they knew that the services were being rendered and appeared to have acquiesced, and where they afterwards allowed the bill.—Township of Cedar Creek v. Wexford Co. Sup'rs, 135 Mich. 124.

¶ 56. On authority of Township of Cedar Creek v. Gladwin County Sup'rs, 135 Mich. 124, county supervisors were required to pay claims for medical services rendered by a physician in cases of infectious disease, where the original hiring was made informally and not by formal action of the board of health, but where itemized bills were presented and allowed at regular and formal meetings of such board.—Pierce v. Gladwin Co. Sup'rs, 136 Mich. 428.

¶ 57. Where a physician informs a county supervisor that he has been treating a poor person but will not continue to do so unless he is to receive pay from the county, and said supervisor tells him that if he will go ahead and treat said person said supervisor will present his bill to the board of supervisors, there is sufficient evidence to support a finding of a legal contract between the county and said physician.—Chapman v. Board Sup'rs Muskegon Co., 169 Mich. 10.

¶ 58. A physician cannot recover for services rendered to indigent persons prior to the date of the agreement made by him with the supervisors for the rendering of services to said persons.—Chapman v. Board Sup'rs Muskegon Co., 169 Mich. 10.

¶ 59. In a suit against a county for services rendered by a physician to an alleged indigent person, the question of the pecuniary ability of the patient is not controlling where there has been a legal employment of said physician by the county.—Chapman v. Board Sup'rs Muskegon Co., 169 Mich. 10.

¶ 60. Where a plaintiff physician makes a contract with the board of supervisors to render professional services to indigent persons, and employs another physician to do the actual attendance, plaintiff may recover

for medicines furnished by him, though the same were administered to the patient by said other physician.—Chapman v. Board Sup'rs Muskegon Co., 169 Mich. 10.

§ 16. Allowance and audit of claim.

Power of board to charge county or township, see ante § 12.
Statement and record of claim, see ante § 14.
Matters concluded by audit, see post § 17.
Disallowance in part, see also ante ¶ 40.
Audits of claims in general, see Counties, VI; Municipal Corporations, XIV; Townships, VI.
Audit of claims by county board and allowance of claims audited by other boards and made a county charge, see Counties §§ 44, 45.
Right to hearing before county board empowered to determine reasonableness of claims, see Counties § 46.

¶ 61. A claimant for services rendered by order of the local board of health, under Pub. Acts 1903, No. 7, may present his claim to the board of supervisors direct, and it is not necessary that the municipality shall first make payment of such claim and then present it to the supervisors as a county charge before mandamus proceedings to compel the supervisors to audit and allow such claim. Bishop v. Ottawa County Sup'rs, 140 Mich. 177.

¶ 62. The effect of Pub. Acts 1903, No. 7, amending Comp. L. 1897, § 4424 providing that the boards of supervisors shall audit claims for services in cases of contagious diseases is not to substitute the judgment of the board for that of the board of health as to whether in a given case a person had a dangerous communicable disease. Where the board of health has acted and has filed the statement with the county clerk as provided by statute the board of supervisors must proceed to audit the bill.—Thomas v. Ingham County Sup'rs, 144 Mich. 319.

¶ 63. Where a doctor's itemized statement of services rendered during an epidemic of contagious diseases was placed before the board of supervisors and certified to by the local board of health it is the duty of the board of supervisors to proceed to audit the account, under Pub. Acts 1903, No. 7, providing for the auditing of bills incurred by the public in cases of infectious diseases, and requiring the board of health to file such bills with the county clerk, notwithstanding the fact that on the bill being referred back to the board of health because of a defective certificate (no certificate being in terms required by the statute) the board having changed in personnel then denied that the services had been rendered at their request.—Dawe v. Board of Health of City of Monroe, 146 Mich. 316.

¶ 64. Under Local Acts 1903, Act No. 540, § 7, providing that no bills against Saginaw county shall be audited or allowed in any other manner than by the board of auditors of such county, an order drawn by the superintendent of the poor, required auditing by such board, notwithstanding Comp. L. § 4506, subd. 7, authorizing such superintendents to draw on the county treasurer for necessary expenses.—Morrison v. Kent, 135 Mich. 38.

¶ 65. Under the charter of the City of Saginaw, Local Acts 1889, No. 455, giving the council power to create a board of health and to appoint the proper officers, and under an ordinance of that city establishing a board of health and health officers and giving the board such powers as township boards have under How. St. chap. 39, the board of health is the proper body to determine the correctness of a physician's bill for services and the city council cannot reduce that amount and escape liability for the balance by showing the receipt and acceptance by the physician of a smaller amount in full payment; such acceptance is without consideration.—Pease v. Common Council of Saginaw, 126 Mich. 436.

¶ 66. Pub. Acts 1895, Act No. 10, created a new board of health for the City of Detroit, and provided that the existing board should turn all of its assets over to the new one, which should assume and pay all lawful claims outstanding against the old board. Each board was empowered to appoint all of its employees, and to fix their compensation, which was to be paid them upon vouchers drawn by the board. Held, that the power so conferred included the authority to pass upon all claims for compensation; and that, where the claim of an employee of the old board had been allowed at a certain amount by the new, the common council had no power to review such action, and increase the amount of the award.—Schneider v. Blades, 108 Mich. 3.

¶ 67. An allowance to the health officer of a township, for attendance upon patients and consultations with other physicians, was sustained, although the inference was that such claimant may have participated in its allowance by the health board, there being nothing to rebut an approval by the others.—Township of Cedar Creek v. Wexford Co. Sup'rs, 135 Mich. 124.

§ 17. ——Matters concluded by audit and allowance.

Effect of allowance to bind county or township or city answerable over to paying city or county, see ante ¶ 49.
Duty to audit claims as presented, see ante § 16.
Matters open to consideration on audit, see ante § 16.

¶ 68. When a physician has presented a bill to a county for services rendered to indigent persons, his bill has been audited, and he has received without protest the

amount allowed thereon, he is estopped to claim the balance as services rendered under Comp. L. 1897, § 4424, relating to contagious diseases.—Browne v. Board of Supervisors of Livingston County, 126 Mich. 276.

¶ 69. Acceptance of part of the compensation fixed by a board of health, which had power thereto, does not estop the recipient, a physician who treated contagious diseases, from recovering the balance of the whole sum allowed from the city, its council having attempted to require a remission of part by fixing a lesser sum which was the sum accepted.—Pease v. City of Saginaw, 126 Mich. 436.

¶ 70. The question of the ability of a patient infected with disease taken in charge by a township health board, to pay, is foreclosed by the allowance by the township board.—Township of Cedar Creek v. Wexford Co. Sup'rs, 135 Mich. 124.

¶ 71. The allowance by a township board of health, of claims for expenses incurred in the treatment of contagious diseases, under Comp. L. 1897, chap. 108, § 4424, was final and binding on the board of supervisors as to the character of the disease, the necessity and the fitness of the articles and services furnished and rendered, as well as the fact that they were furnished.—Township of Cedar Creek v. Wexford Co. Sup'rs, 135 Mich. 124.

§ 18. Remedy on claim by action or appeal.

Actions against governmental subdivisions, see generally Counties; Municipal Corporations; Townships.
Proceedings reviewable in certiorari, see Certiorari § 17.
Certiorari to review action of auditing bodies, see Certiorari § 21.

¶ 72. By Pub. Acts 1903, No. 7 and No. 101, the power to audit, allow, and pay claims for services rendered in caring for the sick under the direction of the board of health of a village is taken away from the board of health, and conferred upon the board of supervisors, which alone is liable for such services; and an action of assumpsit no longer lies against a village to recover for such services alleged to have been performed.—Sawyer v. Village of Manton, 145 Mich. 272.

¶ 73. Mandamus will lie to compel a village board of health properly to certify a claim to the board of supervisors for services performed under its direction, and assumpsit is not proper against such village; where on a claim for services performed nursing contagious cases under the direction of the health officer, such board of health fails or refuses to furnish to the board of supervisors such certified claim.—Sawyer v. Village of Manton, 145 Mich. 272.

¶ 74. Under Const. 1908, art. 8, § 9, and Act. No. 58, Pub. Acts of 1909, § 2, a physician may appeal to the circuit court from a decision of the board of supervisors denying his claim for professional services rendered to indigent persons of the county prior to the year 1908.—Chapman v. Board Sup'rs Muskegon Co., 169 Mich. 10.

HEARING to HIGHWAY ROBBERY.

Cross-References.

Hearing—
On appeal, see Appeal, XII, A.
On certiorari, see Certiorari § 44 et seq.
In equity, see Equity.
In law cases generally, see Trial.
Essential of due process, see Constitutional Law §§ 128-132.
Hearsay—
See Evidence, VII; Indictment, VIII, B.
Heating—
Duty and rights under leases and tenancies, see Landlord and Tenant, IV.
Heating Fixtures—
See Fixtures; Landlord and Tenant, IV, E.
Heat of Passion—
See Homicide.
Heavy Loads or Vehicles—
As element in liability for injuries on highways or bridges, see Highways, XII; Bridges, III.
Duty towards other users of street, see Highways, XIII.
Regulative powers over street uses, see Highways, IX, XI; Municipal Corporations, IX.
Overloading floors as negligence, see Buildings; Master and Servant, III; Negligence.
Heirs—
See generally Descent.
Interpretation of word as used in deed or will, see Deeds, III; Wills, VI.
Distribution and adjustment of rights in administration, see Estates of Decedents, XII, XIII.
Hereditaments—
Inheritable rights, see Descent; Real Property.
Incorporeal hereditaments, see Real Property; Easements.
High Schools—
See Schools.
High Seas—
Great lakes as waters within admiralty and federal jurisdiction, see Admiralty § 1; Courts, V, A; Indictment, III.
High Water Mark—
As boundary on lake or stream, see Boundaries §§ 13, 20.
Rights of riparian owners, see Waters, IV; Navigable Waters, II.
Highway Robbery—
See Crimes § 126; Indictment.

HIGHWAYS AND STREETS.

TREATS of the general law of highways, streets and alleys, of motor vehicle laws and regulations, and of the statutory establishment of so-called private roads. The matters comprised are detailed in the analysis which follows and the matters excluded are particularly shown by cross-references which follow the analysis and by those throughout the body of the topic.

I. GENERAL NATURE, REQUISITES, KINDS, AND EXISTENCE (§§ 1-6).
II. LOCATION AND ESTABLISHMENT (§§ 7-97).
III. ROUTE, BOUNDARIES AND TERMINI; SURVEYS AND RECORDS (§§ 98-104).
IV. CONSTRUCTION, IMPROVEMENT AND REPAIRS (§§ 105-114).
V. ALTERATIONS, EXTENSIONS, GRADES AND CHANGES OF GRADE (§§ 115-124).
VI. ABANDONMENT, VACATION AND DIMINUTION (§§ 125-139).
VII. HIGHWAY OFFICERS AND DISTRICTS (§§ 140-145).
VIII. COSTS AND EXPENSES, FUNDS AND TAXES (§§ 146-153).
IX. PUBLIC CONTROL AND REGULATION (§§ 154-155).
X. TITLE AND ESTATE OF THE PUBLIC; PERMISSIBLE USES AND RIGHTS OF ABUTTERS (§§ 156-167).
XI. OBSTRUCTIONS, ENCROACHMENTS AND UNAUTHORIZED USES AND INJURIES TO HIGHWAY OR ITS APPURTENANCES (§§ 168-196).
XII. DEFECTIVE AND DANGEROUS WAYS AND SURROUNDINGS (§§ 197-363).
XIII. RIGHT TO USE WAY AND LAW OF THE ROAD (§§ 364-410).
XIV. MOTOR VEHICLE REGULATIONS, RIGHTS AND DUTIES (§§ 411-413).
XV. PRIVATE ROADS AND FOOTWAYS (§§ 414-421).

Analysis.

I. General nature, requisites, kinds, and existence.

§ 1. Nature and kinds of ways.
§ 2. State roads.
§ 3. Requisites of highways.
§ 4. Nature and status of alleys.
§ 5. Evidence as to character and existence of way.
§ 6. Law and fact questions as to nature of way.

II. Location and establishment.

A. By Dedication or Prescription and User.

§ 7. In general.
§ 8. Dedication or recognition by conveyance.
§ 9. Necessity and sufficiency of acceptance by public.
§ 10. Establishment by user and prescription.
§ 11. Character and sufficiency of public use.
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§ 13. ——User of varying or shifting way.
§ 14. ——Use under temporary or permissive license.
§ 15. ——User of private roads.
§ 16. ——Knowledge of servient owner.
§ 17. Interruption or interference to cut off prescription.
§ 18. Delay, laches and estoppel.
§ 19. Estoppel of public by taxation or other recognition of private right.
§ 20. Burden of proof, presumptions and evidence.
§ 21. ——As to dedication or prescription.
§ 22. Questions of law and fact.

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§ 23. In general.
§ 24. Necessity for jury or special commissioners.

§ 25. Joinder and misjoinder of proceedings.
§ 26. Roads affecting more than one township.
§ 27. Power and jurisdiction of highway commissioners.
§ 28. ——Over lands in railroad or other public use or navigable waters.
§ 29. Application or petition.
§ 30. Notice of hearing, persons to be served, service and posting.
§ 31. ——Affidavit, return and proof of service.

2. Hearings, laying out, estimates and appraisements.

§ 32. Hearings and adjournments.
§ 33. Scope of hearing and issues.
§ 34. Order laying out road or denying it.
§ 35. ——Implication as to bridges and necessary adjuncts.
§ 36. Estimates and appraisements and measure of compensation.
§ 37. ——Damages for crossing railroads.
§ 38. ——Interest on damages appraised.
§ 39. Return and record of hearing, view and appraisement.
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3. Payment of awards and completion of proceedings.

§ 41. In general; right and necessity.
§ 42. Orders for payment.
§ 43. Estoppel by acceptance of award.

4. Appeals, injunctions and judicial review.

§ 44. In general; right of review and remedies.
§ 45. Appeals to township board.
§ 46. ——Disqualification of members and substitutions.
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§ 48. ——Decision on appeal, record, conclusiveness, and effect.
§ 49. ——Objections and defects barred or cured by appeal.
§ 50. Appeals from township board to circuit court, and trials therein.
§ 51. Review on writ of error to circuit court.
§ 52. Certiorari or mandamus to review proceedings.
§ 53. ——From supreme court.
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§ 57. ——Petition for certiorari, writ and service.
§ 58. ——Parties relator and respondent.
§ 59. ——Return to certiorari.
§ 60. ——Scope of review in general and form of relief granted.
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§ 62. In general; nature and form of proceedings.
§ 63. Strictness of procedure.
§ 64. Necessity and measure of compensation and persons entitled.
§ 65. Public uses and necessity or propriety of street.
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§ 67. Property or quantum of estate necessary or subject to appropriation.
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§ 69. Previous effort to purchase or obtain consents.
§ 70. Maps and surveys.
§ 71. Proper and necessary parties.
§ 72. Petition for condemnation.
§ 73. Summons or notice of proceedings.
§ 74. ——Service of notice or process.
§ 75. ——Service by publication.
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§ 77. Necessity for jury.
§ 78. Character of jury and qualifications of jurors.
§ 79. Venire and return thereto.
§ 80. Functions of jury and questions triable.
§ 81. Oath of jurors.
§ 82. Procedure on hearing.
§ 83. ——Argument and assistance of counsel.
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§ 85. Instructions and special questions.
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§ 89. Abandonment or discontinuance of proceedings.
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§ 92. Procedure for appeal.
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§ 107. Duty and necessity of construction.
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§ 109. ——Highway bridges.
§ 110. ——Joint roads and bridges.
§ 111. Liability for diversion of surface waters.
§ 112. Petition and proceedings for work or repairs.
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§ 115. Alterations and changes in location.
§ 116. Alterations in plan or structure.
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§ 121. Damages for separation of crossing grades.
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§ 124. Judicial review of or relief from alteration proceedings.

VI. Abandonment, vacation and diminution.

§ 125. In general; powers of officers and municipalities.
§ 126. Release of public rights.
§ 127. Ground, purpose and occasion for vacation.
§ 128. Vacation upon conditions.
§ 129. Abandonment and nonuser or adverse possession.
§ 130. Proceedings for discontinuance or vacation.
§ 131. ——Notices and service or publication and proof of same.
§ 132. ——Order or findings, return, and record of vacation.
§ 133. Condemnation and payment of damages.
§ 134. Landowners entitled to object.
§ 135. Estoppel, waiver and cure of defects in vacation.
§ 136. Vacation by judicial proceedings.
§ 137. Judicial review of or relief from vacation proceedings.
§ 138. Reversion or inurement to abutters.
§ 139. Re-establishment of vacated or abandoned way.

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§ 140. In general; authority, powers and duties.
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§ 142. Control over state roads.
§ 143. Contract by or with boards and officers.
§ 144. Torts by officers and official misfeasance.
§ 145. City and village powers.

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§ 152. Payments and disbursements.
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§ 158. Injuries and damages from added uses.
§ 159. Common rights other than travel.
§ 160. Abutters' rights in general.
§ 161. Rights of access; walks and driveways.
§ 162. Rights in cul de sac or disconnected way.
§ 163. Rights in soil of way or growing products.
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§ 165. Sidewalks and appurtenances built by abutter.
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§ 175. Processions and street assemblages.
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§ 179. Interference with highway ditch or drain.
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§ 182. Prescription, estoppel and acquiescence.
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§ 184. Removal of fences.
§ 185. Actions and suits to remove encroachments or open way.
§ 186. Ejectment against encroacher or incloser.
§ 187. Summary and statutory proceedings to remove.
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§ 193. Penalties and penal actions.
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§ 196. Liability and remedy for obstruction of access.

XII. Defective and dangerous ways and surroundings.

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§ 198. Municipal charter provisions.
§ 199. Extent of duty and care in general.
§ 200. Liability for failure to construct.
§ 201. Defective plan and manner of construction.
§ 202. ——Of culverts and bridges.

§ 203. Duty to inspect and keep in repair.
§ 204. ——Sidewalks and footways.
§ 205. ——Crosswalks.
§ 206. ——Boulevards and parkways.
§ 207. ——Alleys.
§ 208. ——Ditches and gutters.
§ 209. ——Trees and overhanging or projecting objects.
§ 210. ——Bridges and culverts.
§ 211. Duty to provide railings, barriers or warning signals.
§ 212. ——On bridges and approaches.
§ 213. ——During construction work or to protect against excavations.
§ 214. Officer or municipality charged with the duty.
§ 215. ——Bridges and culverts and approaches thereto.
§ 216. ——Roads and bridges under joint control.
§ 217. Persons to whom duty owing.

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§ 219. ——Defective culverts and bridges.
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§ 229. Towards users of heavy vehicles or engines.
§ 230. ——On bridges and culverts.
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D. Duty and Negligence Towards Foot Travelers, and What Constitutes Defects.
§ 232. Defective walks and crosswalks in general.
§ 233. Holes, excavations and depressions in walk.
§ 234. Holes and dangerous conditions beside walk or way.
§ 235. Accumulations of water, snow and ice.
§ 236. Obstructions and objects on sidewalk.
§ 237. Defective and unsafe roadways.
§ 238. Speeding or racing in roadway.

E. Duty and Negligence Towards Other Persons, Licensees and Wrongdoers.
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§ 246. ——Collapse of bridge under load.
§ 247. Contributory negligence.
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§ 249. ——Using bridges and culverts.
§ 250. Contributory negligence of foot travelers.
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G. Liability of Abutters, Private Persons and Corporations.

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§ 261. Liability to licensees and trespassers.
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§ 263. Liability over to public in general.
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§ 272. Parties.
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§ 279. ——In actions against abutters and other private persons or corporations.

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§ 280. Burden of proof and presumptions.
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§ 290. ——As to fright of other horses.
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§ 295. ——In actions against abutters and third persons.
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§ 300. ——To show notice or knowledge of defect.
§ 301. ——To show contributory negligence.
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§ 303. ——In actions for injuries from bridges and culverts.
§ 304. ——In actions against abutters or private parties.

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§ 333. Contributory negligence of foot travelers.
§ 334. ——Use of defective walk or way.
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§ 350. ——Knowledge or notice of defect or condition.
§ 351. As to duty and negligence respecting safety of walks.
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§ 355. Construction and maintenance of bridges and culverts.
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§ 365. Manner, kinds and purposes of use.
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§ 373. Duty and negligence towards children and incapables.
§ 374. Statutory liabilities respecting automobiles.
§ 375. Negligence by servant or borrower of automobile.
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§ 379. Improper hitching, standing or parking.
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§ 381. Proximate cause.
§ 382. Contributory negligence of pedestrians.
§ 383. ——Of vehicle users.

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§ 412. Headlight and signal regulations.
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XV. Private roads and footways.

§ 414. In general; establishment under statute.
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§ 417. Costs, expenses and assessments.
§ 418. Opening and application to use.
§ 419. Rights and easements in the way.
§ 420. Duties and negligence towards users of way.
§ 421. ——Pleading, evidence and trial practice.

General powers, duties, functions, rights, and liabilities of cities, villages, townships, and counties not involving the specific law of highways, see Municipal Corporations; Townships; Counties.

Duties and liabilities of railroad and street railway companies operating on streets, see Railroads, VIII; Street Railways, IV.

Railroad crossings over highways and liabilities of railroad corporations relative thereto, see Railroads, VIII.

General law of private easements, see Easements.

General law of plank roads or other toll roads, see Toll Roads.

I. GENERAL NATURE, REQUISITES, KINDS AND EXISTENCE.

Location and establishment by dedication, prescription or statutory proceedings and condemnation, see post II.
Route, boundaries, termini, surveying and recording of ways, see post III.
Construction, improvement and repairs, see post IV.
Alterations, extensions, grades and changes of grade, see post V.
Abandonment, vacation or diminution of roads, see post VI.
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Relative rights of public and abutters, see post X.
Encroachments, obstructions and nuisances and abatement of them, see post XI.
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§ 1. Nature and kinds of ways.

State roads, see post § 2.
Requisites of highways, see post § 3.
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Boulevards and parkways as highways within requirement that municipality inspect and repair, see post § 206.
Allegation in declaration for highway injuries, as to public nature of way, see post § 274.
Sidewalks and crosswalks as ways within statutory requirement to inspect and repair, see post §§ 204, 205.
Canals as public ways, see Canals § 1.
Navigable waters as public ways, see Navigable Waters.
Railroads as "highways" within federal statute granting right of way over public lands, see Railroads, III.

¶ 1. Ways must be either public or private; there is no intermediate species of way for any purpose of passage.—Tillman v. People, 12 Mich. 401.

¶ 2. The word "road" has a varied meaning; it signifies a way of travel, and may mean a private way or a public thoroughfare. Burdick v. Harbor Springs Lumber Co., 167 Mich. 673.

¶ 3. The meaning of the word "road" is to be ascertained from the context, both in common usage and in statutes and decisions. —Burdick v. Harbor Springs Lumber Co., 167 Mich. 673.

§ 2. State roads.

Location and establishment of state highways, see post § 97.
Control over state roads, see post § 142.

¶ 4. State roads are such only as have been laid out by legislative authority.—Davies v. Saginaw County Sup'rs, 89 Mich. 295.

¶ 4a. A road built under legislation appropriating swamp lands therefor, empowering two counties to build it jointly, and appointing commissioners to lay it out and superintend its construction, the contract being in fact let, and the work done being supervised and accepted by the state through its agents and officers, is a state road.—Davis v. Ontonagon County Sup'rs, 64 Mich. 404.

§ 3. Requisites of highways.

See also post ¶ 34.
Cul de sac as highway, see also post ¶ 354.
What included in term "street" for regulative purposes, see post ¶ 544.
Highways within meaning of statutory duty to inspect and keep in repair, see post § 203.
Statutory provisions as to what shall be deemed highways, see Comp. L. 1915, § 4307.
Ferry landings as public highways, see Comp. L. 1915, § 4490.

¶ 5. To constitute a highway the way must be one over which all the people of the state have a common and an equal right to travel; or, at least, a general interest to keep unobstructed.—People v. Jackson, 7 Mich. 432; People v. Beaubien, 2 D. 256.

¶ 6. A highway is a way or a thoroughfare open to all; a way over which the public at large has a right of passage.—Burdick v. Harbor Springs Lumber Co., 167 Mich. 673.

¶ 7. A road that can be advantageously used by the public only by trespassing on private property is not properly a public highway.—Ayres v. Richards, 41 Mich. 680.

¶ 8. There can be no highway that is not made so by common or statute law, or that is not under public custody; and, unless coming under some constitutional protection, there is none than can exist where the law has provided that it shall not exist.—Horn v. People, 26 Mich. 221.

¶ 9. A temporary road outside of the established highway which is used during the construction of a viaduct over an interurban

railroad does not constitute a public highway under Laws 1909, No. 283, chap. XXII, § 1, How. 2nd Ed., § 2462, so as to render a township liable for injuries to one using such temporary road, as a result of defects therein.—Brown v. Township of Byron, 189 Mich. 584.

¶ 10. A road that has never been regularly laid out or opened by the proper authorities, and which is in fact unused and is unfit for travel and closed against the public, is not a "highway" within the meaning of the provision of the railroad law which makes a company laying track across public highways liable for injuries resulting from neglect to restore them to a proper condition, even though the owners of land along the road had moved their fences back so as to open it as a highway and had been paid for their lands by the township, and a bridge had been built upon it by the public authorities.—Flint & P. M. R. Co. v. Willey, 47 Mich. 88.

§ 4. Nature and status of alleys.

Rights of abutters on alleys, see post § 160 et seq.
Subsurface easements and rights in alleys, see post § 166.
Right to damages on vacation of alley, see post § 133.
Wrongfulness of obstructing alley, see post § 181.
Duty to inspect and keep alleys in repair, see post § 207.
Alleys as highways within meaning of statutes as to inspection and repair of highways, see post § 207.
Actionable negligence towards users of private alleys, see post § 420.
Private alleys and easements therein, see Easements.

¶ 11. An alley is not meant primarily as a substitute for a street, but only as a local accommodation to a limited neighborhood and the public has no general right of way through it.—Beecher v. People, 38 Mich. 289; Horton v. Williams, 99 Mich. 423.

¶ 12. Alleys are not public highways and cannot be governed by the same rules. They are for the accommodation of abutting owners, and the public has no general right of way through them.—Bagley v. People, 43 Mich. 355.

¶ 13. An alley is not a highway in the proper sense of the term, as it is intended for the convenience of adjacent property and not for general travel or passage like streets.—Krause v. Lewis, 144 Mich. 549.

¶ 14. An alley is no more than a way subject to a modified supervision, and liable to be used for drainage and other urban service, under municipal regulation.—Edison Illuminating Co. v. Misch, 200 Mich. 114.

¶ 15. An alley is not properly a highway, and is no more than a way subject to a modified supervision, and liable to be used for drainage and other urban services under municipal regulation, but intended for the convenience of adjacent property and not for travel or passage, like streets; the necessity for streets and for alleys cannot be put on the same footing.—Paul v. City of Detroit, 32 Mich. 108.

¶ 16. An alley is not a public highway within the meaning of Laws 1887, Act No. 264 (How. St. § 1446c et seq.), requiring highways, etc., to be kept in repair, etc.—Face v. City of Ionia, 90 Mich. 104.

§ 5. Evidence as to character and existence of way.

Employment by highway officer to look after alleged road as evidence that it was a road, see also post ¶ 683.
Presumptions and evidence as to dedication or prescription, see post §§ 20, 21; Dedication §§ 24-26.
Presumptions and evidence as to width, boundaries and termini, see post § 103.
Evidence of existence of alley as essential to conviction for obstruction, see post ¶ 700.
Impropriety of trial of existence of highway in summary proceedings for removal of obstructions, see post § 190.
Judicial notice of names and existence and location of streets, see Evidence § 9.
General rules of evidence as to documentary or record proofs, see Evidence, IV, V, VIII, C.
Instruction in trespass as to burden of proof of highway pleaded as defense, see Trespass, II.

¶ 17. The fact that no road work was done on a specific portion of a road, where an obstruction was, is not material on the question whether there was a road there, where it appears that no work was needed at that point because it was passable without working and other parts were worked and passable and in use.—Neal v. Gilmore, 141 Mich. 519.

¶ 18. Evidence of a general understanding in the community that a certain street in public use is a public highway is admissible to show its public character.—Village of Grandville v. Jenison, 84 Mich. 54.

¶ 19. Existence of a street is shown by evidence that a plat and dedication was made, duly recorded, approved by the board of public works of the city (Detroit), that the street appears thereon, that soon after men in the employ of the board of public works prepared it for travel and the city paid for the work.—People v. Wolverine Mfg. Co., 141 Mich. 455.

¶ 19a. Existence of a street is recognized by a party petitioning for the vacation thereof to the public authorities.—People v. Wolverine Mfg. Co., 141 Mich. 455.

§ 6. Law and fact questions as to nature of way.

¶ 20. In an action of ejectment where the issue is whether the alley in dispute is a public or a private way the question whether it was originally laid out as a private way is properly submitted to the jury.—Chapman v. City of Sault Ste. Marie, 146 Mich. 23.

¶ 21. Where the question was whether the plaintiff had an available road to market, it was proper to charge that a road, whether lawfully laid out or not, was not a public way for the purposes of the case unless in condition for use.—Wicks v. Ross, 37 Mich. 464.

II. LOCATION AND ESTABLISHMENT.

A. BY DEDICATION OR PRESCRIPTION AND USER.

§ 7. In general.

Establishment by statutory proceedings, see post II, B.
Dedication or recognition by conveyance, see post § 8.
Necessity and sufficiency of acceptance by public, see post § 9.
Establishment by user and prescription, see post § 10.
Character and sufficiency of public use, see post §§ 11-16.
Interruption or interference to cut off prescription, see post § 17.
Delay, laches and estoppel to deny, see post §§ 18, 19.
Burden of proof, presumptions, evidence and questions of fact and law, see post §§ 20-22.
Abandonment and nonuser or adverse possession, see post § 129.
Re-establishment of vacated or abandoned way, see post § 139.
Title and estate of public and rights of abutters in general, see post X.
Right to convert into highway lands taken by condemnation for nonhighway purposes, see Eminent Domain ¶ 511.
Statutory provisions in general, see Comp. L. 1915, §§ 4287-4317.

¶ 22. During the period from 1851 to 1859, when highways could not be established by condemnation, they could still be established by dedication or acquiescence.—Bumpus v. Miller, 4 Mich. 159; Nye v. Clark, 55 Mich. 599.

¶ 23. The law providing for condemnation proceedings has no application to the case of a dedication of a highway by the owner, or where, from his long acquiescence in the public use of it, a dedication is presumed by law so that the public has the right by his assent.—Bumpus v. Miller, 4 Mich. 159.

¶ 24. The adoption by the governor and judges of the plan of the City of Detroit did not, of itself, make public highway of that portion of the projected streets which was covered by private claims and occupied as private property.—People v. Jones, 6 Mich. 176.

§ 8. Dedication or recognition by conveyance.

User as implied dedication, see post ¶ 29.
Presumptions and evidence as to dedication, see post § 21.
Width of dedicated or prescriptive highway, see post § 100.
Increase of dedicated width by public user, see post ¶ 342.
Facts requisite to make out dedication of alley as public one, see Dedication ¶ 19.
Dedication of "private way" parallel with and laterally adjoining highway, see Dedication ¶ 146.
Conformity of plats to adopted city plan and approval by city authorities as prerequisite to dedication, see Dedication §§ 21, 22.
Sufficiency of statutory plat to describe and define boundaries and plan of streets, see Dedication § 22.
Sufficiency under statute of frauds of written grant of use of streets, see Frauds, Statutes of ¶ 312.

¶ 25. Highways by user are based upon an implied dedication by the land-owner.—Kruger v. Le Blanc, 70 Mich. 76.

¶ 26. By conveying land with recognition of the existence of a public street, a grantor estops himself from afterwards claiming title to any portion thereof.—Crosby v. City of Greenville, 183 Mich. 452.

§ 9. Necessity and sufficiency of acceptance by public.

Title of abutter to strip dedicated but not accepted, see post ¶ 495.
Time allowable for acceptance of offer to dedicate, see Dedication §§ 8-11.
Acts essential or sufficient as acceptance of dedication, see Dedication §§ 8-11.
Using, working and improving road or street as acceptance of dedication, see Dedication § 10.
Manner of acceptance of dedication of alleys in original plat of Detroit, see Dedication ¶ 49.

¶ 27. Public user alone, when sufficiently general and long continued, will constitute an acceptance of a county road.—Adams v. Iron Cliffs Co., 78 Mich. 271.

¶ 28. In order that a way may be established by user not only must the general public use it and travel upon it as a thoroughfare but the implied dedication must be accepted by the public authorities and the way taken in charge and maintained as other highways.—Chapman v. City of Sault Ste. Marie, 146 Mich. 23.

§ 10. Establishment by user and prescription.

Public use of way after formal discontinuance as re-establishing it, see post ¶ 498.

Presumptions and evidence as to prescription, see post § 21.
Prescription as to road over public lands, see also post ¶ 685.
Right to appropriate highway moneys to roads laid out by user, see post § 147.
Prescriptive right as against abutting owner to have additional servitude in highway, see post XI; and see also Railroads, III.
Prescription in favor of right to obstruct or inclose part of way, see post § 182.
General law of prescription on private easements, see Easements §§ 11-13.

¶ 29. Highways by user are based upon an implied dedication by the landowner.—Kruger v. Le Blanc, 70 Mich. 76.

¶ 30. User of land as a highway for the statutory period conclusively establishes the dedication of the land for that purpose.—Campau v. City of Detroit, 104 Mich. 560.

¶ 31. Public highways may be established by user under Laws 1909, Act No. 283, chap. I, § 20, How. 2nd Ed., § 2193.—Brown v. Township of Byron, 189 Mich. 584.

§ 11. Character and sufficiency of public use.

Time or duration and continuity of user, see post § 12.
User of varying or shifting way, see post § 13.
Use under temporary or permissive license, see post § 14.
User of private roads, see post § 15.
Knowledge of servient owner, see post § 16.

¶ 32. To constitute a highway by user, there must be a defined line, and it must be used and worked upon by the public authorities, and traveled over and used by the public, for ten consecutive years, without interruption, and the possession by the public must be exclusive as against the owner of the soil or any other person, open and notorious, and accepted by the public generally.—Alton v. Meeunberg, 108 Mich. 629.

¶ 33. A road that has been used and recognized for twenty-one years, and had previously been laid out, surveyed, fenced and worked by the highway commissioners as a town-line road, is properly treated as a public highway, even though it has been allowed to grow up in brush outside of the actual roadway.—Nye v. Clark, 55 Mich. 599.

¶ 34. That a street is used by only a limited number of people will not prevent its becoming a highway by user, where it is traveled as much as the circumstances of the surrounding population and their business require.—Village of Grandville v. Jenison, 84 Mich. 54.

¶ 35. The fact that no part of a highway was opened and worked within four years after it was laid out, as required by Comp. L. 1897, § 4063, does not prevent the road from becoming public by user under section 4061; it merely requires a user for ten years instead of eight.—Neal v. Gilmore, 141 Mich. 519.

¶ 36. The statute (R. S. of 1846, ch. 25, § 29) providing, among other things, that all roads not recorded, which have been used as public highways twenty years or more, shall be deemed public highways, applies not only to cases where the twenty years had elapsed as the taking effect of the law, but also the cases where a portion of that time had elapsed and it was completed afterwards.—Bumpus v. Miller, 4 Mich. 159.

¶ 37. Under Comp. L. 1857, § 1079, declaring all unrecorded roads that had been used twenty years or should thereafter be used for ten years to be public highways, the question of dedication is not involved; after the prescribed period of undisturbed user, the right of the owner of the land to dispute the public user is barred, so far as the prospective provisions of the statute are concerned, whatever his intention may be.—Ellsworth v. City of Grand Rapids, 27 Mich. 250.

¶ 38. It is no defense to a suit for encroaching upon a highway claimed to have become such by use prior to the encroachment, that travel had not then been continuous over its entire length for the statutory period, if travel over the part encroached upon had been so continuous.—Village of Grandville v. Jenison, 86 Mich. 567, adhering on rehearing to opinion in 84 Mich. 54.

§ 12. ——Time or duration and continuity of user.

Statutory provision as to effect of use as highway for ten years, see Comp. L. 1915, § 4307.
Public use for eight years of road laid out but not recorded, see Comp. L. 1915, § 4307.

¶ 39. A road which for forty years has been recognized and treated by the public as a highway must be regarded as having become a highway by user, even though it was not legally laid out by the commissioners.—Wayne County Savings Bank v. Stockwell, 84 Mich. 586.

¶ 40. Uninterrupted user for ten years of a street actually though not legally laid out by the action of highway commissioners who opened such street upon a petition asking for the opening of another will constitute the street a public highway under How. St. § 1315.—Village of Grandville v. Jenison, 84 Mich. 54.

¶ 41. User for ten years will not, under the provisions of Comp. L. 1871, § 1268, of itself make a road a public highway if proceedings have not been taken to lay it out

or establish it as one.—Potter v. Safford, 50 Mich. 46.

§ 13. ——User of varying or shifting way.

See also post ¶ 358.

Routes, boundaries, width, and termini of highways in general, see post III.

¶ 42. A variation of two or three rods in the traveled track at one end of a highway, made such by twenty years' user—the variation having existed only twelve years—will not take away the right of the public to use the road.—Bumpus v. Miller, 1 Mich. 159.

¶ 43. The establishment of a highway by user is not shown by proof of public travel on different tracks over wild and unoccupied land bordering on a river, the course of such travel being shaped with reference to high and low water.—Lyle v. Lesia, 64 Mich. 16.

¶ 44. A highway on a lake shore is not made out by user where the high water line of the lake was never established and the way ran through a swamp and was shifting and at time of trial is 157 feet from the lake.—Schroeder v. Village of Onekama, 95 Mich. 25.

¶ 45. Under How. St. § 1315 providing that all roads used as such for ten years or more, whether any record or other proof of their establishment exists or not, and all roads laid out and not recorded which shall have been used 8 years or more shall be deemed public highways, a road, deflected from the line to make it passable, which had been recognized as a township road for more than ten years, was deemed such a road.—Bigelow v. Brooks, 119 Mich. 208.

§ 14. ——Use under temporary or permissive license.

See also post ¶ 53.

User of private roads, see post § 15.

¶ 46. As a general rule permissive use by the public of a private way cannot convert it into a public way.—Galinski v. City of Detroit, 193 Mich. 184.

¶ 47. The mere permissive use of a private road by the public, however long continued, will not make it a public highway.—Weihe v. Macatawa Resort Co., 198 Mich. 334.

¶ 48. One over whose land a highway by user is claimed may show that the user was under an agreement made with him by the highway authorities that the public might cross his land temporarily, to avoid a defect in the true highway, until the latter could be put in safe condition, and that he continued to allow such use relying on the commissioner's promise, renewed from time to time, to make repairs and to replace the fence; such use of defendant's land did not operate to establish a highway, and his consent thereto was a revocable license.—Commissioner of Highways of Township of Homer v. Riker, 79 Mich. 551.

§ 15. ——User of private roads.

Use under temporary or permissive license, see ante § 14.

Establishment of private roads by statutory proceedings, see post XV.

¶ 49. A public right of way can be acquired by the city over a private way only by an uninterrupted and undisputed user of the land for the prescribed period.—City of Detroit v. Myers, 152 Mich. 666.

¶ 50. Permissive or invited use of a private road by the public is not such use as will of itself convert it into a public highway under Comp. L. 1897, § 4061, however long continued.—Stickley v. Township of Sodus, 131 Mich. 510.

¶ 51. Comp. L. 1871, § 1268 (see How. St. § 1315), makes any road that has been used ten years a public highway whether recorded or not. Held, that this does not apply to mere private ways and cannot make a private way a public highway. It was meant to cure defects in laying out and recording public ways.—Green v. Belitz, 34 Mich. 512.

¶ 52. Under Comp. L. 1897, § 4061, providing that "all roads that shall have been used as such for ten years or more * * * shall be deemed public highways," a private road opened and maintained by a landowner for access to a private dock and ferry, does not become a public highway though used by the public without objection, so as to make the township liable for injuries caused by defects therein, where there has been no act by the township authorities hostile to the private ownership.—Stickley v. Township of Sodus, 131 Mich. 510.

¶ 53. A private road cannot be converted into a highway by time and public use, standing alone, no matter how long continued; invited or permissive use granted by the owners will not avail; but if the relations between the public and the owners change, where official action is being taken to make it a part of a highway system, and the owners have notice of that attitude, which is accompanied by the exercise of public control and public maintenance, said road may and will, in due course of time, become a highway by prescription.—Hinckley v. Dennison, 169 Mich. 361.

¶ 54. A road was originally private and controlled by the owner of the land across which it ran, who maintained a gate across it. In 1882 action was taken by the proper township authorities to open said road for a public thoroughfare, as a part of the highway system of the township. In the course of said proceedings the highway commissioner had said gate removed, took charge

of the way, and threw it open to the public with the full knowledge of the then owner. Its peaceable use as a highway continued until 1910. It was from time to time improved at public expense. Held, said road under Comp. Laws 1897, § 4061, became a public highway.—Hinckley v. Dennison.—109 Mich. 361.

¶ 55. The mere fact that a private road is used by the public for the statutory period does not establish a public highway by user within Comp. Laws 1897, § 4061, when the public authorities have not taken charge of the highway.—South Branch Ranch Co. v. Emery, 191 Mich. 188.

§ 16. ——Knowledge of servient owner.

¶ 56. Actual knowledge by a property owner that a portion of his land is being held adversely by city as an alley is unnecessary where the circumstances are such that he ought to have known it.—Village of Manchester v. Clarkson, 195 Mich. 354.

§ 17. Interruption or interference to cut off prescription.

See also post ¶ 343.

Change in way established for ten years, see post § 115.

Discontinuance of way by abandonment, nonuser or adverse possession, see post § 129.

Obstructions, encroachments and unauthorized uses, see post XI.

¶ 57. Where the owner of the land actually used as a public road merely makes and records a plat upon paper, ignoring the existence of the road, it is not such an interference with the public user of the road as to affect the statutory limitation by which ten years' undisputed use makes it a public highway.—Ellsworth v. City of Grand Rapids, 27 Mich. 250.

¶ 58. The running of limitations in favor of a city to a public alley is not prevented by the mere recording of a conveyance of a right of way deed which would reduce the alley from public to private.—Chapman v. City of Sault Ste. Marie, 146 Mich. 23.

§ 18. Delay, laches and estoppel.

Estoppel to assert existence of highway, see also post ¶ 343.

Estoppel of public by taxation or other recognition of private right, see post § 19.

Creation of highway by user and acquiescence amounting to prescription, see ante § 10 et seq.

¶ 59. Comp. L. 1871, § 1268, in providing that "all roads not recorded which have been used ten years or more, or which may hereafter be laid out and not recorded, and which shall have been used ten years or more, shall be deemed public highways," means that where the public authorities have taken proceedings for the establishment of a public way, a party proposing to contest them must do so within a reasonable time.—Potter v. Safford, 50 Mich. 46.

¶ 60. In an action to recover a penalty for obstructing a highway, the defendant is not estopped to deny the existence of the highway from the fact that he signed the petition for it, or worked upon it and received compensation from public funds, where the proceedings to establish the same were clearly void as to all others.—La Barre v. Bent, 154 Mich. 520.

¶ 61. On a bill to remove obstructions in a street defendant, whose predecessor in title never had any deed to the land alleged to be that portion of the street encroached upon, has no equity to make defense that the public user did not include the place in question so as to constitute it a street.—Village of Grandville v. Jenison, 86 Mich. 567, adhering on rehearing to opinion in 84 Mich. 54.

§ 19. Estoppel of public by taxation or other recognition of private right.

Capacity of public or public officers as such to be estopped, see Estoppel § 3.

¶ 62. The rights of the public in a highway which has become such by user are not affected by the listing of the land for taxation to the former owner, and the payment by him of the taxes so assessed.—Campau v. City of Detroit, 104 Mich. 560.

¶ 63. The assessment of taxes upon lots according to a plat so covering a road in actual use that the lots lie partly within and partly without the space covered by the road does not estop the public or cut off their right to the use of the road, especially when the public right to the highway has become absolute by statutory limitation.—Ellsworth v. City of Grand Rapids, 27 Mich. 250.

¶ 64. While the rights of the public in a highway cannot be admitted away by taxing officers, the fact that the land has been at all times listed as private property is of some significance, in connection with other facts, as affecting the question of adverse, exclusive, and uninterrupted public user.—City of Detroit v. Myers, 152 Mich. 666.

§ 20. Burden of proof, presumptions and evidence.

As to dedication or prescription, see post § 21.

Questions of law and fact, see post § 22.

General law of evidence, see Evidence.

¶ 65. In a contest between the owner of adjoining land and a municipality claiming the existence of a public street or highway over such land, the burden of proof is on the latter.—Diamond Match Co. v. Village of Ontonagon, 72 Mich. 249.

¶ 66. Evidence held insufficient to establish a highway by user continuing an existing highway over a strip of ground between a lake and another highway, paralleling the lake.—Village of Grosse Pointe Shores v. Holmes, 196 Mich. 183.

¶ 67. Under How. St. § 1315, providing that all roads laid out and not recorded which have been used for eight years or more shall be deemed public highways, the records of a defective proceeding for laying out a highway and evidence that it was generally understood in the community that it was a highway, is admissible to show that a highway had been laid out and used long enough to become a public highway.—Gage v. Township of Pittsfield, 120 Mich. 436.

¶ 68. Where land was conveyed to a township for a road in consideration of the closing of another highway, without the deed being recorded, and subsequently the new road was abandoned and the old one reopened, held, on the recording by the township of the deed many years later, that the evidence did not show use and possession sufficient to give it title to the land described in the deed.—Hodges v. Township of West Bloomfield, 186 Mich. 259.

¶ 69. In establishing the character of a rarely traveled road as a highway by user, evidence of an understanding in the community that the way was public was held admissible, in connection with evidence of its use, as tending to negative any supposition that the use was merely by license or sufferance.—Wicks v. Ross, 37 Mich. 464.

¶ 70. In showing the public character of a road, evidence that the overseer of highways has allowed a road tax to be worked out on it was held admissible as bearing on the question, if guarded by the charge that his act did not make it a public highway.—Wicks v. Ross, 37 Mich. 464.

¶ 71. The survey of a road under Comp. L. 1857, § 991, subd. 3, for the purpose of ascertaining and describing it as one which had been used as a highway for twenty years, in order that it may be recorded, is not the laying out of a highway, and the certificate of such survey is inadmissible to prove that the highway described in it had been laid out by the commissioners.—Parker v. People, 22 Mich. 98.

¶ 72. Evidence of the general understanding in the community that a certain street in public use was a highway, and of the refusal of the supervisor to assess the land so used, although requested to do so, on the ground that it was a highway, is admissible to show its public character.—Village of Grandville v. Jenison, 84 Mich. 54.

§ 21. ——As to dedication or prescription.

Evidence of road by user, see also post ¶ 684.
Presumptions and evidence of dedication, see also Dedication §§ 24-26.

(4 Mich. Dig. 28)

¶ 73. The fact that an alley, title to which is claimed by adverse possession by a city, is exceedingly crooked is merely evidence which may be used to rebut the presumption of dedication, arising from uninterrupted use.—Village of Manchester v. Clarkson, 195 Mich. 354.

¶ 74. Where the statute (Comp. L. 1871, § 1345, How. St. § 1474) required the acknowledgment of plats to be under the officer's seal, the record of such plat is unauthorized, and is not evidence of the plat's execution and validity so as to prove the existence of a highway by dedication.—City of Grand Rapids v. Hastings, 36 Mich. 122.

¶ 75. The evidence, though conflicting, was sufficient to sustain a jury finding that a highway was accepted by the public and used, where it appeared that one of the taxpayers at a somewhat indefinite time had worked out his highway labor tax on that road, doing such work as to fit it for travel, that a box drain was put in at one place to facilitate passage, and where the overseer of highways testified that three years before he had caused the statute labor to be worked out on it, and where the road was used in traveling to a certain resort or picnic ground, in hauling water from a bay, and in hauling fishing gear and fish, although there were no houses along its course and parts of it were sometimes impassable and at first neighbors turned their cattle out on it.—Neal v. Gilmore, 141 Mich. 519.

§ 22. Questions of law and fact.

Dedication or prescription of road as law or fact question, see ante § 22.

¶ 76. Where the location of a highway by user is in dispute, and the evidence is conflicting, the court should submit the question to the jury.—McKay v. Doty, 63 Mich. 581.

¶ 77. In an action by a city to recover a delinquent special sewer assessment, in which the defense was that the assessment was void because the sewer was run across defendant's private property without permission, held that it was a question for the jury whether defendant had consented to, acquiesced in, or knew of any public user or improvements upon the land as an alley, where it appeared that defendant testified that he had lived in another city for many years, and had no knowledge of the claimed user, or of any facts tending to establish the alley or that the sewer had been built and one of his stores connected with it until the action was brought, but he also testified that he visited the city about once a year to look after his property and to make repairs and improvements, when necessary, either attending to them personally or directing others to do so.—Village of Manchester v. Clarkson, 195 Mich. 354.

B. BY STATUTORY PROCEDURE.

Titles and rights acquired by establishment of road or street, see post X.
Re-establishment of abandoned or vacated way, see post § 139.

1. Application or petition and precedure thereon.

§ 23. In general.

Establishment by dedication, prescription or user, see ante II, A.
Hearings, laying out and appraisements, see post II, B, 2.
Payment of awards and completion of proceedings, see post II, B, 3.
Appeals, injunctions and judicial review, see post II, B, 4.
Proceedings for street opening in cities and villages, see post II, B, 5.
Establishment of state highways and local systems, see post II, B, 6.
Proceedings for construction, improvement and repair, see post IV.
Alteration, extensions and changes of grade, see post V.
Proceedings for vacation or discontinuance, see post VI.
Statutory procedure to establish "private" roads, see post XV.
Necessity as basis for laying out private way, see post § 414.
Necessity for jury or special commissioners, see post § 24.
Joinder and misjoinder of proceedings, see post § 25.
Roads affecting more than one township, see post § 26.
Power and jurisdiction of highway commissioners, see post §§ 27, 28.
Application or petition, see post § 29.
Notice, service and proof thereof, see post §§ 30, 31.
Special and summary character of proceedings for opening highways, see post ¶ 158.
Titles and rights of abutters and of the public in the road or street, see post X.
Establishment of wharf under guise of highway, see Wharves.
General law of condemnation for public use, including all matters which are not peculiar to highway or street opening proceedings, see Eminent Domain.
What constitutes a "taking" or "injuring" of property for highway uses or for other public uses, see Eminent Domain, III.
Partial validity of act for opening streets which contains inoperative provisions as to widening proceedings, see Statutes, V.
Provisions of the constitution as to eminent domain, see Const. art. XIII, §§ 1, 2.
Proceedings by county road commissioners for laying out highway, see Comp. L. 1915, §§ 4357-4362.
Proceedings on laying out highway which crosses railroad, see Comp. L. 1915, § 4314.
Establishment of line roads, see Pub. Acts 1917, No. 356, amending Comp. L. 1915, § 4299.
Provisions for laying out temporary roads, see Comp. L. 1915, § 4453 et seq.

¶ 78. Proceedings to establish a public highway under Laws 1909, Act No. 283, chap. I, §§ 1-6, How. 2nd Ed., §§ 2174-2179, must comply strictly with the statutes, or they are void.—Brown v. Township of Byron, 189 Mich. 584.

¶ 79. A public highway may be established under Laws 1909, Act No. 283, chap. I, §§ 1-6, How. 2nd Ed., §§ 2174-2179, by proceedings instituted by the commissioner of highways of a township upon written application of freeholders and notice to landowners to be affected, appraisement of damages, and the making of a proper record in the office of the township clerk.—Brown v. Township of Byron, 189 Mich. 584.

¶ 80. From 1851 to 1859 there was no law under which a highway could be legally laid out through condemnation of land to be taken therefor.—People v. Kimball, 4 Mich. 95; People ex rel. Holcomb v. Lowell, 9 Mich. 144.

¶ 81. The validity of the proceedings of a commissioner of highway in laying out a highway is a question of law to be determined from the record and independent facts.—Letourneau v. Erickson, 182 Mich. 617.

§ 24. Necessity for jury or special commissioners.

See also post ¶ 183.
Necessity for jury in street opening proceedings in cities and villages, see post § 77.
Constitutional prerequisites and necessity for jury in condemnation proceedings, see Eminent Domain § 76.
Granting appeal de novo without jury as denying right to jury, see Constitutional Law § 192.
Right to jury, see Comp. L. 1915, § 4295.

¶ 82. Since the constitutional amendment adopted in 1860 a jury or commissioners appointed by a court of record cannot be considered essential to the validity of action by highway commissioners in either laying out or discontinuing highways.—People ex rel. Goldsmith v. Nankin Highway Com'rs, 15 Mich. 347.

§ 25. Joinder and misjoinder of proceedings.

Proceedings to vacate or discontinue highway, see post VI.
Joint proceedings by adjoining townships, see Comp. L. 1915, § 4297.
Joint proceedings by township and adjoining city or village, see Comp. L. 1915, § 4298.

¶ 83. Proceedings to discontinue a highway, to lay out a new one, and to build a

bridge, cannot be united in one petition.—Cox v. Commissioner of Highways of Hartford Township, 83 Mich. 193.

¶ 84. Proceedings to open one highway and discontinue another cannot be combined; only one proceeding can be taken at a time, and every road must be opened or closed on its own merits.—Shue v. Richmond Township Highway Commissioner, 41 Mich. 638.

§ 26. Roads affecting more than one township.

Necessity of joint action to vacate road, see post § 125.

¶ 85. A proceeding to lay out a township-line road is void if action is taken by the commissioner of one township only, inasmuch as How. St. §§ 1296, 1305, provide for joint action by the commissioners of both townships, and the proceedings must be filed and recorded with the clerk in both townships.—Brewer v. Gerow, 83 Mich. 250.

§ 27. Power and jurisdiction of highway commissioners.

Authority of commissioner over road affecting more than one township, see ante § 26.

Over lands in railroad or other public use or navigable waters, see post § 28.

Highway officers in general, see post VII.

Joint action by highway commissioners of adjoining townships, see Comp. L. 1915, § 4288, ¶ 2.

Authority of highway commissioner to lay out highway through uninclosed and unimproved lands without application, see Comp. L. 1915, § 4288, ¶ 4.

Authority of commissioner to adjourn hearing, see Comp. L. 1915, § 4292.

Necessity for concurrence by resolution of township board, see Comp. L. 1915, § 4292.

Authority of highway commissioner to appropriate in excess of one hundred dollars, see Comp. L. 1915, § 4292.

Authority of highway commissioner to remove fences and open up highway after payment or tender of award, see Comp. L. 1915, § 4305.

Duty of highway commissioner to endeavor to secure right of way by gift or purchase, see Comp. L. 1915, § 4306.

Authority of highway commissioner on neglect of special commissioners, see Comp. L. 1915, § 4312.

¶ 86. A highway commissioner has jurisdiction under § 1, subdivision 4, of Act No. 283, Public Acts 1909 (How. St., 2nd Ed., § 2174), to lay out on his own motion a highway on a section line through uninclosed and unimproved land.—Letourneau v. Erickson, 182 Mich. 617.

¶ 87. Instead of bringing suit to determine whether a landowner has encroached upon a public highway the legal existence of which he denies, the highway commissioner may take such landowner at his word and institute condemnation proceedings.—Dewey v. Kaner, 80 Mich. 280.

¶ 88. Under the statute of 1861, p. 246, the commissioners of highways have no power to entertain a second application for laying out the same road within one year from the first and any proceedings thereunder are void.—People ex rel. Sage v. Springwells Township Board, 13 Mich. 462.

§ 28. ——Over lands in railroad or other public use or navigable waters.

¶ 89. The statute confers power upon a commissioner of highways to lay out a highway across village depot grounds, except where the concurrent use of the land will be impossible, or attended by serious inconvenience to the railroad company; and, in order to defeat this right, the company should clearly prove its intention so to use the land as to show its good faith and the incompatibility of the two uses.—Battle Creek & S. R. Co. v. Tiffany, 99 Mich. 471.

¶ 90. An authority to lay out highways does not include a power to lay out a highway over navigable waters.—Highway Com'r Tp. Hope v. Ludwick, 151 Mich. 498.

¶ 91. Highway commissioners have no jurisdiction to lay out a highway into navigable waters of a meandered lake, beyond low water mark.—Highway Com'r Tp. Hope v. Ludwick, 151 Mich. 498.

¶ 92. The statutory proceedings for laying out and establishing highways do not in terms or by inference contemplate the condemnation of rights and interests in and to navigable waters, and compensation therefor.—Highway Com'r Tp. Hope v. Ludwick, 151 Mich. 498.

§ 29. Application or petition.

Notice of hearing and service of notice, see post § 30.

Affidavit and proof of service, see post § 31.

Time within which second application for same road may be entertained by commissioner, see also ante ¶ 88.

Street opening proceedings in cities and villages, see post II, B, 5.

Petition for condemnation in street opening proceedings, see post § 72.

Petition for vacation, see post § 130.

Petition in condemnation proceedings in general, see Eminent Domain §§ 60-69.

Description of route to be stated in application, see Comp. L. 1915, § 4289.

Freeholders' application for establishment of highway by township commissioner, see Comp. L. 1915, § 4288, ¶ 1.

Application of freeholders of adjoining township and city or village, see Comp. L. 1915, § 4288, ¶ 3.

Application of freeholders of adjoining townships for joint action by commissioners, see Comp. L. 1915, § 4288, ¶ 2.

¶ 93. The description in a petition for a highway is sufficiently certain, if places are designated which will enable persons familiar with the locality to locate the way with reasonable certainty.—Page v. Boehmer, 154 Mich. 693.

¶ 94. Under sections 8, 9 and 10, c. 9, Act 283, Pub. Acts 1909, relating to the opening of highways, it is not necessary in order to give the highway commissioners jurisdiction that the petition for said highway be signed by a resident of the township.—Burdick v. Harbor Springs Lumber Co., 167 Mich. 673.

¶ 95. A petition which does not purport to be signed by freeholders of the township confers no jurisdiction to lay out a highway.—Wilson v. Township Board of Burr Oak, 87 Mich. 240.

¶ 96. Under R. S. 1846 it was requisite to the valid laying out of a highway that application should be made therefor in writing by ten or more freeholders, and notice of the application given to the persons interested in the lands, and that a survey of the road should be made and incorporated in an order to be made by the commissioners and filed in the office of the township clerk. And where none of these facts was shown, and the road had never been opened or used, or regarded by the commissioners as a highway, a mandamus to the township board, to show cause why they should not pay the damages to a party through whose land a road was claimed to have been laid, was refused.—People ex rel. Chubb v. Scio Township Board, 3 Mich. 121.

§ 30. Notice of hearing, persons to be served, service and posting.

Affidavit, return and proof of service, see post § 31.

Summons or notice of proceedings for street opening and service thereof, see post §§ 73-76.

Notice in vacation proceedings and persons entitled to be notified, see post § 131.

Notice of hearing on application to be served on owners or occupants, see Comp. L. 1915, § 4290.

Method of service of notice of application on railroad companies, see Comp. L. 1915, § 4290.

Necessity and sufficiency of service of notice of appeal to township board, see post § 45, ¶¶ 163, 164.

¶ 97. Proceedings to lay out a highway are void where a person whose land is to be taken was not served with notice and did not by appearance at the hearing waive her right to notice.—Sherman v. Peterson, 91 Mich. 480.

¶ 98. In proceedings to lay out a highway the statute requires the highway commissioners to issue their notice for convening the town board within five days after their receipt of the freeholders' application; therefore a delay of more than a month was held fatal.—Detroit Sharpshooters' Ass'n v. Hamtramck Highway Com'rs, 34 Mich. 36.

¶ 99. Where notice of proceedings to lay out a public highway sufficiently states the starting point and width, the use of the words "varying so far as is necessary to find suitable ground for making a good and substantial road" will not vitiate the legality of the highway so far as it actually follows the survey lines.—Shepard v. Gates, 50 Mich. 495.

¶ 100. Ten full days' notice—excluding both day of service and day of meeting—of a meeting of the commissioner to determine the necessity of laying out a highway must be served upon the owners or occupants of the land through or adjoining which it is proposed to lay out said road (How. St. § 1298).—Conquard v. Boehmer, 81 Mich. 445; Dixon v. Port Huron Highway Commissioner, 75 Mich. 225.

¶ 101. Under How. St. § 1298 requiring ten days' notice of hearing of the petition ten full days are necessary; and where the notice was dated May 9 and the hearing fixed for May 19 the time intervening was held insufficient.—Cox v. Commissioner of Highways of Hartford Township, 83 Mich. 193.

¶ 102. The ten days' notice of proceedings to determine the necessity of a public highway excludes the day of service as well as of meeting.—People ex rel. Platt v. Clay Township Highway Com'r, 38 Mich. 247.

¶ 103. Under section 4038, Comp. L. 1897, requiring notice of application for the laying out of a public highway to be served on landowners interested, a notice is sufficient although it omits to describe the proposed road as a "public" highway, where it was personally served, and there was no claim that its object was unknown.—Gorham v. Johnson, 157 Mich. 433.

¶ 104. Under Comp. Laws, § 4038, 1897, requiring service of notice of an application to lay out a highway, it is unnecessary, where such service is made, to post copies of the notice.—Gorham v. Johnson, 157 Mich. 433.

¶ 105. In proceedings to establish a highway a notice of the hearing served upon parties whose premises are affected, which notice shows the time fixed for the hearing to be only one day from the date of service and one from the date of notice, is bad.—Dixon v. Commissioner Highways of Township of Port Huron, 75 Mich. 225.

¶ 106. Under How. St. § 1298, proceedings to lay out a highway through lands occupied

by a tenant are void, where notice of hearing upon the application for laying out the highway is not served upon such occupant.—Welch v. Hodge, 94 Mich. 493.

¶ 107. Notice of the opening of a highway to persons other than the occupant of the land was not necessary, where such occupant had been in exclusive possession for more than 18 years prior to the laying out of the highway.—Nedow v. Porter, 122 Mich. 456.

¶ 108. R. S. 1846, ch. 25, § 2, made it the duty of the township clerk, on receiving an order from the commissioners of highways laying out a road, forthwith to post a copy of such order on the outer door of the house or building where the township meeting was usually held, or, if there was no such house or building, then in one of the most public places in the township. Where it appeared that a copy of the order was posted upon an inside door of a tavern, which was one of the two places in the township at which the township meeting was held alternately, it was held, first, that there was no house, or building, within the contemplation of the statute, where the township meeting was usually held; second, that the court would presume, in the absence of any showing to the contrary, that the tavern where the notice was posted was one of the most public places in the township.—People ex rel. Anderson v. La Grange, 2 Mich. 187.

§ 31. ——Affidavit, return and proof of service.

Proof of service in street opening proceedings, see post § 76.

Affidavit of service of notice, see Comp. L. 1915, § 4291.

¶ 109. The affidavit of service of notice by the highway commissioner of the time and place for determining the necessity for laying out a highway is in the nature of legal process, and must show that the commissioner obtained jurisdiction to proceed to the hearing.—Truax v. Sterling, 74 Mich. 160.

¶ 110. Proceedings to lay out a highway are void where the return shows no proof of service upon the owner and occupant of the land.—Cox v. Commissioner of Highways of Hartford Township, 83 Mich. 193.

¶ 111. An affidavit of service upon a railroad company of a notice of a meeting by a highway commissioner to determine the necessity of laying out a highway, which shows that such service was made "by leaving a copy of the notice with their freight agent at Dorr station," without giving his name or showing that he was in charge of the freight office, is fatally defective.—Truax v. Sterling, 74 Mich. 160.

¶ 112. An affidavit of service upon a railroad company of a notice of a meeting by a highway commissioner to determine the necessity of laying out a highway, which fails to show that the persons with whom, or at whose place of residence, the notice was left were either owners or occupants of the lands on the line of the proposed highway, is fatally defective.—Truax v. Sterling, 74 Mich. 160.

¶ 113. The statutory notice in proceedings for the opening of highways is in the nature of process, and it is indispensable that there be legal evidence that it has been given.—Dupont v. Hamtramck Com'rs, 28 Mich. 362.

¶ 114. In proceedings to lay out a highway the return of the highway commissioners that they proceeded to lay out the road in question, "after due notice given according to law," is not sufficient proof of service of the statutory notice; in such proceedings jurisdictional facts must be distinctly shown.—Dupont v. Hamtramck Highway Com'rs, 28 Mich. 362.

¶ 115. A return of service of notice in highway proceedings should state specific facts from which the sufficiency of the service may be determined by the tribunal which is to act instead of by the officer who serves process.—People ex rel. Goldsmith v. Nankin Highway Com'rs, 14 Mich. 528.

¶ 116. The proceedings in laying out a highway cannot be sustained unless it appears that the statutory notice of the proceedings was given.—Blodgett v. Whaley, 47 Mich. 469.

¶ 117. Proof that notice of proceedings to lay out a highway has been served on owners and occupants concerned should be in writing, sworn to, and filed with the township board. An undated statement by a highway commissioner which neither describes the notice nor gives any date to fix the time of service is insufficient.—Detroit Sharpshooters' Ass'n v. Hamtramck Highway Com'rs, 34 Mich. 36.

¶ 118. A showing of notice of a meeting to be held April 25th will not uphold a meeting held May 11th, in the absence of any showing that notice of such latter meeting was given, or that it was held as an adjourned meeting.—Pegler v. Grand Rapids Highway Com'rs, 34 Mich. 359.

2. Hearings, laying out, estimates and appraisements.

§ 32. Hearings and adjournments.

Scope of hearing and issues, see post § 33.

Order laying out road or denying it, see post §§ 34, 35.

Estimates and appraisements and measure of compensation, see post §§ 36-38.

Return and record of hearing, view and appraisement, see post §§ 39, 40.

Appeals, injunctions and judicial review, see post §§ 44-61.
Adjourned hearings, see Comp. L. 1915, § 4292.

¶ 119. Jurisdiction of proceedings to lay out a highway is lost if the commissioner does not meet at the place mentioned in the notice of a meeting to view the premises, even though such commissioner went to the barn on the same premises on which was the dwelling place designated in the notice, the landowner not being present or assenting to the proceedings taken.—Barlow v. Oscoda Highway Com'r, 59 Mich. 443.

¶ 120. Proceedings to lay out a highway by an appropriation of lands of non-consenting parties were held void where the commissioners, when they met and ordered the highway laid out, had no evidence before them that the statutory notice had been given to the owners and occupants of the lands through which it was proposed to lay it.—Names v. Olive & Robinson Highway Com'rs, 30 Mich. 490.

¶ 121. In proceedings to establish a highway, by adjourning the hearing to another day without specifying the hour and place, jurisdiction to proceed is lost.—Dixon v. Commissioner of Highways of Township of Port Huron, 75 Mich. 225.

¶ 122. The power of a commissioner of highways to adjourn the hearing of an application to lay out a highway is limited to twenty days by How. St. § 1300, and a longer adjournment ousts him of jurisdiction, and renders void his action in laying out a highway at such adjourned hearing.—Wilson v. Atkin, 80 Mich. 247.

§ 33. Scope of hearing and issues.

¶ 123. The usual and paramount issues on a proceeding by a highway commissioner to lay out a highway, are the public necessity, and the damages to be awarded for the property taken.—Letourneau v. Erickson, 182 Mich. 617.

§ 34. Order laying out road or denying it.

Implication as to bridges and necessary adjuncts, see post § 35.

¶ 124. Where application is made for laying out a highway, under the statute of 1861, the commissioners must lay out the whole road applied for or no part of it.—People ex rel. French v. Springwells Township Board, 12 Mich. 434.

¶ 125. An order of a highway commissioner to lay out a highway beginning at a certain point, "running nearly in a northwesterly direction, near where the travel is now seeking to get the best route" to another specific point, is void for the uncertainty in the description.—Blodgett v. Whaley, 47 Mich. 469.

¶ 126. Where the statute (Rev. St. 1846, chap. 25, § 1) required the commissioners of highways, in laying out a road, to incorporate an accurate survey thereof in an order signed by them, such order to be filed and recorded, a survey found of record, purporting to be a copy of the field-notes of a survey, is insufficient to show a regularly laid out highway; on the contrary it tends to disprove it.—Kruger v. Le Blanc, 70 Mich. 76.

§ 35. ——Implication as to bridges and necessary adjuncts.

¶ 127. Construction of the necessary bridge is implied, where the proceedings for laying out a highway were regular and the said highway was to extend across a millpond, although the petition made no reference to the construction of a bridge.—Andrews v. Weckerman, 144 Mich. 199.

§ 36. Estimates and appraisements and measure of compensation.

Damages for crossing railroads, see post § 37.
Interest on damages appraised, see post § 38.
Measure of compensation in street opening proceedings in cities and villages, see post § 64.
Highway damages for taking property for opening in so far as ordinary rules for admeasurement of such damages govern and are applied, see Eminent Domain, IV.
Measure and elements of damages for "taking" or "injuring" property, see Eminent Domain, IV.
Payment of awards, see post §§ 41-43.
Procedure to assess damages on laying out highway by county board, see Comp. L. 1915, § 2291.
Determination of necessity and appraisal of damages on hearing, see Comp. L. 1915, § 4292.
Estimate of damages of highway parallel to and within one-half mile of existing highway, see Comp. L. 1915, § 4292.

¶ 128. As the public takes only easement rights over lands condemned for highway purposes, the benefits which would follow the fee, as well as such benefits as would come by reason of the improvement, should be taken into consideration in assessing damages and set-off as against the damages arising by reason of the taking of the lands for highway purposes.—Township of Custer v. Dawson, 178 Mich. 367.

¶ 129. Where a highway is laid out parallel to and within one-half mile of an existing highway, the damages awarded to the owner of lands taken cannot be estimated at less than their value for general farming purposes unless by his assent, which fact must appear by the return of the commissioner.—Truax v. Sterling, 74 Mich. 160.

¶ 130. Damages for opening a private way as a public one cannot be reduced by the

fact that the owner had allowed the public to use it after the previous proceedings had been quashed.—Ayres v. Richards, 41 Mich. 680.

§ 37. ——Damages for crossing railroads.

Damages for separation of crossing grades, see post § 121.

¶ 131. The damage to a railroad from opening a street across it includes the expense entailed by the crossing, and may involve outlays for making it safe.—Grand Rapids v. Grand Rapids & I. R. Co., 58 Mich. 641.

¶ 132. The laying out of a highway across a railroad entitles the railroad company to include in its damages the expense of cattle-guards, fencing and other outlays to complete the approaches, besides the cost of maintaining them.—Chicago & G. T. R. Co. v. Hough, 61 Mich. 507.

¶ 133. The damages awarded to a railroad company where a street is opened through its right of way should cover not only the use of the land taken, but also any extra expense created by the use of the right of way for the street in the ordinary use of the company's road, and such other damage as it may sustain by injury to its track, right of way and franchise occasioned by the crossing, and which may properly be considered as the natural, necessary and proximate cause thereof. The company cannot recover expenses made necessary in order to comply with the police regulations of the state or municipality, but such damages only as arise in making the structural changes necessary to comply with statutory regulations, and which must necessarily continue in the future operation of its road.—In re First Street, City of Grand Rapids v. Grand Rapids & I. R. Co., 66 Mich. 42.

§ 38. ——Interest on damages appraised.

¶ 134. A township is not liable for interest on damages appraised for laying out highway.—People ex rel. Anderson v. La Grange, 2 Mich. 187.

§ 39. Return and record of hearing, view and appraisement.

Burden of proof and presumptions as to necessity, see post § 40.

Return of commissioner to certiorari, see post § 59.

Notice and affidavit of service as part of record to be present with commissioner on hearing, see Comp. L. 1915, § 4291.

Commissioner's return after final determination, see Comp. L. 1915, § 4293.

Necessity for commissioner to view premises described in petition, see Comp. L. 1915, § 4292.

¶ 135. Proceedings to open a highway, where the highway commissioner's return to the township clerk shows neither the time nor the manner of notice and gives no full account of the transactions giving authority to act, must be quashed.—Shue v. Richmond Township Highway Commissioner, 41 Mich. 638.

¶ 136. Failure of the report of a highway commissioner establishing a highway to show when the petition therefor was received does not affect its validity, if the dates appear from the petition itself and the recitals of the notice.—Gorham v. Johnson, 157 Mich. 433.

¶ 137. Where, in proceedings to establish a highway, the record and return contained a copy of the notice of the application therefor, and proof by the commissioner's affidavit that service was made within the proper time, it sufficiently appeared that proof of service was made, and was before the commissioner at the time his action was taken, although neither fact was shown by the record and return.—Gorham v. Johnson, 157 Mich. 433.

¶ 138. In proceedings to establish a highway, it was not necessary that the record and return state what occurred at the meeting prior to the commissioner's proceeding to view the premises, further than to state that the "commissioner and others were assembled," and that "there was a discussion among them regarding the laying out of the proposed highway, after which they dispersed," where it appeared that the commissioner immediately proceeded to make a view, determined that the road was necessary, and that it should be laid out.—Gorham v. Johnson, 157 Mich. 433.

¶ 139. Proceedings for laying out a highway are void unless the commissioner's return affirmatively shows that he determined such action was necessary.—Truax v. Sterling, 74 Mich. 160; Cox v. Commissioner of Highways of Township of Hartford, 83 Mich. 193.

¶ 140. The highway commissioner's failure to show by his return that notice was served upon an occupant of land through which a highway is to be laid is fatal to the validity of his proceedings.—Wilson v. Township Board of Burr Oak, 87 Mich. 240.

¶ 141. Proceedings to establish a highway must be quashed where the commissioner's return to the township clerk does not show when the application was made, or who were the owners of the lands over which the road was to be laid out, or whose interest would be affected, or what the damages awarded were, the value of the land for farming purposes, or that there was a public necessity for the laying out of the road and for the taking of the land affected for such purpose.—Cowing v. Ripley, 76 Mich. 650.

¶ 142. If the record of proceedings to lay out a highway, required by the statute to

be kept by the town clerk, contains no proof of service or posting of the statutory notices, it is jurisdictionally defective.—Van Auken v. Vernon & Shiawassee Highway Com'rs, 27 Mich. 414.

¶ 143. If the commissioner's report to the township clerk does not show that notice of the application therefor, and of a hearing upon it, had been given to the parties interested, and even if proof of notice has been duly filed, the proceedings are fatally defective if the report does not show when the hearing took place, since it would not show that the commissioner took action on the day fixed in the notice for the hearing, and therefore would not show that parties interested had a chance to be heard.—Moetter v. Grosse Pointe Highway Com'r, 39 Mich. 726.

¶ 144. The record of proceedings to lay out and establish a highway must show legal evidence of the petition, the notice, and service; and recital of these facts in the commissioner's return is not sufficient.—Schroeder v. Village of Onekama, 95 Mich. 25.

¶ 145. An insufficient return by highway commissioners as to the giving of notice of proceedings taken by them to lay out a highway is not cured by a subsequent affidavit of service by one of their number, that implies that no proof of service was before them when they acted, other than the mere oral statement of the commissioner who made the service, which cannot be proof to the others, or to third persons, who are entitled to have the facts put on record. Jurisdiction to take from a private owner the possession of his lands can never rest on such a basis as the mere oral statement of the fact of service.—Dupont v. Hamtramck Highway Com'rs, 28 Mich. 362.

¶ 146. Whether the return of the highway commissioners can be cured by an affidavit, subsequently made, of the facts, showing that notice was duly given by one of the commissioners, and that at the time of acting they had the proof of that fact actually before them, quære.—Dupont v. Hamtramck Highway Com'rs, 28 Mich. 362.

¶ 147. Under section 4041, Comp. L. 1897, requiring that in proceedings to establish a highway the commissioner must sign the map and survey of the road, his signature to the record and return containing the map and survey is sufficient.—Gorham v. Johnson, 157 Mich. 433.

¶ 148. Survey found of record, purporting to be copy of field-notes, held insufficient to show regularly laid out highway where statute required survey to be incorporated in order signed by commissioners, etc.—Kruger v. Le Blanc, 70 Mich. 76.

§ 40. ——Burden of proof and presumptions as to necessity.

¶ 149. If the statutory notice of proceedings to lay out a highway may ever be dispensed with, the public authorities who have attempted without notice to appropriate lands for the highway must, when the validity of their proceedings is questioned, show that the circumstances existed to justify their action; the burden is upon them of making out the exceptional case, and not upon the owners of showing the contrary.—Names v. Olive & Robinson Highway Com'rs, 30 Mich. 490.

3. Payment of awards and completion of proceedings.

§ 41. In general; right and necessity.

Orders for payment, see post § 42.

Estoppel by acceptance of award, see post § 43.

Necessity for compensation in street opening proceedings in cities and villages, see post § 64.

Constitutional necessity and time for payment, see Eminent Domain, IV.

Apportionment and assessment of benefits in levying local assessments, see Local Improvements, VI.

Authority and duty to remove fences on receipt of award, see Comp. L. 1915, § 4305.

¶ 150. A private way cannot be converted into a public highway without compensation to the owner of the lands over which it runs.—Ayres v. Richards, 41 Mich. 680.

¶ 151. Damages to the value of the land for farming purposes, taken by a commissioner of highways in laying out or altering a highway, must be allowed to the owner before the public can acquire any rights or interest in the property condemned.—Weber v. Stagray, 75 Mich. 32.

¶ 152. Township authorities cannot refuse to make payment for lands taken for a highway in 1859, on the ground that a road was laid out over the same line in 1857 since from 1851 to 1859 there was no law under which a highway could be legally laid out by condemnation proceedings.—People ex rel. Holcomb v. Lowell Township Board, 9 Mich. 144.

¶ 153. A jury was summoned in 1859, on the warrant of a justice, to determine the necessity of taking the relator's lands for a highway, and to assess his damages. The jury found the taking necessary, and assessed the damages; and their finding was filed in the town clerk's office, but not certified by the justice as required by law. The amount of damages was levied and collected by tax, and the road opened. It was held that the town could not resist the payment of the damages to the relator, on the ground that the justice had failed to certify the

finding.—People ex rel. Holcomb v. Lowell Township Board, 9 Mich. 144.

§ 42. Orders for payment.

Payment of damages awarded, see Comp. L. 1915, § 4311.

¶ 154. Where a highway was laid out through the lands of an individual in 1860, and his damages were appraised, and an order on the township treasurer tendered for the amount, which order was payable "to the owner or occupant, or to the person entitled thereto, for the land so taken," it was held that the order was insufficient, and its tender did not authorize the highway commissioners to take possession of the land. It should have designated the payee, so as to show on its face the person to whom it was payable.—Lull v. Curry, 10 Mich. 397.

¶ 155. Questions involved in the merits of the controversy before the commissioners or the appraisers, or the fraud or misconduct of the parties or officers, cannot be inquired into by the township board upon an application for an order upon the treasurer for the amount of damages assessed.—People ex rel. Anderson v. La Grange Township Board, 2 Mich. 187.

§ 43. Estoppel by acceptance of award.

¶ 156. Unconditional acceptance of a township order in satisfaction of damages occasioned by laying out a highway estops one from afterwards contesting the proceedings on the ground of mere irregularities therein.—Prescott v. Patterson, 49 Mich. 622.

¶ 157. Where a commissioner in a petition for a highway has jurisdiction over the person and the subject-matter, the participation of the person in, and his acceptance of, the award, estops him and his grantee from contesting the validity of the award.—Page v. Boehmer, 154 Mich. 693.

4. Appeals, injunctions and judicial review.

§ 44. In general; right of review and remedies.

Appeals to township boards, see post §§ 45-49.
Appeals from township board to circuit court and trials therein, see post § 50.
Review on writ of error to circuit court, see post § 51.
Certiorari or mandamus to review proceedings, see post §§ 53-60.
Injunction as remedy, see post § 61.
Appeal and review in street opening proceedings, see post §§ 91-95.
Nonliability of officers for laying out highway, see post § 144.
Subjecting land to public street use by force as actionable trespass, see Eminent Domain ¶ 493.
Limitations of common law and chancery actions for relief, see Limitations.
Persons entitled to appeal to township board, see Comp. L. 1915, § 4294.

¶ 158. Proceedings relating to opening a highway are special and summary in character, and, while subject to judicial review and supervision for certain purposes, are not judicial proceedings.—Hartz v. Wayne Circuit Judge, 164 Mich. 231.

¶ 159. A party who is not notified of proceedings to establish a highway can lose nothing by a failure to appeal to the township board.—Names v. Olive & Robinson Highway Com'rs, 30 Mich. 490.

¶ 160. Appeal to the township board is the only way to secure a review of the adequacy of the compensation allowed for land taken for a highway.—Weber v. Ryers, 82 Mich. 177.

¶ 161. The owners of lands appropriated under void highway proceedings may bring trespass when their occupation is disturbed.—Names v. Olive & Robinson Highway Com'rs, 30 Mich. 490.

§ 45. Appeals to township board.

Disqualification of members and substitutions, see post § 46.
Orders appealable and view, hearing and scope of review, see post § 47.
Decision on appeal, record, conclusiveness and effect, see post § 48.
Objections and defects barred or cured by appeal, see post § 49.
Power of township board over disputed questions on application for order upon treasurer for damages, see ante ¶ 155.
Right, method and procedure on appeal to township board, see Comp. L. 1915, §§ 4294, 4295.
Appeals on laying out highways between township and city or village, see Comp. L. 1915, § 4301.
Necessity for concurrence by resolution of township board, see Comp. L. 1915, § 4292.

¶ 161a. Where a road is regularly applied for, and the commissioners decide to lay out a part of it only, any person through whose lands the road runs as laid is entitled to take proceedings to test the validity of their action.—People ex rel. French v. Springwells Township Board, 12 Mich. 434.

¶ 162. An appeal to the township board from the decision of a highway commissioner in laying out a highway across appellant's land need not specify the reasons for the appeal. (How. St. §§ 1302, 1303.)—Brown v. Township Board of Greenfield, 92 Mich. 294.

¶ 162a. The action of township boards on appeal from the highway commissioners cannot be sustained if it does not appear that the party injured by it had notice of their meeting, even though the return shows that it was held at his house.—Prescott v. Patterson, 44 Mich. 525.

¶ 163. The township board has no jurisdiction to entertain an appeal from a decision of the commissioner of highways on a petition for the opening of a highway, holding that the highway was a necessary public improvement, without service of notice of the appeal as required by How. St. § 1302, and merely fixing a time and place for hearing the appeal gave no jurisdiction.—Sanger v. Township Board of Brownstown, 118 Mich. 19.

¶ 164. Failure to serve statutory notice of an appeal taken to the township board from a decision of the commissioner of highways on a petition for the opening of a highway and consequently void action by the board without service of notice, does not prevent service of new notice to give the board jurisdiction to act on the appeal after service.—Sanger v. Township Board of Brownstown, 118 Mich. 19.

¶ 165. On taking an appeal to the township board from the decision of the highway commissioner that a proposed road is necessary, appellant has no further responsibility than duly to make and file his claim of appeal; and the failure of the township clerk to serve a sufficient notice of appeal as required by How. St. § 1302 does not prejudice appellant's right to the appeal.—Sanger v. Township Board of Brownstown, 118 Mich. 19.

§ 46. ——Disqualification of members and substitutions.

¶ 166. A township board on appeal cannot legally proceed to lay out a highway if two of its acting members are financially interested in its being laid out.—Wilson v. Township Board of Burr Oak, 87 Mich. 240.

¶ 167. Members of a township board who took part on the hearing of an appeal by a landowner from the decision of the highway commissioner on necessity of a highway across appellant's land, and who decided that the highway was a public necessity, which decision was quashed, are disqualified from sitting on the hearing of a second appeal one having made affidavit that the highway was a necessity, and another having declared that if he had it to do over again he would do as he did before.—Locke v. Highway Com'r of Wyoming T'p, 107 Mich. 631.

¶ 168. A township board is not disqualified to hear an appeal from a decision of a highway commissioner because two of its members had, just before the hearing of his appeal, participated in determining the appeals of others who had complained of the determination of the commissioner.—Bogue v. De Long, 147 Mich. 63.

¶ 169. A member of a township board is not disqualified from sitting in the hearing of an appeal from the determination of a highway commissioner merely from the facts that his wife was a sister of the deceased wife of one of the freeholders who had signed the application of the highway and is the chief promoter, that his own wife had signed a former application for the opening of this highway, and as a member of the board he had voted for a resolution authorizing the expenditure of $1,000 in opening the highway. These facts at most furnish only evidence of partiality, of interest, or that he had prejudged the case and are overcome by a return that he was disinterested and impartial.—Bogue v. De Long, 147 Mich. 63.

¶ 170. Where on appeal from the decision of the highway commissioner establishing a road, it appears that two of the township board are disqualified to sit on the appeal other justices of the peace than the ones disqualified may be called in to make a quorum, according to express provisions of How. St. § 745.—Locke v. Wyoming Township Highway Commissioner, 107 Mich. 631.

¶ 171. Where a town-clerk is incapacitated to sit as a member of the township board consisting of two justices of the peace, the supervisor and the township clerk, under Comp. L. 1897, § 2344, upon an appeal to it from the decision of the highway commissioner in laying out a public highway, the deputy clerk cannot fill his place as a member of the board.—Dubois v. Riley Township Board, 126 Mich. 587.

§ 47. ——Orders appealable and view, hearing, and scope of review.

¶ 172. No appeal lies to the township board from refusal by the highway commissioner to lay out a highway.—Wilson v. Township Board of Burr Oak, 87 Mich. 240.

¶ 172a. A township board sitting to hear an appeal from the action of a highway commissioner in laying out a road has power to adjourn for any reasonable cause to a specified day.—People ex rel. Van Scoy v. Essex Township Board, 38 Mich. 615.

¶ 172b. A township board, on an appeal from a highway commissioner, cannot go beyond the grounds of the appeal and pass on other matters.—People ex rel. Tefft v. Hamtramck Township Board, 38 Mich. 558.

¶ 172c. A township board has no power to review the proceedings of the commissioners in laying out and establishing a road except on appeal; nor to review the proceedings of the appraisers except to see that they were not void for want of jurisdiction.—People ex rel. Anderson v. La Grange Township Board, 2 Mich. 187.

¶ 173. On an appeal to the township board from the decision of the highway commissioner in proceedings to establish a highway, Pub. Acts 1905, No. 195, does not require that the township board shall view

the premises. While a view may be helpful and desirable it is not error to fail to make it, especially when it was not asked for.—Bogue v. De Long, 147 Mich. 63.

¶ 174. On appeal to the township board from the commissioner to lay out a highway, taken under How. St. §§ 1302, 1303, but stating no reasons, the only questions open to the appellant are the necessity, and, if that is found to exist, the damages.—Brown v. Township Board of Greenfield, 92 Mich. 294.

¶ 175. The township board, upon appeal from award in highway proceedings, is not bound by the decision of the commissioner as to the amount of damages to be awarded, but may, under How. St. 1304, diminish or increase the same.—Brown v. Greenfield T'p Board, 109 Mich. 557.

¶ 176. Where several property owners appeal from the action of a highway commissioner in laying out a highway each has not the separate right to have determined the question of necessity.—Bogue v. De Long, 147 Mich. 63.

§ 48. ——Decision on appeal, record, conclusiveness, and effect.

¶ 176a. Proceedings of highway commissioners to lay out a highway are to be affirmed or reversed as an entirety, and the fact that the proposed road is a long one, and the parties who complain are injured by only a very small portion of it, cannot save the rest, for it is uncertain whether the commissioners would have decided to open anything less than the whole road.—Names v. Olive & Robinson Highway Com'rs, 30 Mich. 490.

¶ 177. The decision of township board on appeal from commissioner's action in laying out highway is final and conclusive.—Soller v. Township of Brown, 67 Mich. 422.

¶ 178. The determination of a township board upon an appeal from a decision of the commissioner of highways locating a road across appellant's land, and awarding compensation for the land so taken, is, under How. St., § 1303, final and conclusive.—Brown v. Greenfield T'p Board, 109 Mich. 557.

¶ 178a. The fact of notice of a meeting of township boards to review the action of highway commissioners is jurisdictional and must appear of record.—Prescott v. Patterson, 44 Mich. 525.

¶ 178b. Notice of an appeal to the township board from an order opening or extending a highway is needful to confer jurisdiction to proceed, and cannot therefore be shown by a mere recital in the final order of the board to the effect that due notice had been given.—People ex rel. Tefft v. Hamtramck Township Board, 38 Mich. 558; Brazee v. Raymond, 59 Mich. 548.

¶ 178c. The proceedings of a township board reversing an order opening or extending a highway were quashed for want of a proper showing of notice of an appeal from the order.—Brazee v. Raymond, 59 Mich. 548.

§ 49. ——Objections and defects barred or cured by appeal.

¶ 179. An appeal to the township board from proceedings to lay out or alter a highway is a waiver of such defects and irregularities as do not show a want of jurisdiction or that the proceedings were void.—Weber v. Stagray, 75 Mich. 32; Brown v. Township of Greenfield, 92 Mich. 294; Prescott v. Patterson, 44 Mich. 525.

¶ 180. Jurisdiction over the person of a landowner in proceedings to lay out a highway is secured where he participates in such proceedings, and takes an appeal.—Page v. Boehmer, 154 Mich. 693.

¶ 181. Whether the highway commissioner before whom proceedings were brought to establish a highway was disqualified is immaterial when the township board before whom the appeal was brought was qualified. Plaintiff's rights having been finally determined by a qualified tribunal, it is of no consequence that they were once determined by a disqualified tribunal.—Bogue v. De Long, 147 Mich. 63.

§ 50. Appeals from township board to circuit court, and trials therein.

Appeal to circuit court from township board and trial therein, see Comp. L. 1915, § 4295.

¶ 182. A dispute as to the location of a section line on which it is proposed to establish a highway, must be settled before steps are taken to open and improve the road; which may be done on an appeal to the circuit court, under § 8 of Act No. 283, of Public Acts 1909 (How. St., 2nd Ed., § 2174), from the decision of the township board.—Letourneau v. Erickson, 182 Mich. 617.

¶ 183. A statute providing for an appeal to the circuit court from the decision of a highway commissioner and a town board laying out a highway, is not in contravention of section 2, art. 3 of the Michigan Constitution, for failing to provide that the case must be heard by a jury of twelve freeholders, inasmuch as said section 2 expressly excludes the necessity for such a jury in the case of decisions by commissioners of highways.—Loomis v. Hartz, 165 Mich. 662.

¶ 184. On the hearing of an appeal from the decision of a highway commissioner in laying out a road, the jury should be instructed either that the land taken as shown by the survey attached to the commissioner's return, alone should be considered in awarding damages, or, if the location is in dispute, that the true location should be determined

and damages assessed with reference to the land actually taken.—Letourneau v. Erickson, 182 Mich. 617.

¶ 185. It is sufficient, in a proceeding to open a highway, to instruct the jury that in order for a public necessity for it to exist it is not requisite that the road should be absolutely necessary to the public, but that it is sufficient if the public is interested, within reason, in having it opened.—Rogren v. Corwin, 181 Mich. 53.

¶ 186. Where the record of the proceedings, as kept in the highway commissioner's book, is introduced to prove the establishment of a highway, and on their face they are void, it is reversible error to let the question of the existence of the highway go to the jury on such evidence.—La Barre v. Bent, 154 Mich. 520.

¶ 187. The finding of a jury as to the true location of a highway, when in dispute, is a material part of the verdict on an appeal from a proceeding to establish a highway.—Letourneau v. Erickson, 182 Mich. 617.

§ 51. Review on writ of error to circuit court.

¶ 188. Proceedings for the condemnation of land for highway purposes under Pub. Acts 1909, Act 283, How. 2nd Ed., § 2173, are properly reviewable by writ of error.—Township of Custer v. Dawson, 178 Mich. 867.

§ 52. Certiorari or mandamus to review proceedings.

From supreme court, see post § 53.
Grounds and propriety of allowing writ, see post § 54.
Interest or grievance to relator, see post § 55.
Time for writ, laches and delay, see post § 56.
Petition for certiorari, writ and service, see post § 57.
Parties relator and respondent, see post § 58.
Return to certiorari, see post § 59.
Scope of review in general and form of relief granted, see post § 60.
General law of certiorari and mandamus, see Certiorari; Mandamus.
Scope of review on certiorari, and presumptions and construction of the return in general, see Certiorari §§ 48-61.
Certiorari to review street opening proceedings, see post §§ 94, 95.

¶ 189. Under Act No. 283, Pub. Acts 1909, which provides for an appeal from the decision of highway commissioners and of a town board ordering the laying out of a road, but which grants no right to review said order by writ of certiorari, the property owner has a complete remedy by appeal to the circuit court, and cannot review said order by certiorari issuing from the circuit court.—Hartz v. Brown, 165 Mich. 660.

§ 53. ——From supreme court.

¶ 190. Proceedings relating to the opening of highways may be reviewed by certiorari, and in such review the supreme court may inquire as to the manner in which the inferior bodies have exercised their jurisdiction.—Hartz v. Wayne Circuit Judge, 164 Mich. 231.

¶ 191. Relator appealed from a decision of a township board in certain highway proceedings. The circuit judge dismissed the appeal on the ground that the statute creating the right of appeal was unconstitutional. Held, relator's proper remedy was by certiorari from this decision, and that mandamus would not lie to vacate this final ruling of the circuit judge.—Hartz v. Wayne Circuit Judge, 164 Mich. 35; Hartz v. Wayne Circuit Judge, 164 Mich. 231.

§ 54. ——Grounds and propriety of allowing writ.

¶ 192. Proceedings connected with the local administration of the state, such as highway openings, etc., will not be reviewed on certiorari unless the court is satisfied that some serious injury has been done the petitioner, and that he has not delayed complaining until rights have been fixed.—Nightingale v. Simmons, 66 Mich. 528.

¶ 193. A review of highway and similar proceedings cannot be had in the supreme court on certiorari unless plaintiff has been prevented from resorting to his statutory appeal without his fault, or unless the case presents strong equities to dispense with it.—Nightingale v. Simmons, 66 Mich. 528.

¶ 194. Where one who felt himself aggrieved by the action of highway commissioners in the matter of laying out a road on a town line took advantage of the appropriate statutory remedy by appeal to the township boards, the supreme court declined to order a writ of certiorari to review the proceedings, no exceptional circumstances being shown.—Burt v. Sumpter & Van Buren Highway Com'rs, 32 Mich. 190.

¶ 195. The decision of the township board on appeal from a highway commissioner's action in laying out a highway is final (How. St. §§ 1302, 1303), and precludes a resort to certiorari except in case of peculiar circumstances; and such circumstances do not exist where the petitioner merely contended that the commissioner's proceedings were irregular, and did not claim damages before the board.—Soller v. Township of Brown, 67 Mich. 422.

¶ 196. If the only question is as to the amount of damages, certiorari will not lie to the commissioner to remove highway opening proceedings to the supreme court, where no reason is given for not resorting to the remedy by appeal.—Detroit & B. C. R. Co. v.

Graham, 46 Mich. 642; Flint & P. M. R. Co. v. Norton, 64 Mich. 248.

¶ 197. The remedy by certiorari to review void proceedings to lay out a highway is not precluded by an action of trespass brought because of the disturbed occupation.—Names v. Olive & Robinson Highway Com'rs, 30 Mich. 490.

§ 55. ——Interest or grievance to relator.

¶ 198. Certiorari to review proceedings to lay out a highway was quashed where the petitioner's interest arose only from his being a tax payer and therefore liable to be called upon to pay a trifling portion of the tax which would be levied to satisfy the appraised damages. His interest was too remote and the amount involved too small.—Vanderstolph v. Highway Com'r, 50 Mich. 330.

§ 56. ——Time for writ, laches and delay.

¶ 199. Fifteen months after the laying out of a highway by the commissioner of highways, the proceedings were removed by certiorari to the circuit court. The person prosecuting the writ had notice of and was present at the proceedings, but made no effort to prevent the improvement and use of the highway by the public until the time of the issuance of the writ. Held, that the writ was properly dismissed in discretion of the court.—Burnett v. Swaney, 114 Mich. 609.

§ 57. ——Petition for certiorari, writ and service.

Oath to application for certiorari, see also Certiorari ¶ 96.

¶ 200. In an application for certiorari to bring up for review proceedings to lay out a highway, a showing that some portion of the applicant's lands have been appropriated is a sufficient showing of injury thereto.—Names v. Olive & Robinson Highway Com'rs, 30 Mich. 490.

¶ 201. A copy of the petition on which a certiorari to review a highway opening proceeding has been allowed should be served with the writ. No error can be relied on unless specified, and respondents are entitled to have their attention called to what they are concerned to explain.—Nightingale v. Simmons, 66 Mich. 528.

¶ 202. A writ of certiorari to review proceedings to lay out a highway will be dismissed with costs if, though there was excusable failure to appeal, there is no showing of any intention to appeal after the complaining party became aware of the action taken.—Wilder v. Hubbell, 43 Mich. 487.

¶ 203. Where a review of highway opening proceedings is sought on certiorari, the oath of the party himself showing why he is justified in resorting to this remedy should be presented.—Nightingale v. Simmons, 66 Mich. 528.

§ 58. ——Parties relator and respondent.

¶ 204. Two landowners having like complaints against the action of a commissioner of highways in laying out a road, and whose injuries are of the same nature, may join in certiorari proceedings to review such action.—Cowing v. Ripley, 76 Mich. 650.

¶ 205. Where commissioners of highways laid out and established a road, and an appeal was taken from their decision, which affirmed what the commissioners had done, a certiorari sued out for the purpose of reviewing the decision of the township board, directed to the commissioners instead of to the township board, was dismissed for the misdirection.—Goodrich v. Lima Highway Com'rs, 1 Mich. 385; French v. Springwells Highway Com'rs, 12 Mich. 267.

§ 59. ——Return to certiorari.

Commissioner's return to township clerk, see ante § 39.

Right of clerk to fees before making return to certiorari, see Certiorari ¶ 107.

¶ 206. On error to a judgment of the circuit court on certiorari to review the action of a highway commissioner in laying out a highway, the supreme court will disregard the findings of fact by the circuit court, and dispose of the case on the commissioner's return to the writ, which must be taken as true.—Gorham v. Johnson, 157 Mich. 433.

¶ 207. It is from the records made and returned to the township clerk by a commissioner of highways, of his action in laying out a road, that the legality of such action is to be determined on certiorari to review the same, and not from his return to such writ outside of such records.—Cowing v. Ripley, 76 Mich. 650.

¶ 208. Proceedings to lay out a highway, are defective and must be quashed if the highway commissioner's return to writ of certiorari fails to show that the statutory notices of the proceedings were served or posted.—Pegler v. Grand Rapids Highway Com'rs, 34 Mich. 359; People ex rel. Gray v. Brockway Highway Com'r, 40 Mich. 165; Nielsen v. Wakefield, 43 Mich. 434.

¶ 209. Where the return on certiorari shows that the proceedings to lay out a highway do not show any proof of service or posting of the notice required by the statute, except the certificate of the commissioners that they have laid out the highway, in which they recite that they have "given notice according to law," the action of the commissioners is without jurisdiction and void.—Van Auken v. Vernon & Shiawassee Highway Com'rs, 27 Mich. 414.

§ 60. ——Scope of review in general and form of relief granted.

See also ante ¶ 190.

¶ 210. Proceedings to lay out a town-line road, where no damage appears to have been done to plaintiff, who has been guilty of laches, and where there is no reason to doubt the fairness of the action complained of, are not reviewed on certiorari for technical objections.—Carpenter v. Highway Com'rs, 64 Mich. 476.

¶ 211. The adequacy of the compensation awarded by a highway commissioner for land taken for highway purposes is not reviewable by certiorari.—Weber v. Ryers, 82 Mich. 177.

¶ 212. On a proceeding to lay out a highway the highway commissioner's failure to show in his return that he met those interested at the place specified in his notice for viewing the premises cannot be complained of by one whose affidavits for certiorari to review the opening proceedings shows that plaintiff met him at such place to oppose his action.—Soller v. Township of Brown, 67 Mich. 422.

¶ 213. On certiorari to review the proceedings of a township board upon appeal from the action of the highway commissioner in laying out a highway, the commissioner's action will not be passed upon where he is not a party to the writ.—Brazee v. Raymond, 59 Mich. 548.

¶ 214. Upon certiorari against the township board and the highway commissioner of the township to review the proceedings of such board on an appeal from an order of the commissioner establishing a highway, the court cannot enter an order for the board to reconvene and consider the appeal. The sole question presented being, was the action valid.—Dubois v. Riley Township Board, 126 Mich. 587.

¶ 215. A statement by the circuit court in setting aside for total want of jurisdiction the decision by a township board on appeal from the decision of the commissioner of highways on a petition for the opening of a highway that the circuit court's action was "without prejudice to prior proceedings," is proper but unnecessary since quashing the action of the board left the original order in statu quo.—Sanger v. Township Board of Brownstown, 118 Mich. 19.

§ 61. Injunction as remedy.

Injunction as remedy in street opening proceedings in cities and villages, see post § 96.

General law of injunctions and occasion and propriety for injunctive relief, see Injunctions.

Dismissal of injunction as bar to further proceedings, see Former Adjudication § 17.

¶ 216. Where the law affords a plain and adequate remedy for persons aggrieved by the action of commissioners in the opening of highways, relief will not be given by injunction.—Burdick v. Harbor Springs Lumber Co., 167 Mich. 673.

¶ 217. Where an award of a board of highway commissioners in laying out a highway is void for want of jurisdiction because of a failure to give the notice required by law, the giving of such notice being treated as a jurisdictional matter, a court of equity may enjoin further proceedings for the opening of the highway.—Burdick v. Harbor Springs Lumber Co., 167 Mich. 673.

¶ 218. Where road commissioners acting as public officers under an unfounded claim of authority are endeavoring to appropriate complainant's land to the use of the public for a highway, they may be enjoined from entering upon the land and from removing trees, buildings, and fences therefrom, and in such case, the court having properly acquired jurisdiction for the purposes of the injunction, may in order to prevent a multiplicity of suits and to do complete justice between the parties, under the prayer for general relief, award damages for the injuries already committed.—Burdick v. Harbor Springs Lumber Co., 167 Mich. 673.

¶ 218a. A bill in chancery for an injunction lies in favor of the owner of property abutting on a highway who has released a certain number of feet off of his land for highway purposes, against the highway commissioner to enjoin the incorrect location and opening of the highway entirely upon complainant's land, other than the land released or that on which the quarter section line was situated, and the cutting down of trees, he not having an adequate remedy at law through appeal under the provisions of Pub. Acts 1909, No. 283, How. 2nd ed., § 2173 et seq., and amendments, pursuant to which the proceedings were taken to lay out and open the proposed highway.—Groves v. Bowman. 201 Mich. 46.

¶ 218b. Where the petition for the laying out of a highway on the quarter line is regular and the surveyor by mistake locates it elsewhere the laying out of the highway may be enjoined.—Loud v. Deacon, 189 Mich. 177.

¶ 218c. One in possession claiming title may have an injunction against an intruder who threatens to enter and dispossess him for the purpose of laying out a public street. Diamond Match Co. v. Village of Ontonagon, 72 Mich. 249.

¶ 219. Where a bill is filed by a railroad company to restrain a highway commissioner from opening a highway which he has laid out across complainant's depot grounds, and on the hearing it appears that complainant

was allowed $100 for its damages, and that it has no just reason to oppose the laying out of the highway, the proceedings of the commissioner will not be reviewed.—Battle Creek & S. R. Co. v. Tiffany, 99 Mich. 471.

¶ 220. On the bare fact established by a sworn answer to the bill that a proposed road is a public necessity without any showing of special circumstances to support establishment of a cul de sac road, injunction will not be granted against the opening of it as a road essentially private in character but petitioned for as a public road.—Fields v. Colby, 102 Mich. 449.

¶ 221. A bill to enjoin a highway commissioner from opening a highway is properly dismissed where it alleges that the complainant appealed from the action of the commissioner to the township board in accordance with Comp. L. 1897, § 4042 and the testimony shows a full hearing before the said board unimpeached by either the bill or the testimony on the ground urged for injunction.—Campau v. Le Blanc, 127 Mich. 179.

5. Street opening in cities and villages.

§ 62. In general; nature and form of proceedings.

Strictness of procedure, see post § 63.
Necessity and measure of compensation and persons entitled, see post § 64.
Public uses and necessity or propriety of street, see post §§ 65, 66.
Property or quantum of estate necessary or subject to appropriation, see post § 67.
Resolution or other preliminaries by municipal council, see post § 68.
Previous effort to purchase or obtain consents, see post § 69.
Maps and surveys, see post § 70.
Petition and proceedings thereon, see post § 71 et seq.
Powers of cities and villages, see also post ¶ 517.
Proceedings by township highway commissioner, see ante II, B, 1-4.
Proceedings to open private alleys and ways, see post XV.
What constitutes a "taking" or "injuring" of property for street uses or for other public uses, see Eminent Domain, III.
Street opening proceedings in fourth-class cities, see Comp. L. 1915, §§ 3136-3164.
Street opening proceedings by villages, see Comp. L. 1915, §§ 2784-2819.
Right on street opening to condemnation proceedings under general law, see Comp. L. 1915, § 3137.

¶ 222. The taking of a citizen's lands for a public highway is taking property for the use and benefit of the public, within the meaning of article 18, § 2 of the constitution.—Truax v. Sterling, 74 Mich. 160.

¶ 223. In street opening cases the city may proceed under Laws 1883, Act No. 124, or by express terms of section 24 of that act under their local charters or other special acts.—Trowbridge v. City of Detroit, 99 Mich. 443.

¶ 224. The constitution of 1850 did not abolish then existing highway laws beyond repealing the provisions for assessing damages in taking lands where the owners did not acquiesce.—Nye v. Clark, 55 Mich. 599.

¶ 225. A city charter providing for condemnation of land for public use may validly permit separate parcels of lands owned by different persons to be condemned by the same jury.—Kundinger v. City of Saginaw, 59 Mich. 355.

¶ 226. Where the contemplated street improvement looks to the establishment of a continuous street, the proceedings for the same may be joint although certain parts of the highway are called by different names.—City of Detroit v. Robinson, 93 Mich. 426.

§ 63. Strictness of procedure.

¶ 227. Proceedings whereby private property is taken against the owner's will for opening a street, being special and adverse, must comply strictly with every provision of the law that is not so purely formal as in no way to bear upon the protection or rights of the parties to be affected. And since, by the same course of proceedings, the value of the land is determined, and the cost of the improvement is levied against the parties to be charged, the inquiry involves not only those principles governing the taking of private property for public use, but also those bearing on assessments to apportion public burdens.—Powers' Appeal, 29 Mich. 504.

§ 64. Necessity and measure of compensation and persons entitled.

Measure and elements of damages for "taking" or "injuring" property, see Eminent Domain, IV.

¶ 228. One who petitions for the laying out of a street is not estopped from claiming damages for his land taken therefor.—Turner v. Village of Stanton, 42 Mich. 506.

¶ 229. Any waiver of damages ought to appear of record in the proceedings of a village board in laying out a street across the land of private persons.—Turner v. Village of Stanton, 42 Mich. 506.

§ 65. Public uses and necessity or propriety of street.

Necessity for establishment of alley, see also ante ¶ 15.
Effect of contract not to open street, see post § 66.

¶ 230. Property cannot be taken for public street use unless there is a necessity, and this must be a real necessity.—City of Detroit v. Daly, 68 Mich. 503.

¶ 231. In estimating the necessity it makes no difference to the public who owns the land. The necessity must be as great where the land is owned separately as where it is part of a larger property.—City of Detroit v. Daly, 68 Mich. 503.

¶ 232. There is no public necessity for the taking of land for the extension of a street where the new portion of the street, as extended, will end at a recreation park, thus forming a mere cul de sac, which is a private way.—In re Opening of Willis Avenue, How. N. P. 265.

§ 66. ——Effect of contract not to open street.

¶ 233. Proceedings for a street opening are not precluded by a prior agreement of a municipality not to extend the street.—In re First St., City of Grand Rapids v. Grand Rapids & I. R. Co., 66 Mich. 42.

¶ 234. Estoppel of city from opening a street across railroad track by its action in leading the railroad company to lay out money and fix its location on the faith of agreement that the street in question would not be opened, quære.—Grand Rapids v. Grand Rapids & I. R. Co., 58 Mich. 641.

§ 67. Property or quantum of estate necessary or subject to appropriation.

Nature of the estate taken and rights of the public and abutters, see post X.

¶ 235. It can never be necessary to take a fee-simple absolute for either alleys or streets.—Paul v. City of Detroit, 32 Mich. 108.

¶ 236. The charter of Detroit does not sanction the taking of the absolute fee of lands for alleys, or make highways of them, when established.—Paul v. City of Detroit, 32 Mich. 108.

¶ 237. The parcels of land sought to be taken for a street need not be contiguous.—City of Detroit v. Robinson, 93 Mich. 426.

¶ 238. In proceedings to open a street, it is not necessary to condemn a public alley crossed thereby, since the condemnation of the land abutting on the alley leaves no one who is in position to complain of its use for a public street.—Scotten v. City of Detroit, 106 Mich. 564.

§ 68. Resolution or other preliminaries by municipal council.

Previous effort to purchase or obtain consents, see post § 69.

Maps and surveys, see post § 70.

Resolution by city council, see Comp. L. 1915, § 3188.

Resolution for street opening by village council, see Comp. L. 1915, § 2786.

¶ 239. A resolution in a street-opening case was fatally defective where it did not contain the separate descriptions of the land proposed to be taken, and the names of the several owners.—City of Owosso v. Richfield, 80 Mich. 328.

¶ 240. The authorities of a village become moving parties in the character of plaintiffs or petitioners when they decide to commence proceedings to open a street.—People ex rel. Bingham v. Brighton, 20 Mich. 57.

§ 69. Previous effort to purchase or obtain consents.

In proceedings for widening streets, see post § 123.

Necessity and sufficiency of previous effort to purchase or obtain consent, see also Eminent Domain § 59, ¶ 186.

Necessity of making landowner with whom previous settlement has been made party respondent in street opening proceedings, see post ¶ 247.

Right of city to secure property for street purposes by negotiation and purchase, see Comp. L. 1915, § 3164.

Right of village to acquire property for street opening by purchase or negotiation, see Comp. L. 1915, § 2819.

¶ 241. The charter of Saginaw provides that when it becomes necessary to take private property for a street the council shall first treat with the owner before taking steps to condemn it. Held, that this requirement is jurisdictional; and that merely receiving a proposal from the owner and tabling it is insufficient; acceptance or a counter-proposal is necessary.—Laue v. City of Saginaw, 53 Mich. 442.

¶ 242. In proceedings for opening a street it need not be alleged in the petition nor need it be shown that an attempt to obtain the land by dedication or sale for the proposed improvement was made and failed before condemnation proceedings were instituted.—City of Detroit v. Beecher, 75 Mich. 454.

§ 70. Maps and surveys.

Map and survey for proposed street as preliminary, see ante § 70.

¶ 243. The map accompanying the petition in a street opening case showed the location of the proposed improvement, and of each parcel of land to be taken, but failed to show the boundary line between a parcel of land only a part of which was to be taken and the land adjoining the remainder of said parcel. The parcel was admitted by the city attorney to be of a certain depth, and all of the testimony was based upon this assumption. Held, that the jury, permitted to take the map to the jury room, could not have been misled by the omission to define thereon said boundary line.—City of Detroit v. Bruder, 104 Mich. 221.

§ 71. Proper and necessary parties.

Necessity that names of owners be stated in resolution, see ante ¶ 239.

Village authorities as parties complainant, see also ante ¶ 240.

¶ 244. The village corporation is party, in the nature of plaintiff or petitioner, to proceedings for the opening of streets, etc., under the general act for the incorporation of villages.—People ex rel. Bingham v. Brighton, 20 Mich. 57.

¶ 245. Proceedings to open a street across the land of a railroad company were held invalid where the company was not named in the proceedings and did not appear, even though damages were awarded to it for the land taken.—Detroit, M. & T. R. Co. v. City of Detroit, 49 Mich. 47.

¶ 246. The mortgagees of the franchises and easements of a railway company need not be made parties to a proceeding to condemn a right of way across its track for a street, if the track is not disturbed and the company is left in control of the road.—Grand Rapids v. Grand Rapids & I R. Co., 58 Mich. 641.

¶ 247. An owner with whom a settlement has been made by the city for his land need not be joined in condemnation proceedings with the owners of other lands for the same street opening improvement.—City of Detroit v. Robinson, 93 Mich. 426.

§ 72. Petition for condemnation.

Petition for highway proceedings by township commissioner, see ante § 29.

Summons or notice of proceedings, see post §§ 73-76.

Necessity for jury, see post § 77.

Character of jury and qualifications of jurors, see post § 78.

Venire and return thereto, see post § 79.

Functions of jury and questions triable, see post § 80.

Oath of jurors, see post § 81.

Procedure on hearing, trial and judgment, see post §§ 82-88.

Abandonment or discontinuance of proceedings, see post § 89.

Appeal and review, see post §§ 91-95.

Injunction and other actions, see post § 96.

Petition in condemnation proceedings in general, see Eminent Domain §§ 60-69.

Petition for condemnation filed by city, see Comp. L. 1915, § 3139.

Petition by village for street opening, see Comp. L. 1915, § 2787.

¶ 248. A petition stating that the object of a proposed public improvement is the opening and extending of a designated street between two streets where not already opened to a certain width, and that, in making and maintaining the proposed improvement, a perpetual right of way over the different pieces or parcels of private property described in the petition will be necessary, and that such right of way is proposed to be used for the purposes of a public street and highway, states fully enough, in "a general way," the nature and extent of the use of the land that will be required in making and maintaining the proposed improvement.—City of Detroit v. Beecher, 75 Mich. 454.

¶ 249. Under Laws of 1887, Act. No. 48 (How St. § 3064c), relating to proceedings for local improvements, and requiring that the petition shall be signed by the city attorney in his official capacity, a petition for a street opening signed "the city of Detroit, by W. S. S., City Attorney," is sufficient.—City of Detroit v. Beecher, 75 Mich. 454.

¶ 250. The requirement that petitions for the condemnation of land for street purposes shall separately describe the land owned by each respondent, and state his interest therein, is to enable the jury to determine the damages suffered by each; and an objection that certain of the parcels affected are not so described is unavailable, where the owners of such parcels have given their assent to the proceedings, and have agreed to convey their interests.—Pontiac v. Lull, 111 Mich. 509.

¶ 251. Under Laws of 1887, Act No. 48, § 3 (How. St. § 3064c) relating to local assessments and requiring the petition to be "verified by the city attorney or by sone person having knowledge of the facts," the city attorney's affidavit that the petition for a street opening "is true to the best of his knowledge and belief" is sufficient.—City of Detroit v. Beecher, 75 Mich. 454.

¶ 252. A petition in condemnation proceedings for a street opening will not be held invalid for failure to set up that certain persons have a right of passage over the premises sought to be condemned, where such right would be in no way impaired by the appropriation of the land for the purpose contemplated.—City of Pontiac v. Lull, 111 Mich. 509.

§ 73. Summons or notice of proceedings.

Notice of hearing in highway proceedings by township highway commissioner, see ante § 30.

Service of notice or process, see post § 74.

Service by publication, see post § 75.

Return and proof of service, see post § 76.

Issuance and service of summons on hearing for street opening by city, see Comp. L. 1915, §§ 3140, 3141.

Issuance and service of summons in street opening proceedings by village, see Comp. L. 1915, § 2789.

¶ 253. The notice to be given by the city attorney in street-opening cases is in the nature of process, and must comply with the statute in every essential particular or the

proceeding will be inoperative.—Specht v. City of Detroit, 20 Mich. 168.

¶ 254. In proceedings to take lands for an alley, notice to the persons liable to pay for the alley is just as essential as is notice to those whose lands are taken.—Paul v. City of Detroit, 32 Mich. 108.

¶ 255. Where an alley is to be opened under the amendment to the Detroit charter in 1869, the notice will be defective if it fails to state that the jury to be summoned will apportion and assess the compensation to be paid for property taken to and upon all lots, premises or subdivisions thereof, within the block in which the alley is situated, and which will be benefited, etc.—Specht v. City of Detroit, 20 Mich. 168.

¶ 256. The summons in proceedings for opening a street will meet the requirement that it shall state briefly the object of the petition if it clearly states that the object is to open the street, naming it, and describes the beginning and terminus of the improvement and the width thereof.—City of Detroit v. Beecher, 75 Mich. 454.

¶ 257. A city charter required notice in street-opening cases to be served "as soon as practicable," and return to be made at least six days before the time appointed for hearing. The resolution was adopted August 8, the hearing was fixed for September 18, and the notice was served on the last of the parties September 9. The return appearing to be made within the time required, and nothing appearing to show that an earlier notice was practicable, it was held that no question of law could arise in respect to it.—Campau v. City of Detroit, 14 Mich. 276.

¶ 258. The charter of Grand Rapids provides that, in proceedings to open streets, the setting aside of the report of a jury by order of the court shall not make it necessary to begin back anew, and allows a new jury to be called on application, without any new notice either of such application or of the original resolution of the common council; held, therefore, that the consequences of any legal error committed before the appointment of the first jury attaches to and vitiates all subsequent steps in the proceeding.—Powers' Appeal, 29 Mich. 504.

¶ 259. The personal notice in street opening proceedings required to be served by the marshal is distinct from the advertised notice required to be given by the common council and not by the marshal.—Powers' Appeal, 29 Mich. 504.

¶ 260. In proceedings to take lands for alleys, the notice prescribed by the old charter of Detroit, which recites that the council have determined to make the improvement, and to take therefor such property as may be necessary, of which notice the court is required to deliver a copy to the jury in connection with its instructions, is objectionable as leading the jury to infer that they need only inquire whether the land described is necessary for the alley, and not whether the alley is necessary.—Paul v. City of Detroit, 32 Mich. 108.

§ 74. ——Service of notice or process.

Return and proof of service, see post § 76.

¶ 261. Where a statute providing for the taking of land by a city for public use specifies what notice shall be given, and does not include personal service, it excludes that method, and the statute is void.—Kundinger v. City of Saginaw, 59 Mich. 355.

¶ 262. Service of notice of proceedings for a street opening is necessary to give jurisdiction to the court.—Powers' Appeal, 29 Mich. 504.

¶ 263. Title 4 of the city charter of Saginaw (Local L. 1883, Act No. 227) is fatally defective in not providing for personal service of notice upon resident owners of property sought to be taken for public use, where such service can be had within the city.—Kundinger v. City of Saginaw, 59 Mich. 355.

¶ 264. There is much reason for claiming that the former charter of Detroit requires notice by publication to be given in all cases of proposed street opening. But where it appears that there was a defect in the publication of such notice, and it does not appear that all the landowners were personally served, the proceedings are held invalid, though the party making the objection was himself personally served.—Brush v. City of Detroit, 32 Mich. 43.

¶ 265. The return of the marshal in street opening proceedings being required to be made at least six days before the day appointed for the hearing, no notice which is required to be included in such return will be valid if made later than six clear days before the day of hearing.—Powers' Appeal, 29 Mich. 504.

§ 75. ——Service by publication.

See also ante ¶ 264.

¶ 266. Notice to a nonresident by publication in proceeding for the condemnation of land, sufficient.—Tuller v. City of Detroit, 97 Mich. 597.

¶ 267. Proceedings to open a street held erroneous by reason of defective and unreasonably published notices.—Osborne v. City of Detroit, 32 Mich. 282.

¶ 268. The provision of the charter of Muskegon that the first publication of a notice of an application for the impanelling of a jury in condemnation proceedings for street opening shall be made at least thirty

days before the day of hearing requires that thirty full days shall intervene between such publication and the day of hearing.—Rifenburg v. City of Muskegon, 83 Mich. 279.

¶ 269. The choice of the daily papers in which the resolution in street opening proceedings is to be published must be made by those who are appointed to give that notice, viz., the common council. A common council can act only by written resolutions.—Powers' Appeal, 29 Mich. 504.

§ 76. ——Return and proof of service.

Affidavit and proof of service of summons in street opening by city, see Comp. L. 1915, § 3141.

Affidavit and proof of service of summons in street opening by village, see Comp. L. 1915, § 2789.

¶ 270. A city charter which requires the marshal to make his return of the service of notice in a street-opening case at least six days before the day appointed for the hearing means six full days.—City of Owosso v. Richfield, 80 Mich. 328.

¶ 271. Under the course of procedure marked out by the charter of Grand Rapids for opening streets, the recorder's court gets no jurisdiction to act in the absence of legal proof of legal notice to the parties entitled to be heard.—Powers' Appeal, 29 Mich. 504.

¶ 272. Where the charter requires that notice to a nonresident in proceedings for opening and maintaining a street, may be given by "posting the same, with a copy of said resolution, in some conspicuous place upon the property intended to be taken," a return that service was made on a nonresident "by posting notice on premises" is not sufficient.—City of Owosso v. Richfield, 80 Mich. 328.

§ 77. Necessity for jury.

Constitutional prerequisites and necessity for jury in condemnation proceedings, see Eminent Domain § 76.

Necessity for jury in street opening, see Comp. L. 1915, §§ 2790, 3142.

¶ 273. In proceedings to take land for an alley, both the persons liable to pay for the alley and those whose lands are taken have a right to be heard before a jury.—Paul v. City of Detroit, 32 Mich. 108.

¶ 274. The recorder of Kalamazoo, upon proper petition and showing, must call a jury to assess damages in proceedings to condemn land for a street.—Goodell v. Kalamazoo City Council, 63 Mich. 416.

§ 78. Character of jury and qualifications of jurors.

Venire and return thereto, see post § 79.

Character of jury and jury trial in condemnation proceedings, see Eminent Domain § 78.

Character of jury and qualifications of jurors in street opening, see Comp. L. 1915, §§ 2790, 3142.

¶ 275. Where a municipal charter provides, in a case of proceedings to open streets, that the excess, if any, of damages over the benefits shall be laid on the whole city as a tax, and requires the jury drawn to assess the damages to be freeholders resident within the city, the jury cannot be declared legally disinterested, as each freeholder has a direct interest in having the assessment so laid as not to fall on the city at large, and thereby charge their own lands and the lands of relations.—Powers' Appeal, 29 Mich. 504.

¶ 276. A statute providing for the taking of property by a city for public use is not unconstitutional because it does not require the jury of condemnation to be composed of parties not interested, but simply requires a juror to swear that he is not interested in the property taken. If a juror is specially interested in having a street opened he is disqualified, and may be challenged for cause.—Kundinger v. City of Saginaw, 59 Mich. 355.

§ 79. Venire and return thereto.

Qualification of jurors, see ante § 78.

Drawing and impanelling jury in condemnation proceedings, see Eminent Domain § 81.

Manner of impanelling jury in street opening proceedings by city, see Comp. L. 1915, § 3142.

Manner of impanelling jury in street opening proceedings, see Comp. L. 1915, §§ 2790, 3142.

¶ 277. The act of the village clerk in issuing a venire in proceedings for the opening of streets, etc., under the general act for the incorporation of villages, is purely ministerial, and if he is also a justice of the peace he may make the venire returnable before himself as such justice.—People ex rel. Bingham v. Brighton, 20 Mich. 57.

¶ 278. The jury must be composed of disinterested nonresident freeholders, and the return to the venire must show the persons summoned to possess the qualifications. This is a jurisdictional requirement which cannot be supplied by a parol or overlooked.—People ex rel. Bingham v. Brighton, 20 Mich. 57.

¶ 279. Where a city charter authorizes a justice of the peace to issue a venire to summon a jury to pass on the necessity of condemning lands for a street, and to assess their value in case the price of the right of way cannot be agreed upon between the common council and the owners, the fact of the disagreement is not one of which the justice may take judicial cognizance simply, but it must be proved to him and be matter

of record in his office, and the record of the proceedings is fatally defective if it does not show evidence of an attempt to agree on the price.—Morseman v. City of Ionia, 32 Mich. 283.

§ 80. Functions of jury and questions triable.

In proceedings for widening street, see post § 123.

Power of same jury to act in condemnation of separate parcels of land owned by different persons, see also ante ¶ 225.

Functions of jury in street opening proceedings, see Comp. L. 1915, §§ 2791, 3143.

¶ 280. Act 124 of 1883 (How. St. §§ 3064a-3064y), providing for the taking of private property by municipal corporations for public use, is not open to the objection that it does not require the necessity of the proposed improvement to be determined by the jury.—City of Detroit v. Beecher, 75 Mich. 454.

¶ 281. Laws of 1883, Act No. 124, providing for the taking of private property for public use by cities, etc., which limits the power of the jury to determining the necessity and the damages, and confers upon the common council the power to assess damages according to benefits; is not invalid as letting the jury pass on damages and necessity without knowing how much will be assessed.—Beecher v. City of Detroit, 92 Mich. 268.

¶ 282. In proceedings for taking private property for public improvements, the fact of the public necessity of the proposed improvement must be found, and not simply the fact that the particular land is necessary to carrying it out; under the constitution the determination of this necessity must be made by the jury; the action of a common council, in passing upon the policy of opening a street over private property which they cannot obtain without adverse proceedings, is not judicial action or final; they stand rather in the position of mere petitioners, and the decision rests with the jury and not with the city.—Powers' Appeal, 29 Mich. 504.

¶ 283. It is for the jury and not for the court to fix the amount of damages where land is taken for a public street.—City of Grand Rapids v. Luce, 92 Mich. 92.

¶ 284. The essential duty of a jury in a street-opening proceeding is to pass on the necessity for the work, and not merely the necessity of taking the land for it.—Grand Rapids v. Grand Rapids & I. R. Co., 58 Mich. 641.

¶ 285. In street-opening proceedings under Laws of 1877, Act No. 201, the jury should make a separate assessment against each parcel of land included in the assessment district designated by the council.—Rentz v. City of Detroit, 48 Mich. 544.

§ 81. Oath of jurors.

Oath of jurors in street opening proceedings, see Comp. L. 1915, §§ 2791, 3143.

¶ 286. The oath administered to the jury in a street-opening case is the measure and limit of their legal action, and must plainly require them to determine the necessity of taking the land sought to be acquired for public use; and an oath which simply requires the jury "to ascertain the necessity for using the property intended to be taken, if it be intended to take any, for such improvement," is not sufficient.—City of Owosso v. Richfield, 80 Mich. 328.

¶ 287. The oath required by Laws 1883, Act No. 124, having been taken by the jury which was properly instructed by the court as to its duties, was held in street-opening case to include a determination by the jury of the necessity of making the proposed improvement.—In re First St., City of Grand Rapids v. Grand Rapids & I. R. Co., 66 Mich. 42.

§ 82. Procedure on hearing.

Argument and assistance of counsel, see post § 83.

In general condemnation proceedings, see Eminent Domain, V.

¶ 288. In proceedings to condemn land for street purposes the court, to prevent abuse, may limit the number of witnesses produced at the hearing to prove a single point.—Dorland v. Grand Rapids Superior Judge, 78 Mich. 182.

§ 83. ——Argument and assistance of counsel.

¶ 289. Except where inquests of damages are provisional and not conclusive, advice of counsel to juries is not allowed; it amounts to embracery.—Paul v. City of Detroit, 32 Mich. 108.

¶ 290. In proceedings to take land for alleys the city is a mere party litigant, and its relations to the jury must be governed accordingly; the requirement in the charter of Detroit that the city attorney give the jury legal advice and counsel concerning their duty, whenever requested, and draw up their verdict in the form of a report for their signature, when they have agreed, is in plain violation of the rule requiring juries to be absolutely free from the influence or counsel of any party on whose affairs they are to act.—Paul v. City of Detroit, 32 Mich. 108.

§ 84. Presumptions and evidence as to necessity and compensation.

In proceedings for widening street, see post § 123.

Power of court to limit number of witnesses to prove single point, see also ante ¶ 288.

Evidence as to damages in condemnation proceedings in general, see Eminent Domain § 95 et seq.
General law of evidence, see Evidence.
Opinion evidence as to necessity and existence of public use for street, see Evidence § 219.
Applicability of presumption of regularity and legality of official action to street-opening proceedings, see Evidence § 38.

¶ 291. In proceedings to condemn lands for a city street there is no evidence showing necessity, where it merely appears that the proposed street would be a convenience to some lots north of the property sought to be taken, and that there are some lots on the south that would be benefited somewhat. —City of Detroit v. Daly, 68 Mich. 503.

¶ 292. A finding that a necessity for opening a street exists is sustained by evidence that there is a considerable population which would thereby secure a more direct route into the city; that the fire department would secure better facilities for protection against fire; that a better communication with the school would be afforded children living in the vicinity; and that the opening would bring people living beyond, five blocks nearer the center of the city.—City of Detroit v. John Brennan & Co., 93 Mich. 338.

¶ 293. The admission in evidence, in proceedings to condemn land for a street, of the opinions of certain witnesses as to the necessity of taking such land for public use, is not a substantial error, where the jurors are from the vicinage, the testimony is full, showing the relation of the proposed improvement to public travel and other streets, and the witnesses give the facts on which their opinions are based.—City of Pontiac v. Lull, 111 Mich. 509.

¶ 294. Whatever the jury may learn of the lands sought to be condemned in a street-opening case under Laws 1883, Act No. 124, by a view of the premises may be used by them in determining the weight of conflicting testimony; but upon this view alone they cannot entirely disregard all other evidence, and fix and determine the compensation according to their own whims and caprices. —City of Grand Rapids v. Perkins, 78 Mich. 93.

§ 85. Instructions and special questions.

¶ 295. A charge, in a proceeding to open a street, that if the benefit to the public of the city exceed the cost and expense of making the improvement the jury is justified in finding that there was a public necessity for making such improvement cannot be complained of when taken in connection with other instructions in regard to the necessity and the limits of damage.—City of Detroit v. John Brennan & Co., 93 Mich. 338.

¶ 296. It is not error to refuse to submit special questions to the jury in condemnation proceedings to open a street; How. St. § 7606, is not applicable.—City of Grand Rapids v. Luce, 92 Mich. 92.

§ 86. Award, finding or judgment.

Specification of benefits, see post § 87.
Conclusiveness and collateral attack, see post § 88.
Verdict and award in street opening proceedings, see Comp. L. 1915, §§ 2792, 2793, 3144, 3145.
Confirmation by court of award and determination of jury, see Comp. L. 1915, §§ 2795, 3147.

¶ 297. In street-opening cases under the former charter of Detroit there must be a written finding or report by the recorder, setting forth all questions arising and action had before him which will not otherwise appear on the record. And no ruling can be reviewed in the supreme court which does not appear in that or some other part of the return.—Duffield v. City of Detroit, 15 Mich. 474.

¶ 298. In order to find that a street is a public necessity it need not be found that the cost of opening added to the cost of grading would not exceed the value of the benefit to the public.—City of Grand Rapids v. Luce, 92 Mich. 92.

¶ 299. Whether, under Laws 1887, Act No. 48, §§ 2, 3 (How. St. §§ 3064a-3064y), relating to local assessments, the jury, in order to find necessity for street opening, must determine that the benefit to the public will be equal to the cost of the improvement, quære; the court being equally divided.—City of Detroit v. Beecher, 75 Mich. 454.

¶ 300. In a street-opening case the jury are not precluded from estimating and determining the whole cost of the improvement before they find the necessity for it, and the compensation of the individual owners is to be apportioned afterwards, as a natural sequence.—City of Detroit v. Beecher, 75 Mich. 454.

§ 87. ——Specification of benefits.

¶ 301. So much of the charter of Detroit as permits a jury, in proceedings to take land for a public way, to find generally the difference between the value of the land taken and the enhanced value of the owner's land not taken, and to charge the result upon the assessment district, instead of finding the damages and the benefits separately, violates the constitutional requirements of just compensation and of uniform apportionment of assessments, and is void.—City of Detroit v. Daly, 68 Mich. 503; City of Detroit v. Beecher, 69 Mich. 15; City of Detroit v. Sauer, 69 Mich. 164; City of Detroit v. Chaffee, 68 Mich. 635.

¶ 302. In proceedings under the former charter of Detroit to open a street against

the will of the landowner there must be a separate finding by the jury of the amount of damages and of the benefits, and the jury must concur in both items.—Duffield v. City of Detroit, 15 Mich. 474.

¶ 303. Where, under Local Acts 1885, No. 354, land is sought to be taken for a street, the jury's finding does not show what the land taken was worth, or how much was deducted for benefits, but simply states that respondent is entitled to compensation to the amount of one dollar, after including benefits, judgment must be set aside.—City of Detroit v. More, 76 Mich. 515.

§ 88. ——Conclusiveness and collateral attack.

General law of collateral attack on judgments, see Judgments, VII.

¶ 304. The award of the jury in a street opening proceeding will not be disturbed where the jury saw the property and heard conflicting testimony as to the damages, though the values ascribed to several parcels leaves a question whether the award, as far as applicable to the damages caused by taking one of two contiguous parcels, was not reached by an improper mode of computation; where on another view it was sustainable as damages to other parcels.—City of Detroit v. Bruder, 104 Mich. 221.

¶ 305. Where, pursuant to Saginaw's City Charter, title 15, § 3, as amended by Local Acts of 1893, No. 402, the necessity for a proposed public improvement (a street opening) and for taking private property therefor, and the compensation to be paid for the land taken, have been determined by proceedings in the recorder's court, the judgment so obtained cannot be attacked collaterally by one whose land was assessed to defray the cost of the improvement, but who was not a necessary party to the proceeding.—Brown v. City of Saginaw, 107 Mich. 643.

¶ 306. The general statute authorizing the taking of private property for public use in cities and villages (How. St., ch. 83) provides that the petition to the court thereunder shall recite the adoption by the common council of the prescribed resolution of necessity; that notice shall be given to the owners of land sought to be taken; that, no sufficient cause to the contrary being shown, the court may impanel a jury to determine the questions of necessity and compensation; and that the judgment of the court confirming the verdict of the jury shall be final and conclusive as to all persons interested therein. Held, that in street opening proceedings the statute contemplates a judicial determination of the questions raised by the averments of the petition; hence a judgment of confirmation necessarily includes a determination by the court that the proceedings were properly instituted; and such judgment is not open to collateral attack.—Scotten v. City of Detroit, 106 Mich. 564.

¶ 307. The purpose of the trial provided for by How. St. §§ 3064g-3064k, is to determine the questions of the public necessity for the improvement (a street opening) and for taking the property sought to be condemned, and the amount of compensation to be awarded therefor. In that proceeding there are two safeguards for the protection of the taxpayer, namely, his representation by the public authorities, and the provision that the judgment is to be entered, upon the verdict of the jury, by the court; and it is not contemplated that these questions shall be open to review in a tax proceeding.—Borgman v. City of Detroit, 102 Mich. 261.

§ 89. Abandonment or discontinuance of proceedings.

¶ 308. It seems that it is for the city council to determine whether any effort has been made to obtain the land required for street opening by amicable agreement with the owner before filing the petition and that it is competent for the council to abandon the proceedings if a settlement is refused.—Goodell v. Kalamazoo City Council, 63 Mich. 416.

§ 90. Costs, witness fees and allowance for attorneys.

Costs allowed under Detroit boulevard act, see Eminent Domain ¶ 393.

Costs on certiorari to quash proceedings, see Costs ¶ 571.

Construction costs and expenses generally, see post VIII.

¶ 309. Where an item taxed as costs in a proceeding to condemn land for street purposes has been excluded on appeal because counsel for respondents had not complied with Comp. Laws 1897, § 644, the trial court has no jurisdiction to entertain a petition for a nunc pro tunc order which will authorize such item to be taxed as costs.—City of Grand Rapids v. Coit, 151 Mich. 109.

¶ 310. Under How. St. § 3064q, which provides that witnesses in a street-opening case shall be entitled to receive from the city the same fees as are provided by law for similar services in an ordinary action at law in the circuit courts, the fees of a respondent's witnesses attending in good faith should be taxed on the filing of the affidavit required for the taxation of witnesses' fees in circuit courts.—Dorland v. Grand Rapids Superior Judge, 78 Mich. 182.

¶ 311. How. St. § 3064s, making it lawful for the judge in a street-opening case to order the payment by the city to any respondent of such a reasonable attorney fee as he may deem just, not exceeding $25, is not mandatory, but the matter of attorney fees is discretionary with the judge.—Dorland v. Grand Rapids Superior Judge, 78 Mich. 182.

§ 91. Appeal or review.

Ordinary highway appeals or review, see ante II, B, 4.

In proceedings to widen streets, see post § 124.

Procedure on appeal, see post § 92.

Scope of appeal, presumptions and matters reviewable, see post § 93.

Certiorari to review proceedings, see post §§ 94, 95.

Right of appeal to circuit court in street opening proceedings, see Comp. L. 1915, §§ 2798, 3150.

Appeal from circuit court to supreme court in street opening proceedings by village, see Comp. L. 1915, §§ 2811, 2812.

¶ 312. A statute providing for the taking of property by a city for public use is not invalid because it gives no right of appeal. —Kundinger v. City of Saginaw, 59 Mich. 355.

¶ 313. The provision of Saginaw Charter, title 15, § 16, that any person whose property is taken "or assessed" may appeal from such judgment, cannot be construed as giving the right of appeal to one whose land is assessed but not taken for the improvement, thereby implying that he is a necessary party to the proceeding, it being apparent that the words "or assessed" were retained in such section by mere inadvertence upon the amendment of the original charter (Local Acts of 1889, No. 455), which provided that the common council should fix the assessment district when it passed the resolution declaring the necessity for the improvement, that the proceedings should be instituted against those whose lands were to be assessed, as well as against the owners of property proposed to be taken, and that the assessment of benefits should be made by the jury awarding the damages, all of which provisions were changed by the amendment of 1893.—Brown v. City of Saginaw, 107 Mich. 643.

¶ 314. The appeal will not lapse in a street opening case, even if the right to settle a case is lost, the appellants having a right to go to a hearing upon the pleadings, files and records in the cause.—Lake Shore & M. S. R. Co. v. Chambers, 89 Mich. 5.

§ 92. Procedure for appeal.

Procedure on appeal in street opening proceedings, see Comp. L. 1915, §§ 2799-2810, 3151-3157.

¶ 315. A city's appeal in proceedings under How. St. §§ 3064a-3064y, from a verdict that there is no public necessity for opening a street, will be dismissed if notice of appeal is not served on all the respondents as required by section 21 of that act. —City of Grand Rapids v. Chicago & W. M. R. Co., 95 Mich. 473.

¶ 316. A verdict in a street-opening case was rendered January 12 and confirmed January 23, and the respondents filed a claim for appeal and an approved bond within the statutory time. Upon filing such claim they requested the official stenographer of the court, who took the testimony, to furnish them with a transcript of his minutes, which was not done until April 15, 1891, leaving only eight days within which to prepare and present a case for settlement. Held, that under the settled practice according to that of chancery it was the duty of the presiding judge to settle a case, and to that end to grant an extension of time for such settlement.—Lake Shore & M. S. R. Co. v. Chambers, 89 Mich. 5.

§ 93. Scope of appeal, presumptions and matters reviewable.

¶ 317. The objection that, before proceedings to open a street were taken, no attempt was made to obtain the consent of property owners cannot be raised on review in the supreme court if not made at an earlier stage.—Grand Rapids v. Grand Rapids & I. R. Co., 58 Mich. 641.

¶ 318. Upon an appeal in proceedings to open a street under Laws 1883, Act No. 124, an appellant may avail himself of an objection to the charge of the court, and of an exception taken thereunder by another respondent.—City of Grand Rapids v. Perkins, 78 Mich. 93.

¶ 319. The presumption is against the existence of any such bias on the part of a street-opening jury as will make its verdict unfair.—Grand Rapids v. Grand Rapids & I. R. Co., 58 Mich. 641.

¶ 320. In reviewing a judgment in proceedings to open a city street, where the inquiry goes to whether the jury awarded adequate damages to property holders, if there is nothing in the record to show bad faith or improper conduct on the part of the jury, and if the record does not warrant the claim of such property holders that the jury disregarded the rule which entitled them to actual compensation of the jury's finding should not be disturbed.—City of Detroit v. Kreamann, 79 Mich. 584.

§ 94. Certiorari to review proceedings.

In proceedings to widen street, see post § 124.

Time for writ, laches, waiver and delay, see post § 95.

General law of certiorari, see Certiorari.

¶ 321. The proceedings for the opening of streets, etc., under the general act for the incorporation of villages are so far judicial in their nature as to be subject to review in the supreme court on certiorari.—People ex rel. Bingham v. Brighton, 20 Mich. 57.

¶ 322. The provision of a statute giving a party claiming damages in a village street

opening case an appeal to the circuit court, held not to preclude the supreme court from exercising its supervisory power by certiorari to review questions other than those of damages solely.—People ex rel. Bingham v. Brighton, 20 Mich. 57.

¶ 323. In an alley-opening case, in Detroit, where plaintiff in certiorari did not appear in any stage of the proceeding, and where the statutory requirements in regard to notice were not complied with, the writ was allowed to prevent "a failure of justice," notwithstanding an appeal was given by statute, the time for taking which had passed.—Specht v. City of Detroit, 20 Mich. 168.

¶ 324. Where an owner of land objects to its condemnation for a street, and the municipal authorities offer to release the land if he will relinquish the damages awarded therefor, he has no right to a writ of certiorari to review the proceeding.—Goodell v. Kalamazoo City Council, 63 Mich. 416.

¶ 325. On certiorari to review proceedings to open a street the plaintiff cannot rely on grievances to others or oppose a street that does not take his own land; the only legal redress he can get is the prevention of the unauthorized use of his land.—Goodell v. Kalamazoo City Council, 63 Mich. 416.

§ 95. ——Time for writ, laches, waiver and delay.

¶ 326. Where the judgment confirming the award in a proceeding under the general law to open a street has not been appealed from within five days, as provided in How. St. § 3064l, certiorari to review such proceedings will not be allowed after a lapse of six months in behalf of some of the respondents therein, especially where there are a large number of corespondents who must be presumed to have acquiesced in the verdict, and who might be prejudiced if the judgment were disturbed.—City of Detroit v. Murphy, 95 Mich. 531.

¶ 327. Where there are a large number of corespondents interested in a street opening proceeding, who have presumably acquiesced in the verdict and complied therewith, and might be prejudiced by disturbing the judgment, the rule is especially applicable that at common law the writ is not one of right, and should not be granted after any considerable delay, unless the court is satisfied that such delay is not due to the petitioner's negligence.—City of Detroit v. Murphy, 95 Mich. 531.

¶ 328. One who attacks a street-opening assessment for his failure to obtain merely trivial or nominal damages must proceed with special alacrity to entitle himself to the intervention of a court.—Rentz v. City of Detroit, 48 Mich. 544.

¶ 329. Proceedings to open a street were taken under Laws of 1877, Act No. 201, and were confirmed, although the damages had not been properly apportioned among the parties affected. The statute allows five days for taking an appeal, but none was taken. More than six months after the confirmation of the proceedings, and after most of the assessments had been collected, they were brought up on certiorari for review, but after the writ was issued the complaining parties paid the damages assessed against them. Held, that they thereby waived the error, and the writ was dismissed.—Rentz v. City of Detroit, 48 Mich. 544.

§ 96. Injunctions and other actions and suits.

General law of injunctions, see Injunctions.

Estoppel to have injunction for nonpayment of damages for raising grades for railroad in street, see Estoppel ¶ 155.

¶ 330. One whose property abuts upon a proposed alley cannot enjoin the city from opening such alley, upon the ground of special injury, where his property is located in a congested portion of the city, and the evidence indicates that the proximity of the alley, insuring as it would space and light on one side of his house, will enhance its market value rather than impair it.—Schmolt v. Nagel, 151 Mich. 502.

6. State highways and local systems.

§ 97. In general.

Uniform system of construction under state reward plan, see post ¶ 366.

Refunds or rewards to townships for sums spent on state reward roads, see post § 153.

Adoption of county, township or general system of highway control and administration, see post § 141.

Control and administration, powers and relative duties of officers, see post § 142.

Necessity of record of proceedings to lay out state roads, see also post ¶ 474.

Provisions for state reward trunk line highways, see Comp. L. 1915, §§ 4851-4859.

Routes and branches of state trunk line highways, see Comp. L. 1915, § 4852.

Constitutional provision for adoption of district road system by electors of proposed district, see Const. art. VIII, § 26.

Procedure for adoption of county road system, see Comp. L. 1915, §§ 4347-4351.

Effect of county road system on township plan, see Comp. L. 1915, § 4377.

¶ 331. The words "trunk line" used in Act No. 334 of Pub. Acts 1913, in referring to trunk line highways, are used in the same sense as applied to "trunk line" railroads connecting termini which are some distance apart.—Luce v. State Highway Commissioner, 181 Mich. 599.

¶ 332. The provisions of section 2, Act No. 334, Pub. Acts 1913, that on petition to the

state highway commissioner of two or more contiguous counties through their boards of county road commissioners, or on his own initiative, shall as he may deem necessary, cause preliminary surveys to be made through such counties of one or more routes for state trunk line highways which he shall submit to the designated boards and officers of such counties for their concurrence in selecting the route for such highway, does not confer on the state highway commissioner power to establish trunk line highways other than those expressly enumerated in such act, since section 2 merely permits local bodies to select the route of trunk line highways when there are two or more feasible routes within their county between the termini mentioned in the act.—Luce v. State Highway Com'r, 181 Mich. 599.

¶ 333. Sole and arbitrary power to select the route of and to establish trunk line highways other than those enumerated in the act, is not conferred by § 9 of Act No. 334, Pub. Acts 1913, on the State Highway Commissioner, such section being limited by section 2 of the act.—Luce v. State Highway Com'r, 181 Mich. 599.

III. ROUTE, BOUNDARIES AND TERMINI; SURVEYS AND RECORDS.

§ 98. Route and boundaries.

Width, see post §§ 99, 100.
Termini and connection with other ways, see post § 101.
Surveying and recording, see post § 102.
Presumptions, evidence, instructions and jury questions, see post §§ 103, 104.
Requisites of description of route in application or petition, see ante ¶ 93.
Sufficiency of description of route in notice of proceedings to lay out highway, see ante ¶ 99.
Sufficiency of description of route in commissioner's order determining necessity and laying out highway, see ante ¶ 125.
Power to select route of trunk line highways, see ante § 97, ¶¶ 332, 333.
Powers of highway officers respecting boundaries, see also post ¶ 500.
User of varying or shifting way as determinative of establishment of highway, see ante § 13.
Center or side line as boundary of lot, see Boundaries §§ 19-21.
Call for highway as boundary of private tract, see Boundaries §§ 13, 19.
Sufficiency of statutory plat to describe and define boundaries and plan of streets, see Dedication § 22.

¶ 334. Where a lot owner, in order to keep people in a public alley from molesting his premises, builds a fence back from the platted boundary line of the valley, and upon his own lot, without having any intention of establishing the fence as the boundary, the city acquires no rights in the owner's lot thereby, and is controlled by the platted boundary.—Weber v. City of Detroit, 159 Mich. 14.

¶ 335. Long practical acquiescence as between the public and a private owner, as to the true line of the latter's fences along the highway, will bind the public.—Gregory v. Knight, 50 Mich. 61.

¶ 336. The fact that a resurvey of a road through a certain section did not change its line, and the fact that at the time of a later conveyance the line was fixed conformably, indicate that there was no recognized change in the location of the roadway.—Hoffman v. City of Port Huron, 102 Mich. 417.

§ 99. Width.

Width of dedicated or prescriptive highway, see post § 100.
Estoppel to claim or deny full width, see post § 182.
Space over which regulative powers extend, see post § 154.
Encroachment on abutter by allowing footings of embankments to extend beyond road lines, see post ¶ 701.
Condemnation of land to widen way, see post § 123.
Vested rights in width or extent, see Constitutional Law § 247.
Power to locate and enfranchise street railway on margin of road within portion forbidden to be graded or cut, see Street Railways, I.
Statutory provisons as to width, see Comp. L. 1915, §§ 4288, 4304, 4307, 4407.
Width of highways laid out by county road commissioners, see Comp. L. 1915, § 4357.
When width of highway may be less than four rods, see Comp. L. 1915, § 4317.
Classes and width of roads for which state rewards will be given, see Comp. L. 1915, § 4387.
Provisions for restoration to full width on road's becoming reduced below fifty feet, see Comp. L. 1915, § 4395.

¶ 337. A street includes the whole width of the public way.—Brevoort v. City of Detroit, 24 Mich. 322.

¶ 338. As the statute (How. St. § 1296) providing that public highways shall not be less than four rods in width does not operate to restrict them to such width, proceedings to open a highway 100 feet wide may be sustained.—Brown v. Greenfield T'p Board, 109 Mich. 557.

¶ 339. It is presumed that a highway on a section line intersecting a creek and ravine was laid out across such ravine at the full statutory width prescribed by Comp. L. 1897, § 4036, to wit, four rods.—Schneider v. Township of Brown, 142 Mich. 45.

¶ 340. Comp. L. 1897, § 4061, providing that all highways shall be four rods in width

and where situated on section lines such lines shall be the center of such roads and the roads shall be two rods in width on each side of the line, cannot be construed to transfer to the public land actually owned, possessed and occupied by an individual without giving him any opportunity of contesting the claims of the public or asserting his own rights. Such a construction would render it unconstitutional.—Watz v. Sunderland, 147 Mich. 96.

¶ 341. How. St. § 1365 providing that when any public highway "which passes along the bank" of any lake, river, "or other watercourse," and which is not included in the limits of a city or village, shall, by the washing away of the bank, or from any other cause, become reduced to a width of less than fifty feet, the highway commissioner shall lay out such highway upon adjacent land to that width, does not apply to a highway which has become reduced in width by the washing away of the bank of a ditch or other artificial watercourse laid in the highway.—DeLapp v. Beckwith, 114 Mich. 394.

¶ 342. An owner of unoccupied land platted the same, and on the plat indicated the limits in the width of a highway dedicated to the township and accepted by it. Held, the bounds of the street dedicated could not thereafter be widened by a mere user by the public.—Bedard v. Simons, 160 Mich. 545.

¶ 343. Abutting owners on a highway duly laid out and established are not estopped from claiming that it is a public highway for its full width by the fact that their grantor maintained a fence across part of it for a few months.—Van Brunt v. Lynch, 76 Mich. 455.

¶ 344. That portion of Shelby street, between Jefferson avenue and Woodbridge street, as projected on the plan of the City of Detroit, being, at the time of its adoption, claimed and occupied as private property, and so continuing to be claimed and occupied thereafter, and the corporate authorities having many years after the adoption of the plan, under their authority to lay out streets through private property, caused a street to be laid out along it, but of less width than the street as originally projected, paying the occupants of the land for the strip so taken, it was held that this was a waiver of any right of the authorities, if they had any under the plan, to that portion of the projected street outside of the lines of the street so opened.—People v. Jones, 6 Mich. 176.

¶ 345. The rights of the public in that part of a highway and bridge which crossed a creek and ravine will be held to have been limited to the actual public use, where the road located on the section line intersecting the creek, deviated as it approached the creek and for some years crossed the creek on a dam, but thereafter was carried across on a bridge built after the dam had ponded the ravine and in a manner not occupying the entire four rods which makes the normal width of a highway.—Schneider v. Township of Brown, 142 Mich. 45.

§ 100. ——Of dedicated or prescriptive highway.

Dedication as impliedly of full statutory width, see Dedication § 81.
Width of roads established by user or prescriptive right, see Comp. L. 1915, § 4307.
Width of purchased or dedicated highways, see Comp. L. 1915, § 4407.

¶ 346. A highway by user includes only so much land as is used for that purpose, and it cannot be extended by How. St. § 1315 upon adjacent lands against the owner's consent except under proper condemnation proceedings.—Coleman v. Flint & P. M. R. Co., 64 Mich. 160; Schelmer v. Price, 65 Mich. 638.

¶ 347. A highway by user need not necessarily be of statutory width, but it becomes such to width and extent used.—Wayne County Savings Bank v. Stockwell, 84 Mich. 586.

¶ 348. How. St. § 1315, in declaring that where highways by user are situated on survey lines such lines shall be the center of the way with two rods on each side thereof, cannot be construed to abrogate any such highway and shift its position; its effect is only to make two rods on each side the limit of the road, except where land-owners have such prescriptive rights against the public as to reduce such limits.—McKay v. Doty, 63 Mich. 581.

¶ 349. Where the public has used a portion of a strip of land reserved in the plat as a private way, it does not necessarily follow that the public right acquired is one for the full statutory width of a street.—City of Detroit v. Myers, 152 Mich. 666.

¶ 350. A dedication for a highway is presumably of the statutory width of four rods, and is not confined to the beaten or traveled way.—Bumpus v. Miller, 4 Mich. 159.

¶ 351. A dedicated highway is presumably of the full legal width, but where the owner's actions indicate a restriction to a narrower space it is as wide as the actual user.—Kruger v. Le Blanc, 70 Mich. 76; Coleman v. Flint & P. M. R. Co., 64 Mich. 160.

§ 101. Termini and connection with other ways.

Variation in course of extension from older portion of way, see post § 117.

¶ 352. There is no statute or rule of law that expressly determines that, before a pub-

lic highway can be laid out, it must have certain and definite termini in other public highways.—Fields v. Colby, 102 Mich. 449.

¶ 353. A highway leading to a navigable stream does not necessarily continue over all wharves and erections that may be placed beyond the terminus at the shore in its natural state.—Horn v. People, 26 Mich. 221.

¶ 354. A cul de sac, in the interior of a city block, opening into other alleys which extend to public streets, but having itself no communication with streets except through those alleys, not being capable of forming a passage-way from one street to another, but furnishing access only to the rear of lots in the block, and never opened, worked or used as a highway, and not shown to have dwellings upon or adjoining it, to which it gives access, is not a way for the obstruction of which an indictment will lie. —People v. Jackson, 7 Mich. 432.

§ 102. Surveying and recording.

Record of proceedings to lay out highway, see ante § 39, ¶¶ 136-138, 140, 142, 147.
Necessity for recording where user continues ten years, see also ante ¶ 51.
Necessity of record of state roads, see also post ¶ 474.
Record of private roads, see post § 418.
Records of vacation proceedings, see post § 132.
Admissibility of survey to prove establishment of highway, see ante ¶ 71.
Record of plat as evidence to prove dedication, see ante § 21, ¶ 74.
Copy of field notes of survey as sufficient record of laying out of highway, see ante ¶ 126.
Actions against surveyors for malfeasance or misfeasance, see Officers, VI, A; Surveyors.
Provisions relating to survey when laying out way and marks and monuments of survey, see Comp. L. 1915, § 4303.
Necessity of filing certified record of street opening proceedings in office of attorney general, see Pub. Acts 1917, No. 47.
Surveying state roads, see Comp. L. 1915, § 4566.
Marking and monumenting survey of state road, see Comp. L. 1915, § 4566.
Surveys and recording of streets in fourth-class cities, see Comp. L. 1915, § 3090.
Surveys of village streets under direction of councils, see Comp. L. 1915, § 2653.
Recording of proceedings of boards of supervisors, see Comp. L. 1915, § 4526.
Survey establishing location and grade of highway to be made by commissioner before beginning permanent improvements on highways, see Pub. Acts 1917, No. 68, amending Comp. L. 1915, § 4332.
Petition and proceedings to locate and survey roads, see Comp. L. 1915, § 4523.
Provisions for restoring or supplying records of roads, see Comp. L. 1915, § 4308.
Payment for surveys, see Comp. L. 1915, § 4316.

¶ 355. The board's action in laying out or discontinuing state road must be recorded and must be signed by chairman and clerk (How. St. § 501).—Pearsall v. Eaton County Sup'rs, 71 Mich. 438.

§ 103. Presumptions and evidence.

Statutory presumption as to title to four rods, see also post ¶ 682a.
General law of evidence, see Evidence.
Parol evidence to locate written description of highway, see Evidence § 184.
Maps, plats and deeds as best evidence of road locations, see Evidence § 124.
Official survey as documentary evidence of road lines, see Evidence § 541.
Fencing in part during term of prescription as evidence of intent to dedicate limited width, see Dedication § 25, ¶¶ 104, 105.
Road record as evidence to locate boundary calling for road, see Boundaries § 29.

¶ 356. Where a highway through a village was originally laid out as a government road one hundred feet wide, and abutters had platted to that width, evidence to show an acceptance of a dedication to the width of one hundred and thirty feet must be unequivocal and satisfactory. Evidence that houses had been built back at varying distances from the original line, and that sidewalks had been ordered laid by the village authorities in front of the premises by the owners, would not establish an acceptance. —Irving v. Ford, 65 Mich. 241.

¶ 357. Evidence held to show that "River Road" in the City of Detroit is identical with the old road provided for by Act of Congress in 1824 and laid out thereunder, that it should be 66 feet in width and the lines as run by the city surveyor to be the same as for the old road, although surveys show that portions of it may have been laid in the river.—Hammond v. City of Detroit, 129 Mich. 295.

¶ 358. In retracing a road not officially located or traveled within definite limits testimony that the way varied over a strip ten to thirty rods wide is admissible only as a last resort.—Hoffman v. City Port Huron, 102 Mich. 417.

¶ 359. On a bill by the owner of land abutting on a highway to enjoin the highway commissioner from trespassing on complainant's land to incorrectly locate the highway and injuring complainant's property, evidence held sufficient to sustain a decree for complainant as to the location of the boundary line, where aside from plaintiff five witnesses who were pioneers in the locality testified to seeing line surveyed and located as alleged by plaintiff.—Groves v. Bowman, 201 Mich. 46.

¶ 360. The ex parte action of surveyors and highway commissioner is not entitled to credence and authority upon the true lines of a highway and the fact of encroachment.—Gregory v. Knight, 50 Mich. 61.

¶ 361. After the establishment of a highway has been shown by other evidence, an early territorial record of its survey may be produced in proof of the line where the road was.—Merrill v. Village of Kalamazoo, 35 Mich. 211.

¶ 362. A survey of a road commencing at a point on a township line and thence running south along the land in question and terminating at a "point" beyond it where there was no east and west road is presumed to have closed with an existing highway.—Hoffman v. City of Port Huron, 102 Mich. 417.

§ 104. Instructions and questions for jury.

¶ 363. The absence of evidence that the authorities had formally accepted a strip of land whereby a public highway is widened is not conclusive of the rights of one claiming such portion of such strip as fronted his lot; where the owners of lands adjacent to such highway have acquiesced for many years in such change in the highway lines and have located the lines of buildings with reference thereto; and the location of the boundary line of such lot as regards such strip is a question for the jury.—Rix v. Smith, 145 Mich. 203.

IV. CONSTRUCTION, IMPROVEMENT AND REPAIRS.

§ 105. In general; construction work and contracts.

Statutory procedure for location and establishment, see ante II, B.
Duty and necessity of construction and improvement, see post §§ 107-110.
Petition and proceedings for repairs or work, see post §§ 112, 113.
Sidewalk and crosswalk work, see post § 106.
Judicial review of proceedings, see post § 114.
Necessity of determining location of section line on which highway is to be established before beginning construction work, see also ante ¶ 182.
Repair and improvement at public expense as determinative of public character of road, see ante ¶¶ 54, 55.
Liability of municipality for failure to construct, see post § 200.
Liability for defective plan and manner of construction, see post § 201.
Liability for failure to keep in repair, see post § 203.
Duty to provide safe guards or warning signals pending construction, see post § 213.
Nonliability of public to abutter for soil used to improve way, see post ¶¶ 598, 599.
Injury to abutter's lateral support by taking soil for road improvement, see post ¶ 702.
Officers empowered to contract and limitations on their powers, see post § 143.
Contracts with or rendition of services by officers, see post § 143.
Purchases of road machinery, see post § 143.
General law of local improvements and local assessments to pay for same, see Local Improvements.
Constitutional provisions as to engagement in works of internal improvement, see Constitutional Law §§ 281-286.
Construction and operation of contracts for construction work on streets, see Building and Construction Contracts; Contracts, VI, VII.
Making and interpretation of public contracts in general, see Public Contracts; and see also Townships, III.
Proceedings for making local street improvements, see Local Improvements.
Contracts with street railways for or in respect to paving of space occupied by tracks, see Street Railways, I, III.
Mode of providing funds for construction and repair, see post VIII; Taxes.
Authority of representative to petition for street improvement, see Estates of Decedents ¶ 204.
Construction of wharf under guise of highway improvement, see Wharves.
Constitutional power of state to aid in highway improvements, see Const. art. X, § 14.
Power of legislature to provide for laying out, construction, improvement and maintenance of highways by state, counties, townships and road districts, see Const. art. VIII, § 26 (amendment of 1917).
What constitutes improvements of highway, see Pub. Acts 1917, No. 125, § 5, amending Comp. L. 1915, § 4675.
Power of county road commissioners to construct, improve, gravel, grade and drain roads under their jurisdiction, see Pub. Acts 1917, No. 356, amending Comp. L. 1915, § 4365.
Lighting of highways in unincorporated villages by township board, see Pub. Acts 1917, No. 264.
Improvement and maintenance of line roads, see Pub. Acts 1917, No. 356, amending Comp. L. 1915, § 4299.
Provisions relating to formation of good roads districts, see Comp. L. 1915, § 4337 et seq.
Provisions for county road system, see Comp. L. 1915, § 4347 et seq.
Plan and specifications of state reward roads, see Comp. L. 1915, § 4387.
Power to purchase land for gravel for roads, see Comp. L. 1915, § 4491.
Approval of county highway engineer of road work under county road system where cost exceeds $500, see Pub. Acts 1917, No. 68, amending Comp. L. 1915, § 4382.

Authority of county road commissioner and state highway commissioner to make contracts under $500 without advertising, see Pub. Acts 1917, No. 125, § 65, amending Comp. L. 1915, § 4735.
Paving and grading in fourth-class cities, see Comp. L. 1915, § 3091 et seq.
Provisions for moving or restoring full width to roads which have become reduced below fifty feet in width, see Comp. L. 1915, § 4395.

¶ 364. Under Act No. 283, Public Acts of 1909, How. 2nd Ed., § 2173, county roads may be constructed by contract.—Brandt v. Luce, 177 Mich. 184.

¶ 365. Where the state has provided for the construction of a state road for a specified grant of swamp lands to be selected by named counties, to be in full payment thereof, a board of supervisors cannot vote to the contractor who takes the contract on the terms specified by the statute, a bonus of a certain sum per mile for building the road, even though the contractor took the job partly in consideration of the bonus.—Davis v. Ontonagon County Sup'rs, 64 Mich. 404.

¶ 366. Comp. L. 1915, § 4386, requiring the state highway commissioners to furnish general plans and specifications for state reward roads, whether such roads are to be built by the township or county road commissioners, and providing for inspection by such commissioners before the reward is paid, provides for a uniform system in road construction.—Township of Clearwater v. Kalkaska County Board Sup'rs, 195 Mich. 323.

§ 106. Sidewalks and crosswalks.
Duty of city or abutters to construct walks, see post § 107..
Removal of walk as trespass to abutter, see post § 165.
Irreviewableness of plan for construction, see post § 114.
Judicial review of action allotting sidewalk space, see post § 114.
Statutory obligation of abutter to make sidewalks, see Local Improvements.
Assessments for sidewalks, see Local Improvements.
Provisions for construction of sidewalks along roads outside of incorporated municipalities, see Comp. L. 1915, § 4571 et seq.

¶ 367. Since section 19, ch. 4, Act No. 283, Pub. Acts 1909, How. Ann. St., 2nd Ed., § 2250, conferring authority over highways upon boards of county road commissioners, expressly limits their jurisdiction to the traveled portion of roads, bridges and culverts, they have no authority over or power to build sidewalks along and on the sides of country roads.—Ferguson v. County of Muskegon, 181 Mich. 335.

§ 107. Duty and necessity of construction.
Bridges, see post § 109.
Culverts, drains and ditches, see post § 108.
Joint roads and bridges, see post § 110.
Liability in tort for injuries due to failure to keep safe for travel, see post XII, A.
Mandamus to compel building of roads and bridges, see Mandamus, III.

¶ 368. It is the duty of the townships to keep state and territorial roads and the bridges upon them in good repair while such roads are used as public highways.—Delta Lumber Co. v. Board of Auditors & Wayne County Sup'rs, 71 Mich. 572.

¶ 369. Under the charter of West Bay City, ch. 23 (Local Acts 1897, No. 442), which authorizes the city to require the owners and occupants of adjacent property to build, rebuild and maintain sidewalks along their property under the direction of the common council, and also provides that the council may provide by ordinance for rebuilding and keeping in repair and pay the cost thereof, it is not the duty of the city to construct sidewalks.—Thompson v. City of West Bay City, 137 Mich. 94.

¶ 370. An ordinance requiring that sidewalks, built by owners of adjacent property, shall be constructed only by permission of, and under the supervision of the city council, does not make it the duty of the city to build sidewalks where the charter places such duty upon the lot owners, even though the city also pays part of the cost.—Thompson v. City of West Bay City, 137 Mich. 94.

§ 108. ——Culverts, drains and ditches.
Liability for defective plan and manner of construction, see post § 202.
Duty to inspect and repairing ditches and culverts, see post §§ 208, 210.
Provisions for drains along and within highways, see Comp. L. 1915, § 4510 et seq.
Consent of township highway commissioner to construction of open drain along public highway, see Pub. Acts 1917, No. 121, amending Comp. L. 1915, § 4512.

¶ 371. The power of highway commissioners in drainage matters is restricted to highway needs, and they cannot usurp the functions of drain commissioner.—Conrad v. Smith, 32 Mich. 429.

¶ 372. Highway commissioners cannot exceed their statutory powers for the purpose of cutting ditches; the power to do this belongs in general to the drain commissioners; the power of the former is restricted to highway needs and to works of small extent and expense.—Conrad v. Smith, 32 Mich. 429.

¶ 373. Highway authorities have no more right than private persons to cut drains that will flood the lands of individuals; and when an overseer does so, he and his assistants are liable for the injury.—Cubit v. O'Dett, 51 Mich. 347.

¶ 374. Highway commissioners have the right to have the surface water, falling or coming naturally upon the highway, drain through the natural and usual channel upon and over the lower lands, and may construct drains and ditches for that purpose.—Tower v. Township of Somerset, 143 Mich. 195.

¶ 375. A highway commissioner must make adequate provision for carryng water from a ditch across a highway through a culvert, by providing tile or pipe of sufficient size to carry the water at all seasons of the year.—Miller v. Harmer, 173 Mich. 560.

¶ 376. Public authorities for the purpose of improving a highway have no right to divert the natural course of surface water so as to impose a new servitude upon another's land.—Smith v. Township of Eaton, 138 Mich. 511.

§ 109. ——Highway bridges.

Power to borrow money or incur debt, see post § 150.
Petition and proceedings for construction and repair of line bridge, see post § 113.
Construction of bridge implied from proceedings to lay out highway, see also ante § 35.
Duty to inspect and repair bridges, see post § 210.
Duty of mill owners to provide bridge over race or dam, see Mills.
Duty of maintaining viaducts for railroads over streets or streets over railroads, see Railroads, IV.
Contracts with railroads respecting construction and upkeep of viaducts and bridges, see Railroads, IV.
Permission to bridge navigable waters, see Navigable Waters, II.
Provisions for erection of highway bridges and repairing of same, see Comp. L. 1915, § 4415 et seq.
Township liability to keep up bridges within villages, see Comp. L. 1915, § 4440.

¶ 377. A county is not required to maintain or repair bridges; that duty rests upon the townships. So held, even in case of a bridge over a state road, which many years before the legislature by special act had authorized the county to rebuild, and which for a time was afterwards kept up by the townships.—Delta Lumber Co. v. Wayne County Auditors, 71 Mich. 572.

¶ 378. Municipalities are under no legal obligation, outside of the constitution and statutes, to build bridges where none has been before.—Fulton Iron & Engine Works v. Township of Kimball, 52 Mich. 146.

¶ 379. A commissioner of highways will not be compelled in any case to repair a bridge not shown to be a public highway. The fact that the highways leading to the river on either side are public ways does not make the bridge a public bridge and highway, or cast any duty upon the township to build or repair, or make the township responsible for non-repair.—Travis v. Skinner, 72 Mich. 152.

¶ 380. It is the duty of the highway commissioners of townships to build, rebuild or repair bridges and keep them in repair where they are not called upon to expend more than $1,000 (How. St. §§ 1379-1381).—Bigelow v. Brooks, 119 Mich. 208.

¶ 381. It is no defense to a petition in mandamus to compel the township highway commissioner to build a bridge that no money has been voted by the electors to construct the bridge; the statute provides for issuing orders and the method for collecting them (Comp. L. 1897, § 4130).—Berube v. Wheeler, 128 Mich. 32.

§ 110. ——Joint roads and bridges.

Apportionment of expense, see post § 151.
Provision for joint erection and upkeep, see Comp. L. 1915, § 4423 et seq.
Provisions as to joint county roads under county road system, see Comp. L. 1915, § 4363.
Provisions for joint action on state line roads, see Comp. L. 1915, § 4315.
Provisions for repairing bridges partly in several townships or municipalities, see Comp. L. 1915, § 4441 et seq.
Joint construction of state line bridges, see Comp. L. 1915, § 4527.

¶ 382. The duty of the several highway commissioners to rebuild a bridge on a town-line road extends to a road on a point off of the town-line, where the authorities for both townships had regarded the deflected road in question as part of the town-line road and had for ten years recognized a joint obligation to construct and maintain the bridge.—Bigelow v. Brooks, 119 Mich. 208.

¶ 383. An allotment of the line road in sections to the several townships, one section including the bridge in question, does not impose the whole burden on the allottee township, where it also appeared that the construction of the bridges on the town line was not included in the allotment, and that the authorities had acted jointly in building and repairing such bridges. It was the duty of such two townships to rebuild the bridge in question and keep it in repair.—Bigelow v. Brooks, 119 Mich. 208.

¶ 384. The "necessity of the public safety" mentioned in the statute (Comp. L. 1897, § 4131), refers to the bridge on the highway of which it is a part and not to a bridge on another highway several miles distant. The necessity of the public highway in question has been settled in the proceeding to lay it out. A bridge must be built so as to constitute an essential part of the highway in question.—Berube v. Wheeler, 128 Mich. 32.

¶ 385. It is lawful for a township, with the authority of the board of supervisors, and by virtue of an express grant from the legislature, to assume voluntarily the erection and maintenance of a drawbridge over a navigable stream that is the dividing line between it and another township.—Dietrich v. Schremms, 117 Mich. 298.

§ 111. Liability for diversion of surface waters.

Power and authority to construct drains and ditches, see ante § 108.

Ditch or drain as nuisance or obstruction to travel, see post § 178.

Diversion caused by change of grade, see post § 120.

General law of surface waters, see Waters, II.

General law of drains, see Drains.

Liability of city or village for defects in sewers or for failure to provide sewers, see Municipal Corporations, XII.

¶ 386. Injury occasioned to an abutting owner by a lawfully constructed highway ditch is damnum absque injuria.—Eagle Township Highway Com'rs v. Ely, 54 Mich. 173.

¶ 387. The liability imposed upon municipalities by How. St. §§ 1446c-1446e, for injuries resulting from their neglect to keep their highways in reasonably safe condition, is limited to injuries to persons and property upon the highway, and does not extend to injuries to abutting lands resulting from obstructions in the highway diverting surface water.—Tatman v. City of Benton Harbor, 115 Mich. 695.

¶ 388. Highway officers have no more right than private persons to cut drains which will flood the lands of private owners; and in an action against such an officer for injury caused by a ditch which he has dug, defendant cannot complain of an instruction that he would not be liable unless the ditch brought upon the plaintiff's land the drainage of a greater area than was drained upon it before.—Cubit v. O'Dett, 51 Mich. 347.

¶ 389. A man obtained permission from the overseer of highways to clear out a certain ditch "if it would benefit the road." Held, that his brother could not maintain an action against the overseer for injuries done his premises by the improvement.—Parker v. Fields, 48 Mich. 250.

¶ 390. In an action for damages for flooding lands, it is error to instruct the jury that highway authorities have the right to turnpike a road, put ditches along the sides, and put in culverts as necessary to properly construct the road, since the highway authorities have no more right than private persons to cut drains which will flood the lands of individuals.—Breen v. Hyde, 130 Mich. 1.

§ 112. Petition and proceedings for work or repairs.

For line or boundary bridges, see post § 113.

Power to make change of grade after petition and proceedings are begun, see also post ¶ 408.

Petitions and proceedings for local improvements and assessments, see Local Improvements.

Proceedings to require construction of sidewalks by abutters, see Local Improvements.

Procedure under state reward road system, see Comp. L. 1915, § 4378 et seq.

Application for highway improvements by abutting owners, see Pub. Acts. 1917, No. 125, § 4, amending Comp. L. 1915, § 4674.

Proceedings for improvements based on application of abutting owners, see Pub. Acts 1917, No. 125, §§ 7-14, amending Comp. L. 1915, §§ 4677-4684.

Petition for improvements presented to state highway commissioner and proceedings thereon, see Pub. Acts 1917, No. 125, §§ 37, 38, amending Comp. L. 1915, §§ 4707, 4708.

Petition by highway commission for drainage improvement, see Pub. Acts. 1917, No. 125, § 56, amending Comp. L. 1915, § 4726.

Liability of petitioners for cost of improvements, see Pub. Acts 1917, No. 125, § 6, amending Comp. L. 1915, § 4676.

¶ 391. In a suit against a township for the balance due on a contract for improving a highway, the township defended on the ground that the petition for the improvement, presented to the township board, was not signed, as required by the statute, by a majority of the resident property holders upon the portion of the highway sought to be improved. Held, that the township was not estopped, by reason of the determination of the township board that the petition presented had been properly signed, from making such defense.—Collins v. Township of Grand Rapids, 108 Mich. 675.

¶ 392. Comp. L. 1897, § 4163, requiring notice to be given to the adjoining owner before trees are cut by highway authorities, in order to give an opportunity to remove them, only applies to trees growing upon the margin of the highway.—De Boer v. Adams, 159 Mich. 560.

§ 113. ——Line or boundary bridges.

¶ 393. Laws of 1889, Act No. 62 (How. St. § 1310a et seq.), which authorizes the board of supervisors of a county to order the construction of a bridge, and fix the respective portions which each township in which it is situated shall contribute towards its construction, etc., only applies to townships in which a portion of the bridge when built is actually located.—Township of Frenchtown v. Monroe County Sup'rs, 89 Mich. 204.

¶ 394. Without discussing Laws 1899, Act No. 62 at length, it was suggested that many imperfections could be pointed out which would render it practically incapable of enforcement.—Township of Frenchtown v. Monroe County Sup'rs, 89 Mich. 204.

¶ 395. How. St. § 1310a et seq., will not be given such retrospective action as would destroy the agreements lawfully made and existing between such townships at the date of its passage, and having been acted upon for years respecting a joint bridge.—Bigelow v. Brooks, 119 Mich. 208.

¶ 396. Under Pub. Acts 1889, No. 62 (Comp. L. 1897, §§ 4051-4056), providing for the construction of bridges partly in one township and partly in another, and for the calling of a meeting of the board of supervisors on application of one of the townships, and providing that the board shall have the power and it shall be their duty to grant or refuse the prayer of the petitioner and to fix the character of the bridge and the proportions of cost to be borne by each of the townships, the action of the board thereunder may be by majority vote, although a two-thirds vote is required by Comp. L. 1897, §§ 2484 (as amended by Pub. Acts 1905, No. 98), and 2485, in taking the actions therein enumerated among which is that of determining the relative proportions which townships shall contribute to the building and repairing of joint roads and bridges. Accordingly Pub. Acts 1905, No. 306, which covers the same subject as the act of 1889 and repeals it, is also satisfied by a majority vote according to the usual order of procedure.—Horner v. Board of Sup'rs of Ionia County, 147 Mich. 581. (See Comp. L. 1915, §§ 4441-4446 for the statutes which supplant Pub. Acts 1905, No. 306.—Editor.)

¶ 397. A petition first presented by one of the townships at a meeting held pursuant to notice duly served, the highway commissioners and the township boards of two adjoining townships being present confer about the rebuilding of a bridge that had been destroyed by a freshet, and the officials of the other having refused to do anything for the rebuilding of the bridge, and the supervisors having passed such a resolution by a majority vote, is in substantial compliance with the provisions of Pub. Acts 1905, No. 306 providing for ordering the building of bridges between townships on application.—Horner v. Board of Supervisors of Ionia County, 147 Mich. 581.

§ 114. Judicial review or relief against improvement proceedings.

See also post ¶ 548.

Review of local improvement proceedings, see Local Improvements, III, VII.

Nonestoppel by bidding for construction of ditch to assert that construction is illegal, see also Estoppel ¶ 206.

Review on certiorari of proceedings for improvement of highway, see Pub. Acts 1917, No. 125, § 66, amending Comp. L. 1915, § 4736.

¶ 398. Municipal discretion as to how much of a street shall be set aside for the actual highway, and how much for the sidewalk, trees, gutters, etc., cannot be reviewed judicially or passed upon by a jury so long as no distinct legal duty has been violated. McArthur v. City of Saginaw, 58 Mich. 357.

¶ 399. Courts or juries cannot interfere with the discretion of municipal authorities in determining where or upon what plan sidewalks or crosswalks shall be built, or as to the connections of such walks, or the access to them.—Williams v. City of Grand Rapids, 59 Mich. 51; Irving v. Ford, 65 Mich. 241; Shippy v. Village of Au Sable, 65 Mich. 494.

¶ 400. Under Comp. L. 1915, § 4736, providing that highway improvement proceedings are subject to review by certiorari, and for a speedy bringing of the writ, that the circuit court shall hear and determine same without delay, and if any material defect be found in such proceedings they shall be set aside in so far as erroneous, and that the entire proceedings shall not be set aside except where the county road commissioners have no jurisdiction, and that if certiorari be not brought within the time prescribed the improvement shall be deemed to have been legally ordered and established, and its legality shall not thereafter be questioned in any action at law or suit in equity, where taxpayers fail to bring certiorari to review the proceedings because of defective advertising for bids within the prescribed time, the proceedings cannot thereafter be questioned in any action at law or suit in equity.—McDermott v. Board of Road Commissioners of Kent County, 199 Mich. 613.

¶ 401. Where an improvement of a highway is undertaken by the authorities in good faith, it cannot be enjoined by a complainant merely because his access to the highway will be rendered less convenient, while his neighbors will secure an advantage.—Dean v. Millard, 151 Mich. 582.

¶ 402. It would seem that a pretended improvement of a highway, for the purpose of procuring an advantage to one owner at the expense of other abutting owners, may be enjoined.—Dean v. Millard, 151 Mich. 582.

V. ALTERATIONS, EXTENSIONS, GRADES AND CHANGES OF GRADE.

§ 115. Alterations and changes in location.

Condemnation or ascertainment of damages, see post § 123.

Opening of other street as consideration for vacation of one, see post § 127.

Estoppel to question vacation and relocation at other place, see post ¶¶ 481, 482.
General provisions as to alterations of highways, see Comp. L. 1915, § 4288 et seq. [Note. The procedure for altering highways is contained in the same chapter and sections with that relating to laying out highways. Fuller references to the statutes may be found cited ante II, B, which relates to laying out proceedings.]
Provisions for widening narrowed roads, see Comp. L. 1915, § 4395 et seq.

¶ 403. A street that has been established and recognized for more than ten years cannot be shifted unless according to charter and statutory conditions.—Pratt v. Lewis, 39 Mich. 7.

¶ 404. Since Laws of 1881, Act No. 243, went into effect, a highway commissioner may alter a highway (unless it is a line road between municipalities), though it has been long established.—Weber v. Ryers, 82 Mich. 177.

§ 116. Alterations in plan or structure.

Changes in location, see ante § 115.
Changes in course or direction of extension, see post § 117.
Changes in grades, see post § 118 et seq.
Separation of crossing grades, see post § 121.
Requisites of estoppel to prevent restoration of drain to its original place, see Estoppel ¶ 116.

¶ 405. Where it was open to the jury on the evidence to find that a road was at first laid out on a section line intersecting a creek, that at first it deviated to cross on plaintiff's dam, that the bridging or embanking across was deferred and that plaintiff acquiesced in the right of the township authorities to bridge or embank meanwhile, that eventually it was bridged and later banked across leaving a culvert for the free flow of water between the two parts of plaintiff's dam and taking away only the ponding capacity of the space within the highway boundaries, it was error to charge that if plaintiff had during those years used the space under the bridge for floodage the township had no right to deprive him of it by changing the bridge to an embankment.—Schneider v. Township of Brown, 142 Mich. 45.

§ 117. Extensions and plan or course of same.

Necessity or propriety of extension of street, see also ante ¶ 232.
Provisions as to rural roads extended from existing streets, see Comp. L. 1915, § 4304.

¶ 406. A variation of a few degrees in extending a street from its course is not prohibited by law, and is within the discretion of a city, if ratified by the finding of the jury that such course is necessary.—City of Detroit v. Beecher, 75 Mich. 454.

§ 118. Power to establish and change grades.

Necessity of established grade to make change actionable, see post § 119.
Establishment of grade as precedent to grade damage proceeding, see post ¶ 425.
Dedication as implied waiver of damages from change of grade, see Dedication § 30.
Regulation of grade level of railroad in street or crossing street, see also Railroads, IV; Street Railways, III.
Establishment and change of grade of street or interurban railway on highway, see Street Railways, III.
Changes of grade in fourth class cities, see Comp. L. 1915, § 3091 et seq.
Establishment and change of grade in villages, see Comp. L. 1915, § 2654 et seq.
Provisions as to reduction of grades on rural roads, see Comp. L. 1915, § 4638.
Provisions relative to separation of highway and railroad grades and elimination of grade crossings, see Comp. L. 1915, § 4750 et seq.
Provisions as to permission to cross railroads and for fixing grades by State Railroad Commission and State Highway Commissioner, see Comp. L. 1915, § 4314.

¶ 407. The Detroit board of public works is required to "establish a system of grades for all streets and alleys," and grades when once established cannot be changed except by resolution of the council. Held, that this does not mean that after the system itself is established no grade shall be changed, but that an established grade, whether fixed by the board or previously, shall not be changed without authority; the mere approval by the council of a paving contract that involves a change of grade cannot be construed as authorizing the board to change it if the specific question was not presented in the resolution for approval. And as to the establishment of a system of grades, it is sufficient if a general scheme is determined upon, and particular grades are fixed as occasion requires, but always subordinate to the general purpose.—Larned v. Briscoe, 62 Mich. 393.

¶ 408. Under Local Acts 1901, No. 303 authorizing a township to improve certain highways and requiring that the township board shall determine the expediency of the improvement, prepare plans and specifications, fix the amount necessary to be raised, and then submit to the electors the question of issuing bonds for the purpose upon notice containing a copy of the resolution declaring the expediency of the improvement, the manner thereof and the amount necessary, and that the board shall thereafter let the contract according to the plans and specifications, and further providing that the board and the highway commissioner shall determine the details of the contract let, the board may, in good faith, change the grade of the highway to be improved, after the matter has been submitted to the electors, since

to hold otherwise would bind them to any error made in the plans, there being no provision in the law for a second submission.—Campau v. Highway Commissioner of Grosse Pointe, 132 Mich. 365.

§ 119. Actionable change of grade.

Damages for separation of crossing grades, see post § 121.

Procedure to ascertain damages, see post § 122.

Diversion of water by change of grade, see post § 120.

What changes of grade amount to a "taking" or "damaging," see Eminent Domain, III.

¶ 409. Damage to adjacent property caused by lawful change of grade of city street is damnum absque injuria.—City of Pontiac v. Carter, 32 Mich. 164.

¶ 410. An unauthorized or illegal change of grade is an actionable injury.—Larned v. Briscoe, 62 Mich. 393.

¶ 411. Damages suffered by an adjacent owner by reason of a change in grade cannot be recovered in the absence of a statute giving right to such recovery.—Cummings v. Dixon, 139 Mich. 269.

¶ 412. Under Comp. L. 1897, § 2784 providing that whenever the grade of a street has been established and improvements made in conformity therewith the grade shall not be changed without compensation to the owner for damages therefrom, damages are recoverable only in case of a change from a grade deliberately established by a competent municipal authority in the prescribed manner.—Cummings v. Dixon, 139 Mich. 269.

¶ 413. In the absence of a previously established street grade an abutting property owner cannot recover damages from a municipality for changing the grade of a street.—Labadie v. Village of Ford, 185 Mich. 402.

§ 120. ——Diversion of surface water by change.

For diversion in construction or repair of road, see ante § 111.

¶ 414. Although a village has the undoubted right to change the grade of a street without being liable to an adjacent owner for a consequent casting of surface waters on his premises, it will be liable for destroying a gutter which had been constructed while the building of such adjacent owner was being erected, and so changing the grade of the street that the waters which had theretofore been carried off were precipitated against and into such building.—Morley v. Village of Buchanan, 124 Mich. 128.

§ 121. Damages for separation of crossing grades.

Procedure to ascertain damages, see post § 122.

Damages for crossing railroad on establishment of highway, see ante § 37.

Damages for viaduct as additional servitude, see also post ¶ 582.

Liability of railroad to abutter, see also post ¶ 706.

Measure and elements of damages for taking and injuring property by change of grade, see Eminent Domain, IV.

Impairment or vacation of highway use or access as a "taking," see Eminent Domain § 25.

Acts of municipality amounting to proprietary or ministerial doings as distinguished from governmental and nonactionable doings, see Municipal Corporations, XII.

¶ 415. Where a city builds a bridge for a crossing over a railroad track in a public street having no charter power to alter grades in that manner it is liable as a wrongdoer for an injury thereby inflicted upon an abutting owner in the usual and ordinary enjoyment of his property.—Schneider v. City of Detroit, 72 Mich. 240.

¶ 416. A city constructing a bridge in a street over a railroad track without eminent domain proceedings, is liable to an abutting owner for damages from depreciation in rental value resulting from such structure. Phelps v. City of Detroit, 120 Mich. 447.

¶ 417. Under Comp. L. 1897, § 4229 et seq., providing for ascertaining damages resulting from a separation of grades at railroad crossings "to all parties sustaining damage thereby," requiring that among others the petition shall name "lessees * * * and others interested in the property * * * including those in possession of the premises," and providing for awarding to the parties interested compensation for damages, one occupying part of the right of way of a railroad company agreeing to such separation of grades may recover for damages due to the destruction of its access by the change of grade and the consequent injury to its improvements made under the lease; since the agreement of the lessor company does not bind the lessee.—City of Detroit v. C. H. Little Co., 141 Mich. 687.

¶ 418. Comp. L. 1897, § 4244, providing for an award of damages upon separation of railroad and highway grades, is a remedial statute, declaring the right of the individual to compensation for damages sustained by him for the public benefit.—City of Detroit v. Detroit United Ry., 156 Mich. 106.

¶ 419. Under Comp. L. 1897, § 4244, authorizing an award of damages to abutting property owners on the separation of highway and railroad grades, compensation can be given only for damages to property abutting upon that portion of the street the grade of which is to be changed, and for such

only as are caused by such change; there can be no award for damages resulting to abutters from the elevation of the railroad tracks as distinguished from those due to change of the street grade.—City of Detroit v. Detroit United Ry., 156 Mich. 106.

¶ 420. The petitioner, the City of Detroit, brought proceedings to lower the grade of a street at a railroad crossing. The defendants, abutting owners, claimed damages under the statute providing for the separation of the grades of streets and of railroads crossing them. Held, they were entitled to damages, since the statute was intended to apply to ordinary highway and street grades, and was not limited to grades created by the city and duly recorded.—City of Detroit v. Snyder, 156 Mich. 511, on rehearing 159 Mich. 227.

¶ 421. In a petition by a city to lower the grade of a street, under the statute providing for the separation of the grades of streets and of railroads crossing them, abutting owners were made an allowance for a paving assessment levied against them. Held, the allowance was improper since such matters were subject to the jurisdiction of the recorder's court in proceedings relating thereto.—City of Detroit v. Snyder, 156 Mich. 511, on rehearing 159 Mich. 227.

§ 122. Procedure to ascertain grade damages.

General law of eminent domain, including all matters which are not peculiar to change of grade proceedings, see Eminent Domain.

¶ 422. Although an agreement between a city and a railroad company for the construction of a viaduct to carry a street across the track is for the purpose of obtaining a right of way over the track where there is no existing right of way, it is none the less subject to the provisions of Pub. Acts 1893, No. 92, and is not enforceable until the damages to abutting owners are fixed by judicial proceedings, or by compromise, under section 3 of the act.—Harper v. City of Detroit, 110 Mich. 427.

¶ 423. In a proceeding for the determination of damages caused by the separation of railroad and highway grades, the petitioner for such change of grades does not bear the burden of reducing to certainty testimony too uncertain in nature to establish a right to compensation.—City of Detroit v. Detroit United Ry., 156 Mich. 106.

¶ 424. Under Comp. L. 1897, ch. 102, providing separate grades for railroads and public highways and streets, where railroads intersect such highways and streets, a city cannot have one jury in one proceeding determine the necessity of grading three streets, and ascertain the resulting damage to all property abutting upon those streets and affected by the change.—City of Detroit v. Dailey, 156 Mich. 9.

¶ 425. The establishment of a street grade held not shown by competent municipal authority in the form of a permanent record as required by law, so as to entitle an abutting property owner to damages for a subsequent alteration of the grade.—Labadie v. Village of Ford, 185 Mich. 402.

§ 123. Condemnation of property to widen or alter way.

Review of proceedings by certiorari, see post § 124.

Damages for removal of fences to prevent snow drifting, see post ¶ 656.

General law of condemnation for streets, see ante II, B; and see Eminent Domain.

Liability for constructing bridge in street without condemning right, see Bridges § 22.

Procedure to widen parkways and boulevards belonging to park system, see Parks.

¶ 426. An attempt to agree with the owner upon a purchase of the premises is a condition precedent to adverse proceedings to take private property to widen a village street.—Arnold v. Village of Decatur, 29 Mich. 77.

¶ 427. Proceedings by a highway commissioner, under How. St. §§ 1296-1304, to condemn land for widening a highway are not irregular and premature on account of the pendency of a certiorari to review proceedings previously taken, and afterwards held void, to discontinue such highway.—Weber v. Stagray, 75 Mich. 32.

¶ 428. Evidence tending to show whether or not a proposed improvement by grading and widening a highway is in itself a public necessity, is admissible in favor of a landowner whose property is sought to be condemned by reason of such improvement.—City of Grand Rapids v. Coit, 149 Mich. 668.

¶ 429. In a proceeding to take private property for the widening of a village street, the jury must pass upon the necessity of the taking.—Arnold v. Village of Decatur, 29 Mich. 77.

§ 124. Judicial review of or relief from alteration proceedings.

Review in street opening cases, see ante II, B, 4.

General law of certiorari, injunctions and other forms of judicial relief, see Certiorari; Injunctions; and like topics.

¶ 430. In certiorari to review a proceeding to alter and widen a highway the objection that the commissioner had no jurisdiction because no highway existed there will be overruled where the commissioner's return shows a highway by user for more than thirty years and less than four rods wide.—Dewey v. Kaner, 80 Mich. 280.

¶ 431. Where on the review of proceedings to alter a highway the objection is made

that the commissioner did not have present at the hearing of the application, notice and proof of service, it will not be sustained where it appears from the return of the commissioner that he offered to go after said papers, but that the attorney of the person making the objection told him it was not necessary, and where it also appears that the township clerk's books containing a record of the papers were present, and that the commissioner had inspected the original papers before the hearing.—Dewey v. Kaner, 80 Mich. 280.

VI. ABANDONMENT, VACATION AND DIMINUTION.

§ 125. In general; powers of officers and municipalities.

See also post ¶ 517.
Grounds and occasions for vacating, see post § 127.
Vacating on conditions, see post § 128.
Abandonment, disuse or sufferance of adverse possession, see post § 129.
Procedure to vacate or abandon, see post §§ 130 et seq., 136, 137.
Condemnation of rights and payment of damages, see post § 133.
Objections, estoppel and cure of defective vacations, see post § 135.
Review of vacation proceedings, see post § 137.
Reversion of title to abutters, see post § 138.
Re-establishment of way, see post § 139.
Nonjudicial character of proceedings by supervisors, see post ¶ 451.
Vacation proceedings as recognition of existence of street, see ante ¶ 19a.
Discontinuance of highway as affecting obligation to inspect and repair, see post § 203.
Revocation of dedication, see Dedication §§ 14-16.
Constitutional inhibition of legislative vacation, see Const. art. VIII, § 27.
Power of county road commissioners to abandon or vacate county road, see Pub. Acts 1917, No. 356, amending Comp. L. 1915, § 4364.
Power of board of supervisors to discontinue or vacate, see Comp. L. 1915, § 4523 et seq.
Vacations by village councils, see Comp. L. 1915, § 2652.

¶ 432. Highway commissioners have power to discontinue roads, notwithstanding the provision in the constitution conferring authority on the boards of supervisors.—People ex rel. Goldsmith v. Nankin Highway Com'rs, 15 Mich. 347.

¶ 433. Under How. St. § 1310 a town-line road which had for ten years been recognized as such by the authorities, could not be discontinued, except by the joint act of the authorities of the two townships.—Bigelow v. Brooks, 119 Mich. 208.

¶ 434. The courts and the common council of the City of Detroit have concurrent jurisdiction over the vacation of streets in that city.—Detroit Real Estate Inv. Co. v. Wayne Circuit Judge, 137 Mich. 108.

¶ 435. The right of the City of Detroit under its charter of 1904, § 169, to vacate a street or alley by proper proceedings, when deemed necessary in the public interest, is clear.—Michigan Cent. Ry. Co. v. Miller, 172 Mich. 201.

§ 126. Release of public rights.

Power of legislature to extinguish public easements in street, see also post ¶ 556.

¶ 436. The rights of the public in city streets may be extinguished by legislation.—Cooper v. City of Detroit, 42 Mich. 584; Horn v. People, 26 Mich. 221.

§ 127. Ground, purpose and occasion for vacation.

Imposition of conditions, see post § 128.
Allegation or showing of grounds in petition, see post § 130.
Sufficiency of record to show purpose and necessity, see post § 132.
Sufficiency of objections on judicial review, see post § 137.

¶ 437. The proper municipal authorities can discontinue a portion of a street, if they could do so otherwise, in consideration of the opening of another street and outlet by a private citizen whose interests are affected in both cases.—Bauman v. Campau, 58 Mich. 444.

¶ 438. It is a fatal objection to the action of the city council in vacating part of a public alley that the proceedings show upon their face that the inducement for the council's action was the division of the property attempted to be acquired by the vacation between the moving party in the vacation proceedings and the city.—Horton v. Williams, 99 Mich. 423.

¶ 439. The legality of the action of a city council in vacating a street cannot be questioned on the ground that the street becomes the property of the abutting owners who are instrumental in having the street vacated.—Curtis v. Charlevoix Golf Assn., 178 Mich. 50.

§ 128. Vacation upon conditions.

Effect of cessation of condition to re-establish way, see post ¶ 497.

¶ 440. A city council, in granting a petition to vacate a street, may impose conditions.—Detroit Real Estate Inv. Co. v. Wayne Circuit Judge, 137 Mich. 108.

§ 129. Abandonment and nonuser or adverse possession.

Nonuser of dedicated way as nonacceptance thereof, see ante § 9.

Right of abutters to close cul de sac or blind way, see also post § 162.
Inclosing disused or blind way as nuisance or obstruction, see post § 180.
Title by adverse possession of highway, see Adverse Possession §§ 2, 5, 28, 51.
Sufficiency of uses by abutter to constitute adverse possession, see Adverse Possession § 28.
Evidence as to adverse possession of way or part of it, see Adverse Possession § 51.
Effect of quit claim to public for street uses as raising estoppel to assert adverse after acquired title, see Estoppel § 19.
Abandonment and nonuser as discontinuance of private easements, see Easements, IV.
Provisions as to discontinuance by four years failure to be worked after laying out, see Comp. L. 1915, § 4309.

¶ 441. There are cases where the abandonment of a street may be presumed by nonuser.—Devaux v. City of Detroit, H. 98.

¶ 442. The general highway laws provide for vacating highways by nonuser as well as by direct proceedings.—Cooper v. City of Detroit, 42 Mich. 584.

¶ 443. Highways may be wholly or partially discontinued by nonuser.—Gregory v. Knight, 50 Mich. 61; Lyle v. Lesia, 64 Mich. 16; Coleman v. Flint & P. M. R. Co., 64 Mich. 160.

¶ 444. Where a highway has been formally abandoned and a new one opened and used instead of it, the old road may be considered vacated.—Lyle v. Lesia, 64 Mich. 16.

¶ 445. A highway can be lost in whole or in part by nonuser, but the portion kept in use will not be affected by the nonuser of the remainder.—Wayne County Savings Bank v. Stockwell, 84 Mich. 586.

¶ 446. The rights of the public in a highway will not be lost by anything short of an actual abandonment of the use by which it was acquired.—Village of Grandville v. Jenison, 84 Mich. 54.

¶ 447. Under How. St. § 1315, a road that has been "laid out and not recorded and actually used for eight years" becomes a public highway; and mere nonuser for two years does not, in the absence of proceedings to discontinue the highway, entitle a railroad company crossing the road to exclude the public by fencing in its right of way.—McNamara v. Minneapolis, St. P. & S. Ste. M. R. Co., 95 Mich. 545.

¶ 448. Nonuser of a highway is not necessarily shown by encroachments upon it at various times by the building of chicken-parks, the piling of lumber, etc., which do not obstruct travel.—Village of Grandville v. Jenison, 84 Mich. 54.

¶ 449. The admitted fact that a strip of land adjoining plaintiff's land has been legally laid out and established as a public highway, will defeat his recovery against defendant for trespass thereupon, even though for a few months plaintiff has inclosed such strip with a fence.—Van Brunt v. Lynch, 76 Mich. 455.

¶ 450. Abandonment of a highway lying between complainant's two parcels of land and title thereto in complainant by adverse possession is shown by the evidence, in an action to enjoin trespass by a highway officer, where it appears that more than twenty years prior to the action the inhabitants of the vicinity had formally assented to the abandonment of an adjoining portion of such highway, thereby closing one exit to the portion lying between complainant's two parcels of land; that thereupon complainant ran a fence across such highway inclosing such portion as lay between his lands, and continued thereafter in the sole and uninterrupted possession and use of such land.—Lawrence v. Kirby, 145 Mich. 432.

§ 130. Proceedings for discontinuance or vacation.

Notice requisite to jurisdiction, see post § 131.
Requisites of the record of the proceedings, see post § 132.
Joinder of proceedings to discontinue with proceedings to lay out highway, see ante § 25.
Vacation of plats as such, see Dedication § 36.
General provisions as to vacation or discontinuance of highways, see Comp. L. 1915, § 4288 et seq. [Note. The procedure for vacating highways is contained in the same chapter and sections with that relating to laying out highways. Fuller references to the statutes may be found ante II, B, which relates to laying out proceedings.]

¶ 451. The action of a board of supervisors in ordering a portion of a state road to be vacated is legislative in its character and not subject to the same rules as judicial proceedings.—People ex rel, Greenman v. Shiawassee County Sup'rs, 38 Mich. 642.

¶ 452. Proceedings to vacate streets are proceedings in rem.—Detroit Real Estate Inv. Co. v. Wayne Circuit Judge, 137 Mich. 108.

¶ 453. A board of supervisors has jurisdiction under How. St. § 497, to discontinue a state road without the presentation of a petition therefor, and an insufficient petition is a mere irregularity, not going to the jurisdiction.—Pearsall v. Eaton County Sup'rs, 71 Mich. 438.

¶ 454. Under Comp. L. 1897, § 2782, How. 2nd ed., § 6001, no petition need be filed with

the common council as the initial act for the vacation of a street, the council being empowered to act on its own motion.—Curtis v. Charlevoix Golf Ass'n, 178 Mich. 50.

¶ 455. Where a city charter does not require the purpose of vacating a street to be expressed, nor make the expression of it obligatory on the subsequent occupation, the expression of a specific purpose in the proceedings to vacate it is surplusage.—Cooper v. City of Detroit, 42 Mich. 584.

¶ 456. A petition for discontinuance of a road signed by persons describing themselves as "freeholders and residents of the townships of Oneida and Delta" does not show in which each of the signers resides and therefore cannot show that a statutory number resides in each.—Pearsall v. Eaton County Sup'rs, 71 Mich. 438.

¶ 457. Discontinuance of a highway that has been in use for twenty years must rest on the unanimous approval of the town board, and that should precede the return made by the commissioner of highways as to his proceedings.—Shue v. Richmond Township Highway Commissioner, 41 Mich. 638.

¶ 458. On May 18 a highway commissioner pursuant to How. St. § 1300 adjourned for twenty days a proceeding to discontinue a highway. Held, that the hearing should have been on June 7, and that one on June 6 made the proceedings void.—Price v. Stagray, 68 Mich. 17.

§ 131. ——Notices and service or publication and proof of same.

Necessity and requisites of petition, see ante § 130.
Showing of notice in record, see post § 132.
Effect of inaction by omitted party to cure proceedings, see post ¶ 483.
Presumption on certiorari as to notice having been given, see post § 137.

¶ 459. An adjoining land-owner is entitled to notice of proceedings to discontinue a state road.—Pearsall v. Eaton County Sup'rs, 74 Mich. 558. Former certiorari by same parties, see 71 Mich. 438.

¶ 460. Notice to an occupant of land traversed by a highway, with reference to which his houses, wells, barns, and orchards have been located, of its proposed discontinuance by the board of supervisors, under How. St. §§ 497, 498, is essential to the validity of the discontinuance proceedings.—Curry v. Place, 99 Mich. 524.

¶ 461. Local Acts of 1895, No. 353, amending the city charter of Jackson and authorizing the vacation of any street or part of street, without application to the court, if all persons interested in the plat, or a "distinct part thereof," consent thereto, requires the consent of those persons only who have a legal right to compensation on the vacation of the street, and notice to others owning property on the plat is not essential to jurisdiction.—Baudistel v. Michigan Cent. R. Co., 113 Mich. 687.

¶ 462. Proceedings of the board of supervisors discontinuing part of a state road may be adjudged void for want of notice and compensation to an adjoining land-owner.—Pearsall v. Eaton County Sup'rs, 74 Mich. 558.

¶ 463. Proceedings by a highway commissioner to discontinue a highway are void where there was a failure to serve process on all of the occupants.—Hatt v. Township Board of Napoleon, 144 Mich. 266.

¶ 464. Failure to serve the statutory notice on a life tenant occupying the land makes proceedings by a highway commissioner to discontinue a highway void although one occupant who was reversioner was served.—Hatt v. Township Board of Napoleon, 144 Mich. 266.

¶ 465. Proceedings to discontinue a highway are void if taken upon a notice shorter than ten days under How. St. § 1298, and accordingly a notice on June 1st for a hearing on June 6th is void.—Price v. Stagray, 68 Mich. 17.

¶ 466. The owner of a parcel of land not fronting upon any highway, and whose only outlet is a private way two rods wide, belonging to him, and extending therefrom to the public highway, is entitled to notice of proceedings to discontinue such public highway as much as if his whole parcel abutted upon it.—People ex rel. Phillips v. China Highway Com'r, 35 Mich. 15.

¶ 467. Notice of proceedings to discontinue a highway must be given to any person whose premises will be left by such action without any outlet or approach on one side. Goss v. Westphalia Township Highway Com'r, 63 Mich. 608.

¶ 468. The requirement is jurisdictional that before a highway commissioner can take any proceedings to discontinue a public highway an affidavit showing the time and manner of serving notice of such proceedings must be made and annexed to the notice or a copy thereof. An ex post facto compliance with this requirement is insufficient.—Goss v. Westphalia Highway Com'r, 63 Mich. 608.

¶ 469. The statute required notice of proceedings to vacate a highway to be served on the owners or occupants of lands through which the road passed, either personally or by copy left at their residences, and by posting in three public places of the township. Held, that the return of service should show the names of persons served, and whether

served by copy left or personally; and it should show the particular places in which notices were posted. In the absence of such a return an order of commissioners vacating the road would be without jurisdiction.—People ex rel. Goldsmith v. Nankin Highway Com'rs, 14 Mich. 528.

§ 132. ——Order or findings, return, and record of vacation.

Imposition of conditions, see also ante § 128.
Time for hearing, see also ante ¶ 458.
Length of notice required, see ante § 131.
Adverse decision by council as bar to judicial vacation, see post ¶ 485.
Necessity that record of township vacation proceedings be signed by chairman and clerk of board, see also ante ¶ 355.
Vacation order as adjudication in rem, see ante ¶ 452, and see also Former Adjudication ¶ 20 and § 77.
Vacation of street as revocation of dedication thereof, see Dedication § 15.
Vote required to discontinue road existing for ten or more years, see Comp. L. 1915, § 4302.

¶ 470. When a road is discontinued the record filed with the township clerk must show everything necessary to render the proceedings valid; e. g., notice to parties interested.—People ex rel. Mead v. Caledonia Highway Com'rs, 16 Mich. 63.

¶ 471. Proceedings to discontinue a highway are void unless the commissioner's return shows he viewed the premises and found a public necessity for such discontinuance and the return that he laid out or discontinued a highway is not sufficient.—Furman v. Furman, 86 Mich. 391.

¶ 472. Where the facts set forth in a petition to vacate a portion of a state road fairly tend to show that the public would be benefited thereby, a finding by the board of supervisors that they were sufficient cannot be questioned.—People ex rel. Greenman v. Shiawassee County Sup'rs, 38 Mich. 642.

¶ 473. When commissioners of highways have gone out of office it is incompetent for them to make any addition or amendment to a return of their proceedings already made and filed with the town clerk; e. g., in discontinuing a highway; whether they could have made such additions before, quære.—People ex rel. Mead v. Caledonia Highway Com'rs, 16 Mich. 63.

¶ 474. How. St. § 501, requiring every order, resolution and determination of the board of supervisors made in pursuance of the act authorizing it to lay out or discontinue state roads to be recorded in the records of the board and to be signed by the chairman and clerk, is mandatory, and in the absence of such authenticated record the presumption that public officers perform their duty cannot sustain the action taken.—Pearsall v. Eaton County Sup'rs, 71 Mich. 438.

§ 133. Condemnation and payment of damages.

Causing or procuring vacation as injury to other owner's right of access, see also post ¶ 704.
General law of condemnation proceedings, see Eminent Domain.
Impairment or vacation of highway use or access as a "taking," see Eminent Domain § 25.
Provisions as to damages from discontinuance or vacation, see Comp. L. 1915, § 4525.

¶ 475. Abutting lot owners have an interest in the land embraced in a public alley, and the city council has no right, under How. St. § 2622, which authorizes it to vacate alleys in the city whenever it shall deem the same a public improvement, and provides that if, in so doing, it shall be necessary to take or use private property, the same may be taken in the manner provided for taking private property, for public use, to vacate part of said alley, without first compensating said abutting lot owners for any damages by them sustained, though their lots may not abut upon the portion so vacated.—Horton v. Williams, 99 Mich. 423.

¶ 476. One who has no property abutting upon a street which has been vacated and no private way connecting with it, cannot recover damages for the closing of the street.—Beutel v. West Bay City Sugar Co., 132 Mich. 587.

§ 134. Landowners entitled to object.

Grounds for objection, see also ante ¶¶ 438, 439.
Persons entitled to notice, see ante § 131.
Persons entitled to damages for vacation, see ante § 133.
Vested rights against discontinuance or vacation, see Constitutional Law § 247.

¶ 477. Persons not abutting owners and having no interest in the fee of a vacated street, cannot question the legality of the vacation proceedings.—Curtis v. Charlevoix Golf Ass'n, 178 Mich. 50.

¶ 478. Under How. St. § 1298, which requires notice to be given to owners and occupants of land through or adjoining which it is proposed to discontinue a highway, only such persons can complain of a discontinuance, one whose premises lie beyond an intervening street which he must cross to reach the discontinued way, and which street which communicates in various directions and furnishes abundant guards against isolation, cannot complain.—Kimball v. Homan, 74 Mich. 699.

¶ 479. A discontinuance of highway which necessitates the making of a short turn by a nearby property owner and his selecting

either of two roads a little distance away, instead of going to a neighboring city by an unbroken straight line, is not a tangible grievance to his convenience of passage.—Kimball v. Homan, 74 Mich. 699.

¶ 480. A complainant who is not materially injured in his means of ingress and egress is not entitled to enjoin a city from closing an alley.—Schmolt v. Nagel, 151 Mich. 502.

§ 135. Estoppel, waiver and cure of defects in vacation.

Conclusiveness of record as to grounds and necessity, see ante § 132.
Amendments of record to cure proceedings, see ante § 132.
Correct final decision as curing intermediate defects, see also post ¶ 486.
Power of legislature to cure proceedings, see post ¶ 506.

¶ 481. Where the action of highway commissioners in altering and practically vacating part of a highway had for twelve years been accepted as valid by the public and by all concerned in the premises, the public authorities cannot set up the irregularity of their own proceedings, and thus acquire for public use, without compensation, land embraced in the vacated road.—Lyle v. Lesia, 64 Mich. 16.

¶ 482. A small portion of a street that had been opened under an invalid statute was afterward discontinued so that travel was deflected from a straight line at its outlet, but the distance to be traveled was not substantially increased. The discontinued part had never been completed as a street, and was taken for business purposes and fenced in. Before this a curb had been run across it where its original outlet had been. Held, that private citizens could not maintain a bill to remove obstructions and compel the reopening of the street, especially if they raised no objection until several years after these changes were made, and showed no grievance more substantial than a mere sidetracking of the street without other inconvenience.—Bauman v. Campau, 58 Mich. 444.

¶ 483. Where proceedings to discontinue a highway were void as to any of the parties they are invalid as to all, and the fact that a life tenant and occupant not served with the statutory notice took no proceedings to establish the invalidity of the proceedings does not cure any invalidity.—Hatt v. Township Board of Napoleon, 144 Mich. 266.

§ 136. Vacation by judicial proceedings.

Concurrent powers of courts and city council, see also ante § 125.
Concurrent jurisdiction of vacation proceedings, see also Courts ¶ 225.

¶ 484. The power of the courts to vacate a city street upon petition of the abutting landowners is not necessarily subject to the acquiescence of the city authorities. It should, however, when opposed by them, be sparingly exercised.—In re Albers' Petition, 113 Mich. 640.

¶ 485. Proceedings for the vacation of a street cannot be brought in the courts after the city council has lawfully acted upon a petition for the same purpose, unless a change in circumstances is shown which justifies it.—Detroit Real Estate Inv. Co. v. Wayne Circuit Judge, 137 Mich. 108.

§ 137. Judicial review of or relief from vacation proceedings.

Persons entitled to relief or protection, see also ante § 134.
Judicial vacation after refusal of council to vacate, see ante ¶ 485.
Pendency of certiorari as bar to new proceeding to widen way, see ante ¶ 427.
Delay as objection to certiorari to review discontinuance, see Certiorari § 23.
Proper respondents to certiorari to review vacation, see Certiorari § 26.

¶ 486. If, on presentation of a proper petition to vacate a portion of a state road, the board of supervisors acquire jurisdiction to act, and do not in their final determination of the case exceed their jurisdiction, defects in their intermediate proceedings will not invalidate their conclusion or make it subject to review on certiorari.—People ex rel. Greenman v. Shiawassee County Sup'rs, 38 Mich. 642.

¶ 487. Proceedings to vacate a highway are void unless the statutory notice is given beforehand to owners and occupants of lands that will be affected thereby. And where the petition for certiorari to review the proceedings avers that there was no notice, and the return does not show that there was any, it is assumed that there was no service.—Ross v. Taylor Township Highway Com'rs, 32 Mich. 301.

¶ 488. The fact that a street is made less conspicuous by discontinuing a portion of it is too shadowy a grievance, if depreciation in the value of property thereon is not shown, to sustain a bill in equity to require it to be opened again.—Bauman v. Campau, 58 Mich. 444.

¶ 489. On a suit for injunction seeking to restrain the vacation of a certain alley adjoining complainant's premises, where it appeared such vacation would result in a benefit to his premises either by adding thereto the vacated alley or by furnishing him a paved area in the rear of his premises, resulting in an enhanced value to his premises, held that the bill was properly dismissed.—Swanteck v. City of Detroit, 196 Mich. 307.

¶ 490. The members of a city council should be made parties to a bill against

abutters charging collusion and fraud in vacating a street.—Curtis v. Charlevoix Golf Ass'n, 178 Mich. 50.

§ 138. Reversion or inurement to abutters.

Invalidity of vacation procured in order to obtain land by reverter, see ante ¶¶ 438, 439.

Rights of abutters in way, see post X, XI.

Conveyance of dedicator's lands in plat as carrying reverted street, see Deeds ¶ 199.

¶ 491. Upon the vacation of a street or alley the land reverts to the abutting owner or owners.—Michigan Cent. Ry. Co. v. Miller, 172 Mich. 201; Edison Illuminating Co. v. Misch, 200 Mich. 114.

¶ 492. Under Comp. Laws 1897, § 3377, How. 2nd ed., § 2522, providing that upon the vacation of a street or alley the same shall be attached to the lot or ground included in a plat and bordering on such street or alley, where an alley is vacated the land in such alley to the center of it becomes attached to an adjoining lot, and upon the sale of a specified number of feet off the part of the lot abutting on such alley, measurement must be made from the center of the alley.—Gazley v. Koepke, 195 Mich. 509.

¶ 493. Where a lot is conveyed as abutting upon a street or alley the dedication of which is to the perpetual use of the public, reserving to the dedicators, their heirs and assigns, "the reversion thereof whenever discontinued by law," the grantee takes the land to the center of the street or alley thereafter vacated.—Scudder v. City of Detroit, 117 Mich. 77.

¶ 494. Where land was conveyed to a township for a road in consideration of the abandonment of another highway, the deed not being recorded, and the new road was subsequently abandoned and the old road reopened, held that the recording of the conveyance many years later by the township did not confer any rights on it in the land therein described.—Hodges v. Township of West Bloomfield, 186 Mich. 259.

¶ 495. Where a strip three feet wide on the edge of land dedicated to a city for a street and included in the description has never been used and occupied by the public, it becomes the property of the abutting property owner.—Werner v. Hinz, 172 Mich. 360.

§ 139. Re-establishment of vacated or abandoned way.

¶ 496. Where any part of a highway has been extinguished and turned to other uses, it cannot be renewed without the same methods of dedication or user which would turn other lands into public ways.—Cooper v. City of Detroit, 42 Mich. 584.

¶ 497. Where a highway is vacated conditionally it is not re-established by the suspension of the conditional occupation.—Cooper v. City of Detroit, 42 Mich. 584.

¶ 498. The use of a highway, as such, for eight years after its discontinuance by the board of supervisors of the county, makes it a public highway by virtue of such subsequent user, under How. St. § 1315, which provides that "all roads which have been or which may hereafter be laid out and not recorded, and which shall have been used eight years or more, shall be deemed public highways."—Curry v. Place, 99 Mich. 524.

VII. HIGHWAY OFFICERS AND DISTRICTS.

§ 140. In general; authority, powers and duties.

Power and jurisdiction of township highway commissioner, see ante §§ 27, 28.

Relative powers of highway and drain commissioners, see ante § 108.

Adoption and election for township, county or general system of control, see post § 141.

Control over state roads, see post § 142.

Power to raise money, see post § 146.

Power of county road commissioners as to building sidewalks, see ante § 106.

Power to alter established way, see ante § 115.

Establishment and changes of grade, see ante § 118.

Power to abandon or vacate, see ante § 125.

Nonjudicial character of proceedings, by officers to vacate, see ante ¶ 451.

Duty to institute summary proceedings to remove obstruction, see post § 187.

Proper party plaintiff in action for injury to road or bridge, see post § 192.

Necessity of record to support presumption of duty regularly done, see also ante ¶ 474.

General law of officers, see Officers.

Law of officers peculiar to township officers and not peculiar to highway administration, see Townships, V.

Encroachment on constitutional office of highway commissioner, see Constitutional Law ¶ 1132.

Authority of township highway commissioners to lay out highways, see also Eminent Domain ¶ 17.

Officers empowered to act in granting franchises or permits for use of streets for street railways, see Street Railways, I.

Road districts for purpose of taxation, see Taxes, IV.

Duty to maintain bridge over race, see Mills.

For statutes relating to the official organization of cities and villages, see the respective charters.

Power of legislature to prescribe powers and duties of boards of supervisors, county and district road commissioners, and township highway commissioners and overseers in relation to highways, see Const. art. VIII § 26 (amendment of 1917).

Powers granted county road commissioners and state highway commissioner, see Pub. Acts 1917, No. 125, amending Comp. L. 1915, § 4672.
State highway department and its duties for promoting construction of roads, see Comp. L. 1915, §§ 4378-4394.
Officer under state reward system, see Comp. L. 1915, § 4378 et seq.
General statutory duties of commissioners and overseers, see Comp. L. 1915, § 4471 et seq.
Miscellaneous provisions relating to officers (duties of clerk, administration of oaths by commissioner, power to examine witnesses, fees of officers, etc.), see Comp. L. 1915, § 4477 et seq.
Powers and duties of the board of supervisors, see Comp. L. 1915, § 4518 et seq.
Powers and duties of supervisors, see Comp. L. 1915, § 2288 et seq.
Quorum required for board of county road commissioners, see Pub. Acts 1917, No. 356, amending Comp. L. 1915, § 4355.
Election, tenure and power of good roads commissioners, see Pub. Acts 1917, No. 268, amending Comp. L. 1915, § 4341.
Election and tenure of county road commissioners, see Pub. Acts 1917, No. 356, amending Comp L. 1915, § 4352 et seq.
Election, tenure, salary and duties of state highway commissioner, see Pub. Acts 1917, No. 177, amending Comp. L. 1915, § 4379.

¶ 499. Highway commissioners are constitutional officers (Const. art. XI, § 1), and no provision has been made by law subjecting them to the general direction of the township.—Burnham v. Township of Byron, 46 Mich. 555.

¶ 500. Highway commissioners and township boards have no authority to act for the mere purpose of settling boundaries, and cannot properly disturb any possession with that object.—Shue v. Richmond Township Highway Com'rs, 41 Mich. 638.

¶ 501. The care and supervision of all highways and bridges is in the hands of the highway commissioners of the several townships in which they are situated.—Delta Lumber Co. v. Board of Auditors & Wayne County Sup'rs, 71 Mich. 572.

¶ 502. State agents appointed by the governor under an act of the legislature to improve a highway cannot become town officers by acquiescence. The town has no share in their appointment, and they interfere with the functions of such town officers as are constitutionally provided for.—People ex rel. Hubbard v. Springwells Township Board, 25 Mich. 153.

¶ 503. Boards of supervisors have no control over roads not state or territorial; they cannot raise money except for their own roads.—Attorney General v. Bay County Sup'rs, 34 Mich. 47.

§ 141. Township and county systems or general plan of control.

Refund to township of sums spent on state reward roads, see post § 153.
General law of elections not involving matters peculiar to voting on submitted questions, see Elections.
Constitutional provisions for county, district or township road systems, see Const. art. VIII, § 26.
Power of legislature to provide by law for submission question of adoption of county road system to electors of counties, see Const. art. VIII, § 26 (amendment of 1917).
Statutory provisions relating to "good roads districts," see Comp. L. 1915, § 4337 et seq.
Proceedings for formation of good roads district, see Pub. Acts 1917, No. 268, amending Comp. L. 1915, § 4342.
Provisions for county road system, see Comp. L. 1915, § 4347 et seq.
Statutory provisions establishing county road system in various counties of state and creating county highway department, see Pub. Acts 1917, No. 305.
Provisions for system of highway labor tax in working roads, see Comp. L. 1915, § 4612 et seq.
Rights of townships operating under township highway system, see Pub. Acts 1917, No. 271, amending Comp. L. 1915, § 4377.
Jurisdiction of board of county road commissioners over county road system, see Pub. Acts 1917, No. 356, amending Comp. L. 1915, § 4364.

¶ 504. Pub. Acts 1895, No. 230, providing that a township might adopt a township road system, is repealed by implication in so far as it relates to Saginaw County, by Loc. Acts 1899, No. 419, as amended by Loc. Acts 1901, No. 335, providing for the control and improvement of the roads in Saginaw County and the raising of funds therefor, the provisions of the latter act being inconsistent with the right of any township within that county to control its own roads under a township system.—Saginaw Co. Sup'rs v. Hubinger, 137 Mich. 72.

¶ 505. Under Const. art. IV, § 49, providing for the adoption of county road systems by a majority vote of the electors of the county, a majority of the votes cast at the election is sufficient.—Shearer v. Board of Supervisors of Bay County, 128 Mich. 552.

§ 142. Control over state roads.

Establishment of state highways, see ante II, B, 6.
Refund to townships of amounts spent on state reward roads, see post § 153.
Local control over state roads, see Comp. L. 1915, § 4313.

¶ 506. The legislature has power by mere enactment to vacate or alter a state road, and it may consequently confirm the irregu-

lar action of the supervisors to the same end.—People ex rel. Bristol v. Ingham County Sup'rs, 20 Mich. 96.

¶ 507. The board of supervisors having full control over the opening, altering and discontinuing of state and territorial roads, the exercise of such power by highway commissioners was repugnant thereto.—People ex rel. Goldsmith v. Nankin Highway Com'rs, 15 Mich. 347.

§ 143. Contract by or with boards and officers.

Contracts for construction and rights of parties, see also ante § 105.
Borrowing money or incurring debt for tools and machinery, see post § 149.
Relative powers of commissioner and board as to allotment of moneys, see post ¶ 521.
Public contracts for road and bridge work or construction, see Public Contracts; Townships, III.

¶ 508. Highway commissioners have no authority to contract with persons who have not themselves bid for work that under the statutes can only be let on sealed proposals.—Beard v. Burdell Township Clerk, 58 Mich. 245.

¶ 509. A board of county road commissioners of a county which has adopted the county road system pursuant to Act No. 283, P. A. 1909, How. 2nd Ed., § 2173, may purchase road construction machinery without advertising for bids therefor.—Brandt v. Luce, 177 Mich. 184.

¶ 510. The power of the board of county road commissioners to purchase machinery for road construction under Act No. 283, Public Acts 1909, How. 2nd Ed., § 2173, may be exercised when contracts for road building are let, and also when bids have been rejected and the work is performed by day labor.—Brandt v. Luce, 177 Mich. 184.

¶ 511. The board of highway commissioners may ratify an unauthorized contract for doing work which it is within their general powers to contract for, and can do so either while the work is in progress or after it is completed, by action at a meeting held pursuant to notice, or at a meeting of all the members without notice; but the members of the board severally have no such power.—Taymouth Township v. Koehler, 35 Mich. 22.

¶ 512. A de facto commissioner of highways let a job without requiring the bidders to offer security at the time of letting, and without finishing the contract then or adjourning the proceedings to some stated day. The successful bidder some days afterwards refused to sign the contract, and the commissioner, without acting publicly, gave the job to the next higher bidder. Held, that the proceedings did not conform to the statute, and that the township treasurer could not be compelled to pay the order issued by the commissioner to the contractor.—Mackenzie v. Baraga Township Treasurer, 39 Mich. 554.

¶ 513. Plaintiff highway commissioner put his own man and team to work upon a highway. Held, he could not recover against the township for time spent in overseeing them in their work.—Baars v. Township of Laketon, 163 Mich. 665.

§ 144. Torts by officers and official misfeasances.

Responsibility of municipality or township for misdoings of officers, see Municipal Corporations, XII, XV; Townships, IV.
Penalties and forfeitures for official delinquency or misdoing, see Comp. L. 1915, § 4458 et seq.

¶ 514. The discretion of the overseer of highways, in deciding how and where he will distribute highway labor, is limited by the rights of individuals, and he and his assistants are jointly liable for the invasion of those rights; and accordingly a person sued for flooding caused by a highway ditch is not absolved by the fact that it was made under the overseer's direction.—Cubit v. O'Dett, 51 Mich. 347.

¶ 515. Highway commissioners are not liable for their action in laying out a highway where they have jurisdiction and violate no law.—Sage v. Laurain, 19 Mich. 137.

¶ 516. The penalty for violation of "the provisions of this act" provided in Pub. Acts 1891, No. 130 (Comp. L. § 4087), an amendment to a section of the general highway law adding new duties, applies only to violations of the provisions of the amending act and not to the failing to perform the duties prescribed in the various sections of the amended statute in force at that time, where the original law prescribes punishment for the neglect of duties as to which it is not expressly repealed.—Hatch v. Calhoun Circuit Judge, 127 Mich. 174.

§ 145. City and village powers.

Power to regulate motor vehicle traffic, see post § 411.
General regulative and police powers of cities and villages, see Municipal Corporations, IX.

¶ 517. A power conferred upon a common council to establish, alter, vacate, and abolish highways, streets, alleys, and public grounds within the city, does not confer absolute authority upon the common council.—Schmolt v. Nagel, 151 Mich. 502.

VIII. COSTS AND EXPENSES, FUNDS AND TAXES.

§ 146. In general.

Application and allotment of funds, see post § 147.

Borrowing money and incurring debt, see post §§ 148-150.
Apportionment of expenses among two or more townships, see post § 151.
Paying and disbursing funds, see post § 152.
Refunds or state rewards, see post § 153.
City and village powers, see post § 145.
Want of sufficient signers to petition for improvement as defense to liability for work, see ante ¶ 391.
Duty and obligation to construct and repair, see ante §§ 107-110.
Costs of procedure in street opening proceedings, see ante § 90.
Constitutional limitations on indebtedness without vote of people, see also Constitutional Law § 277.
Taxing power, limitations and purposes, see Taxes, I.
District in which property or person is taxable for roads, see Taxes, IV.
Levying the taxes, see Taxes, VII.
Working out highway tax by labor, see Taxes, III, VIII.
Accountings by official collectors and custodians for tax moneys, see Taxes, X.
Local assessments to pay for city or village improvements, see Local Improvements.
Local assessments for rural highway improvements, see Local Improvements.
General law of the fiscal affairs of cities and villages, townships and counties, see Counties; Municipal Corporations; Townships.
Provisions as to election of overseer duties and meetings under labor tax system, see Comp. L. 1915, § 4612 et seq.
Highway taxes and the assessment thereof, see Comp. L. 1915, ¶ 4492 et seq.
Highway tax provisions, see Comp. L. 1915, § 4318 et seq.
Provisions as to labor tax, see Comp. L. 1915, § 4614 et seq.
Provisions for improvements to be paid for by local assessments, see Comp. L. 1915, § 4671 et seq.
Provisions relating to cost and expenses of bridges, see Comp. L. 1915, § 4415 et seq.

¶ 518. Boards of supervisors have control of none but state and territorial roads, and cannot raise money for others.—Attorney General v. Bay County Sup'rs, 34 Mich. 47.

§ 147. Application and allotment of funds.
Provisions as to funds in fourth class cities, see Comp. L. 1915, § 3213 et seq.
Maintenance and upkeep of state rewarded roads, see Pub. Acts 1917, No. 356, amending Comp. L. 1915, § 4389.
Manner in which commissioners may expend improvement fund, see Pub. Acts 1917, No. 332, amending Comp. L. 1915, § 4327.

¶ 519. Highway funds may be appropriated to work highways by user as well as those laid out by statute.—Peninsula Iron & Lumber Co. v. Township of Crystal Falls, 60 Mich. 510,

¶ 520. The word "townships," as used in Laws 1887, Act No. 200, § 5, which provided that "all money-tax assessed and collected within any township for highway purposes shall be expended within the limits of the township on which the same may be assessed," and in Laws of 1889, Act No. 274, which substantially re-enacts the same provision, means surveyed townships and not political townships.—Manistee Lumber Co. v. Township of Springfield, 92 Mich. 277.

¶ 521. Pub. Acts 1907, No. 108, dividing taxes for highway purposes into a road repair tax and a highway improvement tax, and determining the method of expenditure, and amount to be used under the supervision of the township board, is inconsistent with and repeals by implication Pub. Acts 1907, No. 37, § 3, authorizing the highway commissioners of a township to buy material for purposes approved by the township board.—Reimink v. Strabbing, 157 Mich. 332.

§ 148. Borrowing money or incurring debt.
For road machinery, see post § 149.
For bridge work or construction, see post § 150.
Powers of supervisors to raise money for roads, see also ante ¶ 503.
General law of municipal and public bonds, see Municipal Bonds.
Provisions relative to township road bonds, see Comp. L. 1915, § 4499 et seq.

¶ 522. Highway commissioners can only act when authorized; there is no general presumption that they can bind their township by obligations which they may see fit to issue, and if, in a proceeding to enforce such obligations, there is no finding of their authority to issue them, it must be assumed that none existed.—Hosier v. Higgins Township Board, 45 Mich. 340.

¶ 523. The amount of money which the board of supervisors can authorize a township to raise by tax or loan in any one year to build or repair roads or bridges under How. St. § 483, subd. 15, is limited to $1,000. —Newaygo County Mfg. Co. v. Echtinaw, 81 Mich. 416.

¶ 524. The right of the commissioner of highways to expend $1,000 in the building and repairing of bridges in his township during the year, and to cause said sum to be certified to the supervisor for assessment (How. St. §§ 1379, 1380), is not affected by the voting of a labor and money tax by the electors under How. St. § 1327; such tax is not intended to meet anything but the ordinary improvement of highways and bridges during the year.—Longyear v. Aplin, Auditor General, 72 Mich. 415.

§ 149. ——For road tools and machinery.

¶ 525. Comp. L. 1897, § 4194, authorizes a highway commissioner to contract for and

purchase on instalments a road machine, and his power to contract is derived from a properly signed and certified petition of a majority of the taxpayers representing more than one half of the taxable property in the district "to be ascertained by the last preceding assessment roll," accordingly a petition signed by less than one half of the taxpayers or representing less than one half of the taxable property would confer no greater authority upon the commissioner to contract than though no petition had been presented to him.—Indiana Road Machine Co. v. Keeney, 147 Mich. 184.

¶ 526. Under Act No. 283, P. A. 1909, How. 2nd Ed., 2173, providing that the board of county road commissioners may incur liability for an amount not exceeding three-fourths of the tax on hand. Held, a payment for machinery, portion of the cost being deferred, is valid, and must be charged only on the fund in hand.—Brandt v. Luce, 177 Mich. 184.

¶ 527. Sections 8 and 10 of Act No. 108, Pub. Acts 1907, permit the borrowing of money by townships for the purchase of road tools only after the tax therefor has been determined.—Power v. Gray, 186 Mich. 646; Power v. Balitz, 186 Mich. 652.

¶ 528. Sections 8 and 10 of Act. No. 108, Pub. Acts 1907, do not authorize the issuance of township orders for road tools payable three years after date.—Power v. Gray, 186 Mich. 646; Power v. Balitz, 186 Mich. 652.

¶ 529. A township order for road tools issued previous to the adoption of § 10 of Act No. 283, Pub. Acts 1909, § 2183, How. St., 2nd Ed., and payable three years after date without the authorization of the electors under § 2269, Comp. Laws 1897, § 1326, How. St., 2nd Ed., is void.—Power v. Gray, 186 Mich. 646; Power v. Balitz, 186 Mich. 652.

§ 150. ——For bridge work or construction.

Power to raise money for bridge repairs, see also ante ¶ 381.

¶ 530. Highway commissioners have no authority to involve the township in debt at their discretion for building bridges.—Hosier v. Higgins Townshp Board, 45 Mich. 340.

¶ 531. Comp. L. 1897, § 4131, requiring the voters of a township to pass upon the raising of more than $2,000 for building or repairing any bridge in a township, relates to bridges wholly within the township and does not forbid the raising of a larger sum in each of two townships for a boundary line bridge as provided by Comp. L. 1897, §§ 4051-4056.—Ionia Sup'rs v. Ionia Circuit Judge, 134 Mich. 412.

§ 151. Apportionment of expense of joint or boundary roads and bridges.

¶ 532. Laws of 1889, Act No. 230 (How. St. § 1387a et seq.), which provides for the building, etc., of bridges on county-line roads at the joint expense of the adjoining townships, does not affect a pre-existing agreement between townships made under How. St. § 1307, and long acted upon, whereby one township is charged with the duty of maintaining a certain part of the road with the bridge thereupon.—Stitt v. Casterline, 89 Mich. 239.

¶ 533. An allotment of maintenance of a dividing highway made between two townships is valid and effective after having been acted upon for 27 years, although the record does not show that notice was given of the meeting at which the allotment was made.—Brophy v. Schindler, 126 Mich. 341.

¶ 534. Laws of 1857, Act No. 164, although broad enough in its title to repeal all of chapter 25 of Revised Statutes 1846, providing in the body of the act that all acts in contravention are repealed, does not repeal Comp. L. 1857, § 1070, which provides for allotment of township line roads; a reallotment of a road is therefore valid.—Brophy v. Schindler, 126 Mich. 341.

¶ 535. In the absence of constitutional restrictions the legislature has power to provide for the erection of a bridge between two townships, and to repose in the board of supervisors the duty of determining the relative proportion of costs for each township.—Ionia County Sup'rs v. Ionia Circuit Judge, 134 Mich. 412.

§ 152. Payments and disbursements.

Illegality in making of contract as bar to payment for work, see also ante ¶ 512.
Orders payable in the future for road machinery, see also ante ¶ 529.
Orders on township or county treasurers and township or county warrants for payment, see Townships, VI; Counties, VI.
Certification, allotment and grant of state swamp lands for compensation for road work, see Public Lands, IV.
Provisions relating to highway orders and payment of same, see Comp. L. 1915, § 4556 et seq.

¶ 536. Highway commissioners cannot bind their township by a partial payment for work which the township could not have authorized; such as the digging of a sewer within another jurisdiction.—Sault Ste. Marie Highway Com'rs v. Van Dusan, 40 Mich. 429.

§ 153. Refunds for sums spent on state reward roads.

Accountings for taxes collected and disbursed, see Taxes, X.
Rewards and aids payable under state reward system, see Comp. L. 1915, § 4378 et seq.
Roads meriting state reward and amounts thereof, see Pub. Acts 1917, No. 356, amending Comp. L. 1915, § 4387.

Additional reward for increase in percentage of gravel in road construction, see Pub. Acts 1917, No. 85.
Annual repair reward for maintenance of state reward roads, see Pub. Acts 1917, No. 356, amending Comp. L. 1915, § 4398.
Application for state rewards and procedure thereon, see Pub. Acts 1917, No. 356, amending Comp. L. 1915, § 4386.
Funds paid for rewards under state reward system, see Comp. L. 1915, § 4388.

¶ 537. A township which has since the adoption of the county road system, expended for state reward roads an amount equal to that expended by the county on county roads within the township, is, under § 26 of Act No. 355, Pub. Acts 1913, entitled to the return from the county of the road taxes paid by it, since such computation is not confined to the taxes paid by the township since the passage of such section.—Township of Clearwater v. Kalkaska County Board Sup'rs, 187 Mich. 516.

¶ 538. Since the rights created between a county and a township by § 26 of Act No. 355, Pub. Acts 1913, with respect to the return to the township of road taxes paid by them, when the total equals the amount expended by the county in county road work within such townships, are not contractual, a retrospective construction of the act, by basing a township's right to such return on the total amount paid in road taxes since the adoption of the county road system and not since the passage of such section, is not prohibited.—Township of Clearwater v. Kalkaska County Board Sup'rs, 187 Mich. 516.

¶ 539. The provisions of Pub. Acts 1909, No. 283, chap. IV, § 27, How. 2nd Ed., § 2258, that in case any organized township shall decide to build a mile or more of state reward road as provided in section 26, as amended by Pub. Acts 1913, No. 355, chap. IV, § 26, the township board of such township shall file a written notice with the board of county road commissioners on or before the first day of May in the year in which such road is to be built, stating that it is the intention of such township to build a certain piece or pieces of road, which shall be fully described in such notice, are not a condition precedent to the right of a refund under section 26, providing that the adoption of the county road system in any county shall not prohibit any organized township from building state reward roads with money raised by tax or bonding, and that where a township raises money by bonding for such purpose the county road tax paid by such township, upon certificate by the township clerk as to amount of bonds remaining unpaid, shall be returned to the township each year to be applied in payment of such bonds until they are fully paid.—Township of Coldsprings v. Kalkaska County Board Sup'rs, 195 Mich. 109.

¶ 540. A demand by a township, which had issued bonds and expended the money for the building of state reward roads, under Pub. Acts 1909, No. 283, chap. IV, § 26, How. 2nd Ed., § 2257, as amended by Pub. Acts 1913, No. 355, chap. IV, § 26, for a return of the county road taxes of the preceding year held to be timely, although the county had expended such taxes in the regular channels of the county road business.—Township of Coldsprings v. Kalkaska County Board Sup'rs, 195 Mich. 109.

¶ 541. Compliance with Pub. Acts 1909, No. 283, chap. IV, § 27, How. 2nd Ed., § 2258, providing that the township board of any township deciding to build one or more miles of state reward roads shall give notice thereof to the county road commissioners before May 1st, and requiring that the county road commissioners furnish engineers or surveyors, and, if it be the piece of road the county road commissioners intend to improve, it shall be constructed in accordance with the plans of the county board, is not a condition precedent to the right to a refund under the provisions of section 26, How. 2nd Ed., § 2215, providing that the adoption of the county road system in any county shall not prohibit any organized township from building state reward roads with money raised by tax or by bonding and in townships where money has been raised by bonding to build such roads, the township clerk shall certify to the board of supervisors, at the annual meeting thereof, the amount of bonds remaining unpaid, and the county road tax paid by such township shall be returned to the township each year to be applied in payment of such bonds until they are fully paid, and that no township shall be entitled to the return of its county road tax until it shall have paid as much money in county road taxes as may have been expended on county roads within such township by commissioners.—Township of Clearwater v. Kalkaska County Board Sup'rs, 195 Mich. 323. (Ostrander, J., dissenting.)

¶ 542. Under Pub. Acts 1909, No. 283, § 26, as amended by Pub. Acts 1913, No. 355, relating to the building of state reward roads by townships with moneys raised by tax or bonding and providing that in townships where money has been raised by bonding to build such roads, the township first shall certify to the board of supervisors, at the annual meeting thereof, the amount of such bonds remaining unpaid, and the county road tax paid by such township shall be returned to it each year to be applied in payment of such bonds until fully paid, but no township shall be entitled to the return of such tax until it shall have paid as much money in county road taxes as may have been expended on county roads within such township by such commissioners, if a township has paid as much money in county road taxes as has been expended on county roads

within such township by county commissioner, it is entitled to the return of the whole of the road tax to be used in the payment of bonds, even though a computation shows a balance in favor of the township of less than the amount of the tax for the particular year.—Township of Clearwater v. Kalkaska County Board Sup'rs, 195 Mich. 323. (Ostrander, J., dissenting.)

¶ 543. In computing the amount of taxes expended on county roads within a township by county road commissioners there should be charged to a township not only the amount of road expenditures but its share of overhead expenses.—Township of Clearwater v. Kalkaska County Board Sup'rs, 195 Mich. 323.

IX. PUBLIC CONTROL AND REGULATION.

§ 154. In general.

Legislative control, see post ¶ 556.
Proper party plaintiff in action for injury to road or bridge, see post § 192.
Regulations of travel and use of the road, see post XIII.
Motor vehicle regulations, see post XIV.
Highway officers and districts and their powers, duties and liabilities, see ante VII, post XII.
Power of legislature and right of local self-government, see Constitutional Law §§ 81-88.
Legislative and local powers to grant rights in highways, see Constitutional Law § 81.
State supervision of roads as invasion of right of local government, see Constitutional Law § 82.
Legislative delegations of power over roads and bridges, see Constitutional Law § 89.
Constitutional police regulations of highways and surroundings, see Constitutional Law § 100 et seq.
General police and regulative powers and functions of cities and villages, see Municipal Corporations, IX.
Municipal regulative power as limited to local matters subject to state control of highways, see Municipal Corporations, IX.
Municipal power to grant use of streets, see also Franchises § 1.
Regulation and control of navigable waters in respect to bridging them for highway crossings, see Navigable Waters, II.
Constitutional guaranty of local control, see Const. art. VIII, § 28.
[Note. To cite all statutes either civil or criminal having the nature of regulations affecting or relating to highways and streets in this connection is impossible. Consult indices to the published statutes and see topics in this digest relating to the specific matter of the regulation, e. g., Crimes, II; Highways, XI; Street Railways; Railroads; Navigable Waters.]
Charter power grantable by legislature, see Comp. L. 1915, § 3807.
General highway law, see Comp. L. 1915, chap. 86.
Local control over state roads, see Comp. L. 1915, § 4313.
Control of state roads within municipalities, see Comp. L. 1915, § 4570.
For the charter powers of the various cities and villages over streets and ways, see the respective charters.
Powers of county board over roads, see Comp. L. 1915, § 2288 et seq.
Statutes relating to good roads districts and to county road system, see Comp. L. 1915, § 4337 et seq.
Regulative powers of supervisors, see Comp. L. 1915, § 4518 et seq.
Supervisory power and control in fourth class cities, see Comp. L. 1915, § 3087 et seq.

¶ 544. A city street includes not alone the roadbed, but sidewalks, and the city's jurisdiction and control extend over the entire street dedicated to travel on foot as well as travel in vehicles.—In re O'Brien, 119 Mich. 540.

¶ 545. The general power over streets, their grades and maintenance, and over bridges, which is usually possessed by cities must be considered with reference to, and is limited by, the purposes and uses of public highways.—Ransom v. City of Sault Ste. Marie, 143 Mich. 661.

¶ 546. A city is divested of its control over a street only so far as conflicts with the rights of the plank road company, where its charter empowers the plank road company to take the street and construct thereon a plank road with toll gates and obliges it to keep the road in repair.—Bagg v. City of Detroit, 5 Mich. 336.

§ 155. Judicial control and supervision.

Review of matters relating to construction and repairs, see also ante § 114.
Judicial vacation proceedings, see ante § 136.
General doctrines as to want of judicial power to encroach on or control administrative functions of government, see Constitutional Law, II; and see also Injunctions; Mandamus.

¶ 547. Courts cannot interfere with municipal control over the question as to what streets shall be opened and worked, and how and when. Nor has a court of equity the means or process for executing the decision of such questions.—Bauman v. Campau, 58 Mich. 444.

¶ 548. Courts cannot control municipal discretion as to when or where walks shall be laid in streets.—Irving v. Ford, 65 Mich. 241.

X. TITLE AND ESTATE OF THE PUBLIC; PERMISSIBLE USES AND RIGHTS OF ABUTTERS.

§ 156. In general; nature of public estate.

Quantum of estate to be taken or condemned for streets, see ante § 67.
Nature and extent of abutters' rights, see post § 160.
Nonabutters' rights on vacation of way, see ante §§ 133, 134.
Loss of public rights by abandonment and nonuser, see ante § 129.
Legislative release of public rights, see also ante § 126.
Alterations, extensions and changes, see ante V.
Abandonment and vacation, see ante VI.
Acquiescence between public and abutter as to boundary line as determinative of title and estate of public, see also ante ¶ 335.
Sufficiency of public interest to sustain ejectment against obstructor, see post § 186.
Rights of public in use of alleys, see also ante § 4, ¶¶ 11, 12, 15.
Wrongfulness of obstruction in alley, see post § 181.
Rights and easements in "private" roads laid out under statute, see post § 419.
Power to lay sidewalks, restriction to traveled portion leaving margin clear, see ante ¶ 367.
Character and extent of estates created by common law or statutory dedications, see Dedication §§ 27, 28.
Inalienability of dedicated streets, see Dedication § 29.
Private easements in roads and ways, see Easements.
Private rights by dedication, see Dedication.

¶ 549. Neither the governor and judges nor the common council had or have any power or authority to grant the exclusive use of any of the streets or alleys of the city of Detroit to individuals.—People v. Carpenter, 1 Mich. 273.

¶ 550. The title of a municipality in streets and alleys is such as to enable the public authorities to devote them to public purposes.—Edison Illuminating Co. v. Misch, 200 Mich. 114.

¶ 551. The fee in the streets is in the abutting owners, and the municipality has merely an easement in and over them.—Werner v. Hinz, 172 Mich. 360.

¶ 552. The City of Detroit has no proprietary interest in the land in its streets.—In re Albers' Petition, 113 Mich. 640.

¶ 553. A city has no such interest in its streets as will authorize it to bring ejectment to oust a street railway therefrom.—City of Detroit v. Detroit United Ry., 172 Mich. 136, aff'd in 229 U. S. 39, 57 L. ed. 1056, 33 Sup. Ct. Rep. 697.

¶ 554. The fee to an alley is in the municipality in trust for the public.—Edison Illuminating Co. v. Misch, 200 Mich. 114.

¶ 555. Where a municipal corporation acquires land for a public highway, the easement thereon belongs to the State, and the city has no right to its possession, other than the public generally.—Graham v. City of Detroit, 174 Mich. 538.

¶ 556. All public highway easements are subject to control or extinguishment by legislative authority.—Horn v. People, 26 Mich. 221; Cooper v. City of Detroit, 42 Mich. 584.

§ 157. Proper highway uses and additional servitudes.

Necessity of paying damages for addition of use or servitude, see post § 158.
Subsurface rights and easements, see post § 166.
Improper or unauthorized structures in way as nuisances, see post § 168 et seq.
[Note. The propriety of devoting highways to uses for the service of the public other than vehicular and foot travel is treated here, but the right of a street railway corporation, telephone line or pipe line or other public utility to use and occupy the streets and the necessity and sufficiency of a grant, franchise or permit, together with the terms and conditions attending the right, are treated in specific topics referred to hereafter.]
Use of highway for public drain, see Drains § 22.
Rights of street and other railroads to use streets, grants of such rights, permits and licenses, and conditions upon such use, see Street Railways, I, III; Railroads, I, III, IV.
Rights of telegraph, telephone and wire lines to use streets and conditions on such use, see Telegraphs.
Right to use highway for toll road and conditions on grant or permit, see Toll Roads.
Rights of water companies to lay pipes in streets and conditions on grants or permits, see Waters, VI.
Power to lease terminus of street for dock or wharf, see also Wharves.
Dedication as implied consent to all ordinary servitudes, see Dedication § 30.
Reservation in deed of right to construct railways in streets, see Deeds ¶ 252.
Right of railroad to cross highway with tracks, see Railroads, III.
Right to condemn land for railroad purposes in street independently of city franchise, see Eminent Domain ¶ 22.
General regulative power of city or village over streets, see Municipal Corporations, IX, D.
Construction of ordinances granting rights in streets, see Municipal Corporations, VI.

Effect of general statute to abrogate municipal power to grant uses in highway, see Municipal Corporations, VI, IX.
Constitutional requirement of local municipal consent to use of streets or roads by public service lines, see Const. art. VIII, § 28.
Provisions relative to grants of franchises on highways, see Comp. L. 1915, chap. 90.
Distance from center line for poles set along way, see Comp. L. 1915, § 4408.

¶ 557. City streets are not exclusively for the passage of persons and vehicles, but for all the other purposes to which it is customary to devote them.—Henkel v. City of Detroit, 49 Mich. 249.

¶ 558. The right of public utilities to use alleys as well as streets, with proper municipal consent, is expressly recognized by the constitution, art. VIII, § 28.—Edison Illuminating Co. v. Misch, 200 Mich. 114.

¶ 559. The use of a public highway by a street railway company is a legitimate use and does not create any additional servitude.—Smith v. Jackson & Battle Creek Traction Co., 137 Mich. 20; Austin v. Detroit, Y. & A. A. Ry., 134 Mich. 149.

¶ 560. A street railway operated by steam or electricity is an additional servitude upon a street or highway.—Nichols v. Ann Arbor & Y. Street R. Co., 87 Mich. 361, per Long and Grant, JJ.

¶ 561. The use of a street by an ordinary street railway does not create an additional servitude.—People ex rel. Kunze v. Fort Wayne & E. R. Co., 92 Mich. 522.

¶ 562. The use of streets in a city for street railway purposes is not an additional servitude.—Mannel v. Detroit, Mt. C. & M. City Ry., 139 Mich. 106.

¶ 563. The use of streets for street railway purposes is a legitimate use, and the general powers vested in a city by its charter "to open, close, and widen streets" and "to prescribe, control, and regulate the manner in which the highways, streets, avenues," etc., "shall be used and enjoyed" are powers broad enough to permit the city to consent to the use of its streets for such purposes by any company having the requisite franchises of a street railway.—Detroit Citizens' St. R. Co. v. City of Detroit, 64 Fed. 628.

¶ 564. An ordinance giving the right to construct and operate a street railway in the center of a street having a drive-way twenty-five feet wide, so as to leave nearly nine feet on each side for the passage of vehicles, does not deprive the general public of the use of the street, nor does it create an additional servitude.—People ex rel. Kunze v. Fort Wayne & E. R. Co., 92 Mich. 522.

¶ 565. A common council cannot so multiply street railway tracks in a particular street as to interfere with the rights of the general public in the street.—Street Ry. Co. of Grand Rapids v. West Side St. Ry. Co. of Grand Rapids, 48 Mich. 433.

¶ 566. The common council of Saginaw is prohibited by Local Acts 1897, No. 465, which prevents it from granting exclusive privileges to the use of the streets, from permitting the erection of a permanent stairway occupying a part of the street where said stairway is used simply as an outside entrance to a private building.—McCormick v. Weaver, 144 Mich. 6.

¶ 567. Whether or not the common council of Saginaw has authority to authorize a stairway encroaching on the public street depends upon the temporary or permanent character of the stairway and on whether or not it would be a nuisance and obstruction; and the charter and ordinances do not authorize such construction where it is permanent in character and for private use.—McCormick v. Weaver, 144 Mich. 6.

¶ 568. The commissioners of internal improvement had no right, under the general powers conferred upon them, to appropriate a portion of a street in the city of Detroit for the purpose of erecting offices and other buildings thereon.—Cooper v. Alden, H. 72.

¶ 569. The common council of Detroit had no right, though acting under a resolution of a public meeting of the freemen, to lease a portion of a public street to the commissioners of internal improvement for the use of the state for the purpose of a railroad depot and tracks connected therewith.—Cooper v. Alden, H. 72.

§ 158. Injuries and damages from added uses.

Liability of street railway to abutter for change of grade by construction of railway, see Street Railways, III.
Impairment of rights of abutting owners by laying of railroad on highway, see Eminent Domain § 23.

¶ 570. Street railways may be authorized and laid in the public streets of cities and villages without compensating the adjacent lot-owners.—Grand Rapids & I. R. Co. v. Heisel, 38 Mich. 62.

¶ 571. The legislature has power to provide that street-railway companies shall pay to abutting owners the damages caused by the construction of their roads.—Taylor v. Bay City Street R. Co., 80 Mich. 77.

¶ 572. Where a municipality has power, derived from the legislature, to accommodate streets to a new use consistent with and in aid of the general use to which streets are devoted, abutting owners whose property is not taken have no remedy for con-

sequential injuries unless the legislature gives them one.—City of Detroit v. Grand Trunk Ry. of Canada, 163 Mich. 229.

¶ 573. The streets of a city may be used for any purpose which is a necessary public one and the abutting owner will not be entitled to a new compensation in the absence of a statute giving it. Therefore, the uses of a street which in no wise interferes with the rights of the abutting owner does not impose a new burden and servitude in addition to what was implied by the dedication.—Detroit City Ry. v. Mills, 85 Mich. 634.

¶ 574. Inasmuch as the abutting owner on condemning land for the use of streets and highways receives as damages the full market value of his land, afterwards there is no such thing as damage to his reversionary interest caused by a use which is not a public one and adds no additional servitude.—Detroit City Ry. v. Mills, 85 Mich. 634.

¶ 575. The setting in a street of poles to aid in the propulsion of street cars by electricity is not, it seems, such a taking of private property as requires a previous condemnation and compensation.—Detroit City R. v. Mills, 85 Mich. 634.

¶ 576. The use of a street for an electric railroad operated with poles and overhead wires is not an additional servitude for which abutting owners are entitled to compensation.—Dean v. Ann Arbor St. R. Co., 98 Mich. 330.

¶ 577. How. St., chaps. 100, 101, authorizing construction along public highways of telegraph lines, are not repugnant to Const., art. 15, § 9, requiring compensation to be made before any person's property is taken by a corporation for public use.—People v. Eaton, 100 Mich. 208.

¶ 578. Condemnation of right of way is unnecessary for an ordinary street electric railway.—Nieman v. Detroit Suburban St. R. Co., 103 Mich. 256.

¶ 579. A street railway company organized under How. St., ch. 94, has no power to construct and operate a railroad along the side of the traveled portion of the public country highway with the consent of the township authorities upon a road-bed not conforming to its grade, but made by means of cuts and fills, without compensation to abutting land-owners; and the construction and operation of such a road will be perpetually enjoined in behalf of such owners.—Nichols v. Ann Arbor & Y. Street R. Co., 87 Mich. 361.

¶ 580. The owner of an abutting premises cannot complain that an electric interurban road is placed on his side of a highway where it is made suitable for crossing between his house and the highway.—Austin v. Detroit, Y. & A. A. Ry., 134 Mich. 149.

¶ 581. The dedication of a street to the public does not authorize it to be used for an ordinary railroad track; and the municipal representatives cannot authorize it to be so used without compensation to adjacent owners.—Grand Rapids & I. R. Co. v. Heisel, 38 Mich. 62; Grand Rapids & I. R. Co. v. Heisel, 47 Mich. 393.

¶ 582. The city of Detroit may build a bridge where necessary for safe passage over a railroad in one of its streets, subject, however, to the payment of damages when such building injures private property.—Schneider v. City of Detroit, 72 Mich. 240.

§ 159. Common rights other than travel.

¶ 583. There is no common of pasture in highways.—Campau v. Konan, 39 Mich. 362.

§ 160. Abutters' rights in general.

Title to fee of street, see also ante § 156.
Rights of access and right to make connections and intersecting driveways, see post § 161.
Rights in blind streets or disconnected ways, see post § 162.
Rights in soil, products and trees, see post §§ 163, 164.
Rights in sidewalks and similar appurtenances, see post § 165.
Subsurface uses and easements, see post §§ 166, 167.
Right of reverter on vacation or discontinuance of way, see ante § 138.
Actionable change of grade, see ante § 119.
Damages for separation of grades, see ante § 121.
Right to damages on vacation of way, see ante § 133.
Railroad crossing viaduct as additional servitude, see ante ¶ 582.
Laying railway on one side of street, see ante ¶ 580.
Right to damages for additional use or servitude, see ante § 158.
Rights in private roads laid out under the statutes, see post § 419.
Right to construct cattle passes and culverts, see Comp. L. 1915, § 4560 et seq.
Duty as to care of hedges, see Comp. L. 1915, §§ 4564, 4565.
Right to complain of drain on highway, see also post ¶ 641.
Effect of dedication and rights passed thereby, see Dedication § 27 et seq.
Terms of deed or record thereof or possession or other fact as notice of rightful fee ownership in street, see Notice and Record of Title.
Effect of deeds to combine fee of street in owner on one side, see Deeds ¶ 91.
Thread or side line of street or way as boundary line, see Boundaries § 19.
Duty of landowners to fence way and liability of owners of animals straying on land, see Fences; Animals.

Rights of abutting owners as to trespassing or straying animals, see Animals §§ 4, 7.
Measure of damage for abutters who do not own soil in street, see Eminent Domain ¶¶ 154-155, 158, 162.
Quantum or character of easement in abutters where street is not accepted and public, see Easements ¶ 110.
Acts on highway as trespass on improved lands of abutter, see Crimes ¶ 439.
Responsibility of township for trespassing acts of officers, see Townships, IV, V.

¶ 584. A lot owner sustains a three-fold relation to the street, (1) as one of the general public, (2) as owner of the reversionary interest to the center of the street, (3) as owner of a lot, possessed of the right of ingress and egress to and from the street. —Detroit City Ry. v. Mills, 85 Mich. 634.

¶ 585. An abutting owner has a right to plant trees, build sidewalks, and do such other acts in the half of a platted street in front of his lots as do not interfere with the public use.—Smeberg v. Cunningham, 96 Mich. 378.

¶ 586. An abutting property owner has the right, as against all the world and even against a municipality, to occupy and use the street in any reasonable manner, so long as public traffic is not interfered with.—Crosby v. City of Greenville, 183 Mich. 452.

¶ 587. Whether the owner of premises fronting upon a city street has the same rights in the street as a proprietor bounded on an ordinary highway, quære.—Bissell v. Collins, 28 Mich. 277.

¶ 588. Purchasers of lots on the governor and judge's plan of Detroit have no other or greater rights in the streets or alleys than if the plan had been laid out by an individual who had legally dedicated the streets and alleys.—Cooper v. Alden, H. 72.

¶ 589. The rights of abutters whose land was condemned for a boulevard in Detroit in 1890 are governed by Local Acts 1889, No. 388, under which the condemnation was had, and not by the former Local Acts 1879, No. 374, which was expressly repealed.—Turner v. City of Detroit, 104 Mich. 326.

§ 161. Rights of access; walks and driveways.

Liability and remedies for injury to access, see post § 196.
Filling up ditch to gain access as "wilful" obstruction, see post ¶ 642.
Liability for injuries to users of driveways and private ways, see post § 420.
Rights in parked spaces in boulevards beside traveled way, see Parks.
Right of landowner to way over lane dedicated as approach to adjacent cemetery, see Cemeteries ¶ 3.

¶ 590. An abutting owner has the right of ingress and egress to and from his lot from an alley.—Edison Illuminating Co. v. Misch, 200 Mich. 114.

¶ 591. Abutting owners have the right of access to the highway, and one who has been cut off therefrom by the running of a ditch, or the improvement of the road, may bridge the ditch, or grade the approach to his premises; but in so doing he must not obstruct the ditch or the way.—Eagle Township Highway Com'rs v. Ely, 54 Mich. 173.

¶ 592. An abutting owner may not be deprived of ingress and egress by means of a driveway to and from his property to the highway in front of it.—Goodfellow Tire Co. v. Commissioner of Parks & Boulevards City of Detroit, 163 Mich. 249.

¶ 593. Under Act No. 374, Local Acts 1879, and its amendments, the Commissioner of Boulevards of Detroit has no authority to refuse a permit to one owning property abutting on the boulevard to make a driveway leading from his property to a boulevard, and mandamus will lies to compel said commissioner to issue the permit.—Goodfellow Tire Co. v. Commissioner of Parks & Boulevards City of Detroit, 163 Mich. 249.

§ 162. Rights in cul de sac or disconnected way.

See also ante ¶ 354.
Wrongful obstruction or inclosure, see post § 180.

¶ 594. The parties interested in the adjacent lots would have a right to close a cul de sac or to regulate its use as to them should seem proper, so far, at least, as respects its use as a way for passage or travel, where it appears that there has never been any act of the public authorities accepting it, and the owners have been allowed to keep a large portion of it closed, and to erect valuable buildings upon it.—Tillman v. People, 12 Mich. 401.

¶ 595. It makes no difference in respect to the right of abutters to close a cul de sac that buildings erected along it, but since removed, were for a time used as dwellings. Any right of way dependent upon such use would cease when the buildings were removed.—Tillman v. People, 12 Mich. 401.

§ 163. Rights in soil of way or growing products.

Right in common in soil or products, see ante § 159.
Right to lateral support and injuries thereto, see post § 195.
Trees growing in way, see post § 164.
Right of abutter to prevent by force destruction of grass in unused part of road, see Assault ¶ 15.

¶ 596. The owner of the soil is not punishable for a nuisance in using any part of it in such a way as not to interfere with

the public convenience.—Clark v. Lake St. Clair & Up-River Ice Co., 24 Mich. 508.

¶ 597. Grass growing on the unused part of a public highway belongs to the owner of the fee, and may be protected by such owner against wanton or malicious damage or destruction by a private person.—People v. Foss, 80 Mich. 559.

¶ 598. A landowner could not recover damages from the village for the removal of earth from the street in front of his property for the improvement of the street, where no street grade had been legally established.—Wheat v. Van Tine, 149 Mich. 314.

¶ 599. A landowner is estopped to complain of the removal of earth from the street in front of his premises by the village officers, to the extent to which such removal was authorized and assented to by him.—Wheat v. Van Tine, 149 Mich. 314.

§ 164. Trees in highway.

See also ante ¶ 585.

Notice to remove trees to be destroyed in making road, see also ante ¶ 392.

Trees as nuisances, see post § 632.

Tort liability of municipality or public service corporation for injuring trees in highway, see also Municipal Corporations, XII; Townships, IV; Street Railways; Telegraphs.

Right of telegraph or telephone lines to trim trees interfering with wires, see Telegraphs.

Statutory provisions as to shade trees in highways, see Comp. L. 1915, § 4467 et seq.

Shade trees in village streets, see Comp. L. 1915, § 2660.

Right to trees or timber on newly opened highway, see Comp. L. 1915, § 4483.

¶ 600. The owner of the land over which a highway passes may therein plant trees, set posts, and do such other acts as will add to his convenience or assist in beautifying his premises.—People's Ice Co. v. The Excelsior, 44 Mich. 229.

¶ 601. Trees in a highway are the property of the adjacent owner, and if they encroach on the road so as to necessitate removing them the owner is entitled to a reasonable notice in order that he may remove them for transplanting; and a highway commissioner who wantonly cuts down and sells trees in a highway is liable in trespass.—Clark v. Dasso, 34 Mich. 86.

¶ 602. Permission to road commissioners to open a highway over certain lands upon condition that they pay for timber thereon after estimate by the owner, does not give them authority to cut and sell trees within the limits of the road before the owner has made the estimate, and trees so cut and sold may be recovered by the owner in replevin.—Keweenaw Association v. O'Niel, 120 Mich. 270.

¶ 603. An abutting owner has title to shade trees on the street adjoining his premises.—Stretch v. Village of Cassopolis, 125 Mich. 167.

¶ 604. It is a trespass to cut down and remove trees without previous notice to the abutting owner so that he might protect his rights.—Stretch v. Village of Cassopolis, 125 Mich. 167; Miller v. Detroit, Ypsilanti & A. A. Ry., 125 Mich. 171.

¶ 604a. Cutting branches of trees which obstruct other proper highway uses without having given previous notice to the abutting owner is not a trespass.—Wyant v. Central Telephone Co., 123 Mich. 51.

§ 165. Sidewalks and appurtenances built by abutter.

Duty to build walks, see ante §§ 106, 107.

Removal of sidewalk and retaining wall within street lines by city in improving street as a conversion of them from owner abutting on street, see Conversion § 3, ¶ 10.

Measure of damages for removal of sidewalk in front of lot, see Damages ¶ 424.

¶ 605. Where the city authorities instructed the street commissioner to remove a cement sidewalk that had been built by the city in front of plaintiff's property, and the plaintiff had procured a decree declaring void a special assessment levied against the property for the cost thereof, in an action by plaintiff for trespass it was error to direct a verdict for the defendant, and the case should have been submitted to the jury with proper instructions upon the subject of damages, inasmuch as an actionable trespass had been proved.—Jordan v. Thorp, 142 Mich. 515.

§ 166. Subsurface uses and easements.

Vault as proper use, see also post ¶ 631.

Rights of different subsurface users and licensees toward each other, see post § 167.

Vested character of right to lay sewer, or the like, in street under grant from public, see also Constitutional Law § 247.

¶ 606. Public alleys involve easements in the nature of ways for the installation of water pipes, sewers and other urban services for the general welfare under municipal regulation.—Village of Manchester v. Clarkson, 195 Mich. 354.

¶ 607. A city having no sewer system of its own may grant to a citizen, under proper circumstances and restrictions, the right to construct a private sewer in the streets at his own expense, which may be used by him without interference by other citizens.—Boyden v. Walkley, 113 Mich. 609.

¶ 608. A clerical error in a resolution of the common council granting permission to a lot owner to construct a private sewer in the street, whereby authority was given to construct the sewer upon the "westerly" instead of the "easterly" side of the street, as contemplated by all the parties, will not abridge the rights of the owner in a sewer constructed and maintained for several years upon the easterly side.—Boyden v. Walkley, 113 Mich. 609.

§ 167. Rights and liabilities of subsurface owners and users towards each other.

¶ 609. The rights of a public heating company having its mains in an alley and the rights of its successor are in the nature of continuing easements and are superior to the rights of a mason contractor excavating for a wall to and into the alley.—Edison Illuminating Co. v. Misch, 200 Mich. 114.

¶ 610. Although a city could waive the requirement in the charter of a heating company that it obtain a permit from the department of public works for the laying of steam mains in an alley, the fact that such permit was not obtained may not be presented as a defense in an action by the assignee of such company against a mason contractor for negligence in excavating on the lot of an abutting owner, causing injury to the mains. —Edison Illuminating Co. v. Misch, 200 Mich. 114.

¶ 611. A mason contractor who has the contract for the erection of a basement for a building on a lot abutting on an alley has no right, in the prosecution of his work, to excavate to and into the alley in such a way as to interfere with existing electric conduits of a lighting company and heating mains placed there by authority of the city. —Edison Illuminating Co. v. Misch, 200 Mich. 114.

¶ 612. Evidence held to present a question for the jury as to whether there were surrounding objects and monuments sufficient to put a mason contractor excavating to and into an alley in the progress of the work of constructing a basement to a building upon notice of the presence of the conduits and heating mains of a lighting and heating company.—Edison Illuminating Co. v. Misch, 200 Mich. 114.

XI. OBSTRUCTIONS, ENCROACHMENTS AND UNAUTHORIZED USES AND INJURIES TO HIGHWAY OR ITS APPURTENANCES.

§ 168. In general.

Distinction between obstructions and encroachments, see also post ¶ 698.
Nature and extent of abutters' rights, see ante § 160.
What uses are proper and within contemplated highway servitudes, see ante § 157.
Tracks and public service lines in street, see post § 169.
Buildings and other structures, steps, platforms, awnings, etc., see post §§ 170, 171.
Vaults and other structures below surface, see post § 172.
Trees and growing things, see post § 173.
Temporary uses, see post § 174.
Assemblages and processions, see post § 175.
Unusual uses of the way, coasting, etc., see post §§ 176, 177.
Ditches and drains and interference with highway drainage, see post §§ 178, 179.
Inclosures of blind or disused ways, see post § 180.
Obstructions of alleys, see post § 181.
Prescription and estoppel in favor of obstruction, see post § 182.
Abatement, prevention and removal of obstructions and encroachments, and remedies for abating or removing, see post § 183 et seq.
Actions for injuries to highway, see post § 192.
Penalties and penal actions, see post § 193.
Injuries to or encroachments on abutter, see post §§ 194-196.
Effect on width of highway of obstructing fence, see also ante ¶ 343.
Right to fence private roads laid out under the statute, see post § 419.
General law of public and private nuisances, see Nuisances.
When highway nuisance regarded as indictable, see Nuisances, IV.
Effect of extension of city boundaries to make toll gates a nuisance by inclusion within city, see Nuisances, I.
Encroachments ripening into adverse title, see Adverse Possession §§ 2, 3, 5.
Unauthorized obstruction or structure in highway as nuisance, see also Highways § 168 et seq.
Statutory duty of commissioner to cause removal of obstructions, see Comp. L. 1915, § 4401 et seq.
What fences deemed to be encroachments, see Comp. L. 1915, § 4401.
Disposal of logs, cordwood, etc., lying along way, see Comp. L. 1915, § 4411.
Provisions as to animals running at large on streets, see Comp. L. 1915, § 7293 et seq.

¶ 613. An unauthorized obstruction across a public street is a public nuisance.—Pontiac & L. Plank-Road Co. v. Hilton, 69 Mich. 115.

¶ 614. Encroachments and obstructions in public streets not related to the use thereof as a public thoroughfare are not ipso facto nuisances.—Pastorino v. City of Detroit, 182 Mich. 5.

¶ 615. Any encroachment of a permanent nature upon a street either on or above the surface thereof, which endangers or interferes with its use, is a public nuisance.—Hass v. Booth, 182 Mich. 173.

¶ 616. Not every encroachment on a way is necessarily a nuisance.—People v. Carpenter, 1 Mich. 273; Clark v. Lake St. Clair & New Up-River Ice Co., 24 Mich. 508.

§ 169. Tracks, wires and pipe lines illegally in way.

Prescription as against abutter, see post ¶ 650.
Tracks and the like regarded as proper highway servitudes, see ante § 157.
Right of unlicensed subsurface occupier to recover for injury done by another, see ante § 167.
Nature of franchise or right to lay gas pipes in street, see Gas § 1.
Power to oust public service corporation for noncompliance with conditions, see also Gas ¶ 9.
Judicial notice as to customary placement of telegraph and telephone poles, see Evidence ¶ 121.

¶ 617. A railroad track laid in a city street under proper authority is not a public nuisance.—Felton v. Wedthoff, 185 Mich. 72.

¶ 618. A railroad which is laid in a street under authority of a city ordinance is not a nuisance, although the company has not complied with the provisions of Comp. L. of 1897, § 6234, subd. 5, How. 2nd Ed., § 6587, by making payment of damages and compensation to the adjoining owners.—Plantenga v. Grand Rapids Terminal Ry. Co., 190 Mich. 661.

¶ 619. It seems that a street railway laid in a street without authority is a nuisance.—Township of Bangor v. Bay City Traction & Electric Co., 147 Mich. 165.

¶ 620. A railway built upon a highway without authority of law is not rightfully there and the public may have it removed whether it be called an encroachment, an obstruction, or a nuisance.—Township of Bangor v. Bay City Traction & Electric Co., 147 Mich. 165.

¶ 621. While a railroad lawfully constructed on a highway and rightfully there cannot be held to be an unlawful obstruction of or an encroachment upon the highway, it is an obstruction in the sense that any structure or new use may be an obstruction to its use by the public generally.—Township of Bangor v. Bay City Traction & Electric Co., 147 Mich. 165.

¶ 622. The fact that a railway was built within the limits of a plank road by consent of complainant township, and as claimed nearer the roadway than was authorized, does not make the plank road a nuisance if there is no showing that travel is thereby made more dangerous; and especially not where it appears that if put farther to one side valuable trees would have been destroyed needlessly.—Township of Erin v. Detroit & E. Plank-Road Co., 115 Mich. 465.

§ 170. Buildings and structures in way.

Movable fruit stand in way, see also post ¶ 636.
Proper uses of way, see ante § 157.
Railroad crossing viaduct as additional servitude, see ante ¶ 582.

¶ 623. A boat house standing at the foot of a street upon public land and placed so as to prevent access to an adjoining lot is a nuisance in fact and may be abated by the owner of the lot after notice.—People v. Severance, 125 Mich. 556.

¶ 624. A fruit stand on the sidewalk of a street is a nuisance per se, which may be summarily removed by the municipality under its police power.—Pastorino v. City of Detroit, 182 Mich. 5.

§ 171. Steps, platforms, awnings and other building appurtenances.

Stairways as improper uses beyond power of council to permit, see ante § 157.

¶ 625. A flight of stairs, described in the case, within the limits of Woodward avenue, in the city of Detroit, was held to be an obstruction not authorized by the governor and judges or by the common council.—People v. Carpenter, 1 Mich. 273.

¶ 626. A permanent stairway erected on the public street and used as an entrance to a private building constitutes a nuisance.—McCormick v. Weaver, 144 Mich. 6.

¶ 627. A basement staircase opening in a sidewalk is not per se a nuisance; and permission from the municipal council to make one would itself rebut any presumption that it was.—Everett v. City of Marquette, 53 Mich. 450.

¶ 628. A roof built twelve or fifteen feet above an alley is not necessarily an obstruction, nor is anything that does not interfere with its accustomed use.—Beecher v. People, 38 Mich. 289.

¶ 629. A platform built in an alley, at the rear of a store, for convenience in transferring goods, cannot be assumed, as matter of law, to be an obstruction or a nuisance.—Bagley v. People, 43 Mich. 355.

¶ 630. A wooden awning over a sidewalk in front of a store is not per se a public nuisance.—Hawkins v. Sanders, 45 Mich. 491.

§ 172. ——Subsurface spaces and vaults.

Rights of subsurface use and liability for injury thereto, see ante §§ 166, 167.

¶ 631. Excavations, properly and safely constructed under the public streets in cities for the convenience of the owners of the

premises adjoining are not unlawful; and they are not liable to be treated as nuisances if kept in repair, and the use of the street is not interrupted for an unreasonable length of time.—Fisher v. Thirkell, 21 Mich. 1.

§ 173. Trees and growing things.

Rights of abutter and the public respecting trees, see ante § 164.

Provisions for removal or suppression of noxious weeds, see Comp. L. 1915, § 4598.

¶ 632. A tree in the highway is not per se a nuisance.—Clark v. Dasso, 34 Mich. 86.

§ 174. Temporary uses interfering with travel.

See also ante ¶ 567.

¶ 633. Where one creates in a public street obstructions which in the first instance are lawfully there, but which he is bound to remove as speedily as possible, they become unlawful from the beginning if he does not remove them in a reasonable time.—Bowen v. Detroit City R. Co., 54 Mich. 496.

¶ 634. The owners of premises may make temporary and incidental uses of the public sidewalk in front of them, if they do not continue to do so for too long a time, and such invasions of the public right of travel are not in and of themselves nuisances, although they may become such if the obstructions are not removed within a reasonable time.—Maclam v. Hallam, 165 Mich. 686.

¶ 635. The length of time an obstruction may have remained in a public street does not determine its character; whether it is temporary or permanent depends upon its nature.—Pastorino v. City of Detroit, 182 Mich. 5.

¶ 636. A fruit stand located on the sidewalk of a public street is not a permanent obstruction in the sense of the term as applied to inclosures, substantial structures, steps, stairways, walls and other physical attachments to the soil of a permanent nature obtruding upon and obstructing a street. Pastorino v. City of Detroit, 182 Mich. 5.

§ 175. Processions and street assemblages.

¶ 637. Processions in city streets for political, religious, social or other demonstrations, by day or reasonable hours at night, are not necessarily nuisances, and regulation, not prohibition, unless under clear authority of the charter, is the extent of a city's power.—In re Frazee's Case, 63 Mich. 396.

§ 176. Unusual or illegal vehicular traffic.

Penalty for obstruction of way in moving buildings, etc., see Comp. L. 1915, § 4410.

¶ 638. Steam-engines as a means of locomotion in public highways are not necessarily a nuisance.—Macomber v. Nichols, 34 Mich. 212.

§ 177. Coasting or playing in way.

¶ 639. Coasting on a public street is not necessarily a nuisance, and the licensing of such a use of a city street is within the discretion of the common council, which discretion the courts will not review.—Burford v. City of Grand Rapids, 53 Mich. 98.

§ 178. Ditch or drain as encroachment or obstruction of way.

As injury to abutter's access, see also ante § 161, post § 196.

Interference with drain, see post § 179.

Right of abutter to bridge over ditch to gain access to way, see ante § 161.

¶ 640. It has always been the policy of the state to allow the use of highways for drainage purposes.—Kiley v. Bond, 114 Mich. 447.

¶ 641. An adjacent land owner complaining of the enlargement of a drain in a highway as an impairment of the highway must stand on his own equities, and cannot litigate the sufficiency of the drain proceedings to bind the highway officers or the question whether the highway will be safe for use as such with the drain widened as proposed.—Kiley v. Bond, 114 Mich. 447.

§ 179. Interference with highway ditch or drain.

Right to keep ditch open, see also post ¶ 653.

¶ 642. It is "wilfully" obstructing a public highway ditch for one who knows its character to purposely and perversely fill it up in a permanent way, even though his object is to obtain access from his lands to the highway, and the act is done under a mistaken notion of his rights.—Eagle Township Highway Com'rs v. Ely, 54 Mich. 173.

¶ 643. The defense that a ditch laid along a public highway, and used for draining water therefrom, was not legally laid out and established, cannot be pleaded in an action to recover the penalty imposed by How. St. § 1403, for wilfully placing obstructions therein.—Hines v. Darling, 99 Mich. 47.

§ 180. Inclosing disused or disconnected ways.

See also ante § 162.

Encroachments or misuse as evidence of abandonment and nonuser, see also ante ¶¶ 448-450.

Right of public to prosecute for obstruction of a cul de sac, see also ante ¶ 354.

¶ 644. The obstruction of a mere cul de sac in the interior of a city block which led into alleys that extended to public streets was held not to be a public wrong such as might be redressed by public prosecution.—People v. Jackson, 7 Mich. 432; Tillman v. People, 12 Mich. 401.

¶ 645. There is no obstruction of a street, which is a cul de sac entirely inclosed by defendants' land, by their building a fence across it which has remained for more than a year before complaint is made under a city ordinance and where there was no actual use of it; and it is error to charge that it was immaterial whether it was used or not.—People v. Wolverine Mfg. Co., 141 Mich. 455.

§ 181. Obstruction of alleys.

Overhanging roofs, see also ante ¶ 628.
Platform in alley for loading goods, see ante ¶ 629.
Municipal power respecting obstructions, see also post ¶ 699.

¶ 646. Obstructing the use of an alley is not a public wrong, but if wilful may cause such injury to individuals as will support an action for private remedy.—Bagley v. People, 43 Mich. 355.

§ 182. Prescription, estoppel and acquiescence.

Long acquiescence by the public as to location of boundary fence of abutter as binding public, see also ante ¶ 335.
Right to keep prescriptive drain open, see post ¶ 653.
Ejectment as remedy for encroachment or obstruction, see post § 186.
General doctrines of prescription, see ante II, A; and see also Easements; Adverse Possession.
Prescriptive right to maintain stairways in private joint alley, see Easements ¶ 55.
Estoppel to regard street railway as unlawfully on highway, see Estoppel ¶ 211.
Estoppel of consenting person to object to nuisance, see Nuisances, I.
Estoppel as affecting public or title to land, see Estoppel §§ 3, 10, 51.

¶ 647. The location of a highway according to the original survey is generally of no consequence where abutting owners have held continued occupancy for twenty-five years.—Shue v. Richmond Township Highway Commissioner, 41 Mich. 638.

¶ 648. The fact that an adjoining land owner kept and maintained a fence across a portion of a highway, which had been duly laid out and established by the proper authority, did not deprive it of its character as a public highway, nor did it estop such owner or his grantees from claiming it as a public highway.—Van Brunt v. Lynch, 76 Mich. 455.

¶ 649. Where a highway has been legally laid out, abutting owners are not estopped from claiming that it is a public highway for its full width by the fact that their grantor maintained a fence across a part of it for a few months.—Van Brunt v. Lynch, 76 Mich. 455.

¶ 650. A prescriptive easement to maintain a railroad track in a public street may be acquired as against an abutting owner, notwithstanding that the track constitutes a public nuisance.—Felton v. Wedthoff, 185 Mich. 72.

¶ 651. Where the only rights in a highway, title to a part of which was claimed by an abutting owner by adverse possession, obtained by such owner and his predecessors, was a permissive occupancy, such occupancy ceased when the public through its proper officers demanded the use of the entire highway.—Mendel v. Poland, 200 Mich. 571.

¶ 652. A city is not estopped to claim relief on a bill against the owner of a building to restrain the construction of a stairway within the street line from the street to the basement of the building where the only permission granted is by the common council to the predecessor in title of defendant, in face of an ordinance which gave this power to the board of public works, and the predecessor in title did not act upon the permit, and also in view of Pub. Acts 1907, No. 46, denying the right of a person to acquire title to property as against the public by adverse possession.—City of Ann Arbor v. Goodspeed Real Estate Co., 189 Mich. 165.

§ 183. Abating, preventing or removing obstruction without litigation.

Highway commissioner's order to remove, see post § 188.
Justifiable force in preventing misuse of street or alley abutting on premises, see Assault § 18.
Abatement of nuisances by personal acts without resort to judicial proceedings, see Nuisances, II.
Injunction against revocation of license to build projection into street, see Injunctions, II, F.

¶ 653. Where a ditch or drain along a public highway in front of an abutting owner's premises has existed for more than twenty years, and a highway commissioner has the right to keep it open and in good condition, an obstruction in the ditch made by the abutting owner may be removed by the highway commissioner without proceeding under Pub. Acts 1909, Act No. 283, chap. 15.—Miller v. Harmer, 173 Mich. 560.

¶ 654. A highway commissioner having by law "the general care and superintendence of highways" has such a special interest in them as to warrant him in abating a nuisance caused by obstructions as one specially aggrieved thereby, even if not entitled to bring a legal proceeding.—Neal v. Gilmore, 141 Mich. 519.

¶ 655. The methods of dealing with encroachments in highways considered historically.—Township of Lebanon v. Burch, 78 Mich. 641.

§ 184. Removal of fences.

Appeal to circuit court from decision of highway commissioner, see post ¶ 687.
What constitute legal fences, see Fences.
Provisions for removal of fences, etc., on newly opened way, see Comp. L. 1915, § 4395.
Provisions as to moving back fences where road has become reduced below fifty feet, see Comp. L. 1915, § 4395.
Provisions as to damages for removal of fences and improvements in widening ways, see Comp. L. 1915, § 4398.
Removal after judgment in summary proceedings, see Comp. L. 1915, § 4406.
Proceedings for removal of fences dangerous in themselves or tending to obstruct way, see Comp. L. 1915, § 4412 et seq.
Costs and expenses of removing and assessment of expense, see Comp. L. 1915, § 4402.

¶ 656. Under Pub. Acts 1913, No. 125, providing for the removal of fences which cause obstructions to public highways, stump fences standing upon the owners' lands which have been tolerated by long custom, and which the highway commissioner ordered removed because they caused snow to drift into and fill up the highway, are not, by force of such statute, nuisances per se, but such statute proceeds rather along the theory of eminent domain, and damages should be allowed to the owners of such fences.—Township Board of Grant v. Larsen, 192 Mich. 630.

§ 185. Actions and suits to remove encroachments or open way.

Summary remedy under the statute, see post § 187 et seq.
Ejectment as remedy, see post § 186.
Condemnation proceedings as alternative for suit for encroachment, see ante ¶ 87.
Grounds for bill to compel opening of street after attempted vacation, see also ante ¶ 488.
Estoppel of complainants to maintain bill, see also ante ¶ 482.
Estoppel of city to sue, see ante ¶ 652.
Parties defendant to bill for opening street vacated by collusion, see ante ¶ 490.
Defense that public user did not include place in question in action to remove obstruction, see ante ¶ 61.
Want of continuous travel for statutory period as defense in action for encroachment, see also ante ¶ 38.
Ex parte action of surveyors and highway commissioner as evidence of encroachment on highway, see also ante ¶ 360.
Injunctive relief from nuisances, see Nuisances, III; Injunctions.
Injunction as remedy to preserve rights in private way or private rights in public way, see Easements § 40; Injunctions, II, F.
Reasons and considerations governing grant or denial of injunctions, see also Injunctions, I, II.
Actionable obstruction of private easement or of way not accepted by public, see also Easements § 38.
Nuisance as court or jury question, see Nuisance, III, IV.
Matters litigable in bill to restrain construction of drain in highway, see also Drains ¶ 348.
Measure of damages for obstruction of way, see Damages § 105.
Indictment or action for obstructing highway as acceptance of dedication of it, see Dedication ¶ 30.
Concurrent jurisdiction in obstruction cases, see Courts ¶ 229.
Jurisdiction of chancery under the statute, see Jud. Act, chap. VI, § 4, ¶ 1; Comp. L. 1915, § 12302, ¶ 1.

¶ 657. Where a plat was withdrawn after lots had been purchased in accordance with it, it was held that the rights of the lot owners were private and could not be adjudicated in a suit by the city to which they were not parties, nor made the foundation of a public right in a suit brought by the city entirely in behalf of the public to compel the opening of the street and removal of obstruction.—City of Detroit v. Detroit & M. R. Co., 23 Mich. 173.

¶ 658. Unless there are special circumstances chancery will not entertain a bill to remove from a township highway an alleged obstruction.—Township of Greenfield v. Norton, 111 Mich. 53.

¶ 659. The right of a city to a public street may be tried by suit to enjoin private parties from obstructing it; ejectment is not the sole remedy.—City of Mt. Clemens v. Mt. Clemens Sanitarium Co., 127 Mich. 115.

¶ 659a. A municipality may maintain a bill in equity against a street railway company unlawfully occupying the highway to compel the removal of its tracks.—City of Detroit v. Detroit United Ry., 172 Mich. 136, aff'd in 229 U. S. 39, 57 L. ed. 1056, 33 Sup. Ct. Rep. 697.

§ 186. Ejectment against encroacher or incloser.

See also ante ¶ 553.
Ejectment as remedy for recovery of easement of use of street, see also Ejectment ¶ 11.

¶ 660. A city has no such interest in the lands embraced within one of its streets as authorizes it to bring ejectment therefor, even though its charter gives it the supervision and control of all streets; that is nothing more than the usual power of township officers over their ways or of cities over their streets.—City of Grand Rapids v. Whittlesey, 33 Mich. 109.

¶ 661. A county cannot bring ejectment to remove obstructions from land dedicated to

the public use as a street, but held adversely to the public.—Bay County v. Bradley, 39 Mich. 163.

¶ 662. The owner of the record title to land in a platted street in front of his lots has a possessory right thereto as against one who incloses it, since under How. St. § 7790, he has a right to plant trees in it, build sidewalks and do other acts of possession not inconsistent with the public use.—Smeberg v. Cunningham, 96 Mich. 378.

§ 187. Summary and statutory proceedings to remove.

Notice to remove as foundation of the proceeding, see post § 188.
Notice of claim by landowner, see post § 189.
Issues and pleadings, trial and judgment, see post § 190.
Appeal and review, see post § 191.
Available remedy by summary proceedings as reason against allowing injunction, see Injunctions, I, II.
Liability of officer for wrongfully or illegally bringing proceedings to remove obstructions, see Officers, VI, A; and see also Malicious Prosecution.
Jurisdiction of justices of the peace in obstruction proceedings, see Comp. L. 1915, § 14169.

¶ 663. The statute (How. St. §§ 1371, 1372), in regard to removing encroachments on highways gives a public remedy, and is not designed to make it the commissioner's duty to institute proceedings at the instance of a private person, when the commissioner believes, after an honest inquiry, that no unlawful encroachment exists.—White v. Carlisle, Leonidas Highway Com'r, 95 Mich. 288.

¶ 664. The proceeding for the summary removal of encroachments upon a highway does not cover cases where the existence of any highway, including the land where the alleged encroachments are, is disputed in good faith or where the title to land is involved.—Roberts v. Cottrellville Highway Com'rs, 25 Mich. 23; Campau v. Button, 33 Mich. 525; Gregory v. Stanton, 40 Mich. 271; Willson v. Gifford, 42 Mich. 454; Gregory v. Knight, 50 Mich. 61.

¶ 665. The municipal power to prevent the obstruction of public easements does not extend to settling the title to lands, and cannot be exerted in a summary proceeding unless an actual public user has been interrupted.—Beecher v. People, 38 Mich. 289.

¶ 666. Whether a highway lawfully exists over private property is a question which cannot be settled against the owner without the right to a trial in the due course of law, and a municipal board cannot decide upon it so as to bind him, and acts at its peril in attempting it.—Sheldon v. Village of Kalamazoo, 24 Mich. 383.

¶ 667. The statutory action of trespass for encroachments on a highway (Sess. L., 1881. Act No. 243, chap. VI, How. St. § 1372) does not lie where the notice to remove them shows that the alleged encroachment is caused by fences entirely obstructing the road.—Gorham v. Withey, 52 Mich. 50.

¶ 668. Under the statute of 1861 (Comp. L. 1871, § 1291), the proceedings to remove encroachments applied only to highways actually laid out and opened under the statutes, and not to those which exist only by dedication or user.—Parker v. People, 22 Mich. 93; Roberts v. Cottrellville Highway Com'rs, 25 Mich. 23; Campau v. Button, 33 Mich. 525; People v. Smith, 42 Mich. 138.

¶ 669. The highway act of 1881 (How. St. § 1371), protects from encroachment highways by user as well as those laid out by law.—Krueger v. Le Blanc, 62 Mich. 70.

§ 188. ——Order and notice to remove.

Quashal for insufficiency of notices, see post ¶ 681.
Necessity of service to call for service of counter notice, see post § 189.

¶ 670. An order from the commissioner of highways to move one's fence as being an encroachment on the highway must state how far the fence lies from where it ought to lie.—People v. Smith, 42 Mich. 138.

¶ 671. Comp. L. 1871, §§ 1290, 1291, provides that if one whose fence encroaches on the highway does not move it within thirty days after being ordered to do so by the highway commissioner, the latter may sue him. Held, that the landholder cannot be put in default unless he has been distinctly notified how far the fence lies from the true line, and if the notice is defective in that regard, the thirty days do not begin to run until it is perfected.—People v. Smith, 42 Mich. 138.

¶ 672. The order and notice of removal preliminary to an action of trespass, for encroachment upon a highway, must under the statute (How. St. § 1373) be substantially accurate in describing the highway and the encroachment; and the declaration must strictly follow the order.—LeBlanc v. Kruger, 75 Mich. 561.

¶ 673. An encroachment is sufficiently described in an order for removal as a "strip of land two rods in width across the land of A. B., the south end of private claim No. 32, which now lies enclosed by said fence."—Krueger v. Le Blanc, 62 Mich. 70.

¶ 674. Section 4059, 2 Comp. Laws 1897, provides that a commissioner in giving notice to remove a fence encroaching upon the highway, shall not require the removal in less than sixty days, and also not within the period from April 1st to November 1st. On

April 12, 1907, defendant served notice on plaintiff to remove his fence in thirty days. Defendant did not himself remove the fence until November 11, 1907. In a suit in trespass by the plaintiff, held, the notice was sufficient under the statute.—Hoag v. Boehmer, 162 Mich. 330.

¶ 675. Notice to remove an encroachment from a highway is properly served upon the occupant of the land adjoining.—Krueger v. Le Blanc, 62 Mich. 70.

¶ 676. In an action for trespass quare clausum where the highway commissioner claimed that the plaintiff had encroached upon a highway, and made an order which was served on him requiring him to remove the fence erected, and no denial in writing was served as required by Comp. L. 1897, § 4122, denying the existence of the highway, and the commissioner after the expiration of thirty days took down the fence and placed the materials on plaintiff's land, the order of the highway commissioner reciting that the road was on the town line and the "east half of said highway is allotted to the township of Frenchtown to maintain," but there was no proof of any such allotment, or even that the fence was not upon the true line as described in the order, such order is not of itself proof of the facts stated therein and in the absence of such proof furnishes no justification for the trespass committed.—Labo v. Asam, 143 Mich. 24.

§ 189. ——Counter notice of claim of right.

Statutory provisions for notice of claim and formation of issue as in trespass, see Comp. L. 1915, § 4402 et seq.

¶ 677. In trespass for an alleged encroachment upon a highway, where it is found that no copy of the order of removal was served upon defendant as required by How. St. § 1371, it is error to reject, under section 1373, defendant's offer of evidence of title to the land, on the ground that defendant had served no notice upon the highway commissioner under section 1372, denying the existence of the highway; defendant was not required to serve such notice unless he had been served with a copy of the order.—Osborn v. Longsduff, 70 Mich. 127.

¶ 678. In an action for obstructing a highway under Comp. L. 1897, § 4157, the defendant is precluded from raising the question of title where he neglects to give notice under Comp. L. 1897, § 782, and bond required by section 784 notwithstanding section 9804 which provides that in suits for penalties or forfeiture, the defendant may give in evidence under the general issue any matter in bar of the action, as this is a general statute not applying to the specific proceedings.—Ramsby v. Bigler, 129 Mich. 570.

§ 190. ——Pleadings and issues, evidence, trial, and judgment.

Sufficiency of description in notice, see ante § 188.

Impropriety of trying title or existence of highway, see also ante § 187.

Evidence that road existed, see ante § 5.

General laws of evidence and trial practice not peculiar to this proceeding, see Evidence; Pleading; Trial; Justices of the Peace, IV.

Credibility and weight of testimony of highway commissioner, see Witnesses, VI.

General law of trespass, see Trespass.

Statutory provisions as to issues joined on notice of claim of right, see Comp. L. 1915, § 4403.

Statutory provisions as to procedure, trial, verdict, and judgment, see Comp. L. 1915, § 4404.

¶ 679. Where a declaration in an action of trespass under How. St. § 1371, for an encroachment upon a highway so describes the highway and the encroachment as to exclude the latter from the limits of the former, to which declaration defendant pleads the general issue with the denial of any encroachment upon the highway as described in the declaration, the defect is fatal to a recovery.—Varden v. Ritchie, 86 Mich. 197.

¶ 680. In proceedings to remove encroachments from highways the jury cannot pass upon anything that is not complained of.—Gregory v. Knight, 50 Mich. 61.

¶ 681. Proceedings to remove encroachments from a public highway must be quashed where neither the notices given nor the findings of the jury furnish any means of finding the extent of the encroachment or its distance from what is said to be the true line of the highway.—Gregory v. Knight, 50 Mich. 61.

¶ 682. A summary proceeding by a highway commissioner before a justice of the peace for the removal of encroachments presupposes that the existence and bounds of the highway are not questioned; and in such a proceeding the title to the highway and its existence cannot be tried as against the landowner.—Gregory v. Knight, 50 Mich. 61.

¶ 682a. Under proceedings commenced by a highway commissioner to procure an adjudication that a fence of defendant was an encroachment upon the public highway, said proceedings being brought under Comp. L. 1897, §§ 4122-4126, a judgment that can be supported upon no other theory than section 4061 giving the public a title to the strip of defendant's land two rods in width on each side of the section line must be reversed inasmuch as this section has no application.—Watz v. Sunderland, 147 Mich. 96.

¶ 683. In an action by a highway commissioner for encroachment upon a public

highway it was not error to permit a witness to testify as to his employment by the plaintiff and instructions to him to see whether any obstructions were on the road and to look after it, such evidence having some bearing on the question of whether the public authorities had accepted the road as a highway.—Parkey v. Galloway, 147 Mich. 693.

¶ 684. In an action brought by the Commissioner of Highway under Comp. L. 1897, § 4061 to recover damages for encroachment on a highway which crossed land occupied by defendant, where the question at issue was whether it was a highway by user, evidence that the road was cut in 1872 to enable forest products to get to a shipping point, that it was on land belonging to the United States, that it had been used as a public highway by the public generally, and that the township had expended money on the road was sufficient to send the case to the jury, and it was not error to refuse to direct a verdict.—Parkey v. Galloway, 147 Mich. 693.

¶ 685. Where no request is made and the attention of the trial court is not called thereto, in an action for encroachment on a public highway, it is not error to fail to instruct the jury that the title to the land was in the United States and the township could not gain title by user, that the statute of limitations could not operate against the government.—Parkey v. Galloway, 147 Mich. 693.

§ 191. ——Appeal or other review of proceedings.

Quashal for insufficiency of notices, see ante ¶ 681.
General law of certiorari, see Certiorari.
Certiorari to review orders for removal of obstructions or unlawful objects, see Certiorari § 18.
Proper respondents to certiorari to review encroachment proceeding, see Certiorari § 26.
Return to certiorari in encroachment proceedings, see Certiorari ¶ 114.
Judgment on certiorari to encroachment proceedings, see Certiorari ¶ 228.
Provisions respecting appeals to circuit court, see Comp. L. 1915, § 4405.

¶ 686. Amendment of declaration on appeal, in respect to description of land in action for obstruction of a highway under the statute is precluded by How. St. § 1375, where it would change the issue.—Graham v. Langston, 65 Mich. 45.

¶ 687. Upon appeal to the circuit court from the determination of a highway commissioner in regard to the removal of fences under Pub. Acts 1913, No. 125, held that the circuit court, at the trial on such appeal, correctly excluded evidence that the fences in question were a harborage for noxious weeds, or that they interfered with the enjoyment by others of their property, which were matters which the law was not framed to remedy.—Township Board Grant v. Larsen, 192 Mich. 630.

§ 192. Actions to redress or prevent injuries to highways.

General law of trespass, see Trespass.
Actions of trespass on the case for nuisance, see Nuisances, III.
Treble damages for injuries to roads, see Damages § 209.
Overseer or commissioner as proper party to sue for injury to bridge, see Bridges § 25.
Statutory liability for injury to highway or appurtenances, see Comp. L. 1915, § 4458 et seq.

¶ 688. Actions for injuries to highways and bridges cannot be brought by the township in which they are situated, but must be brought by the overseer of highways, or, if he is disqualified from suing, by the commissioner of highways (Pub. L. 1881, Acts Nos. 242, 243, pp. 285, 288).—Township of Denver v. White River Log & Booming Co., 51 Mich. 472.

¶ 689. Damages to highways, bridges and culverts in a township by flooding cannot be recovered by the township either at law or in equity under the rule established in Township of Denver v. White River Log & Booming Co., 151 Mich. 472, and Township of Merritt v. Harp, 131 Mich. 174, but must be recovered by the overseer or commissioner of highways designated by the statute to sue for such damages.—Township of Merritt v. Harp, 141 Mich. 238.

¶ 690. Whether an overseer of highways can sue for injuries to a highway from acts done before the creation of the township in which he is overseer, and where the only damage alleged, since such township was set off, resulted to it from the cost to the town of making changes in the highway that were rendered necessary by the acts charged, quære.—Shepard v. Gates, 50 Mich. 495.

¶ 691. A joint action cannot be brought by the overseers of two adjoining road districts for an injury caused to a bridge which is partly in each district.—Port Huron Highway Com'rs v. Stockman, 5 Mich. 528.

¶ 692. Commissioners of highways of the township cannot, on the refusal of the respective overseers to prosecute, sue under the statute, and recover in one action for the damages sustained by both districts.—Port Huron Highway Com'rs v. Stockman, 5 Mich. 528.

¶ 693. One action cannot be brought for injuries to highways and bridges in different districts.—Township of Denver v. White River Log & Booming Co., 51 Mich. 472.

¶ 694. In an action under How. St. § 1403, by the highway commissioner against one obstructing a watercourse by building a dam which stopped the flow of water and flooded a highway, it is no defense to set up that the township had constructed a ditch along the highway which brought water upon defendant's land through such watercourse which would otherwise not have reached it. —Commissioner of Highways of the Township of Tittabawassee v. Sperling, 120 Mich. 493.

¶ 695. A township has such interest in its highways that it may maintain a bill to restrain the flooding of such highways though the highways may be under the supervision of the highway commissioner.—Township of Merritt v. Harp, 131 Mich. 174.

§ 193. Penalties and penal actions.

For obstructing highway ditch, see ante § 179.
Estoppel to deny existence of highway in action for obstructing, see ante ¶ 60.
Indictable nuisances, see Nuisances.
Immunity of state from costs in penal actions for obstructions, see Costs § 12.
General law of penal actions, see Penalties.
Penalty for nonremoval after notice, see Comp. L. 1915, § 4402.
Penalties and forfeitures for injury to or obstruction of highways, see Comp. L. 1915, § 4458 et seq.
Trespass as form for collection of penalties, see Comp. L. 1915, § 4484.
Execution on judgment for penalties, see Comp. L. 1915, § 4485.

¶ 696. The penalty for obstructing a highway does not come under Comp. L. 1857, § 5846, How. St. § 9261, relating to undefined misdemeanors, for that only reaches offenses where no penalty has been fixed by statute; and it cannot be enforced by indictment or information.—Pettinger v. People, 20 Mich. 336.

¶ 696a. In a prosecution for penalties for highway obstruction under Comp. L. 1857, § 5122, How. St., § 8439 before a justice of the peace, the supervisor of the township in which the penal acts were done or the prosecuting attorney of the county must intervene.—People v. Navarre, 22 Mich. 1.

¶ 697. In an action by a highway commissioner under 2 Comp. L. 1897, § 4157, which confers no personal right of action, to collect a penalty for the obstruction of a highway, a declaration shows clearly enough that the commissioner and not an individual is suing where it indicates that the action is brought under said statute.—La Barre v. Bent, 154 Mich. 520.

¶ 698. Obstructions have always been distinguished from encroachments by our statutes, and the power conferred upon a city to impose penalties for obstructions would not warrant their being imposed for encroachments.—City of Grand Rapids v. Hughes, 15 Mich. 54.

¶ 699. Until an alley in the city of Detroit has been actually open to the uses for which it was designed, the occupation or obstruction of it cannot properly be punished under city by-laws. In giving the power to regulate the use of alleys, and remove obstructions from them, the city charter contemplates the preservation of actual, and not theoretical, easements, and the protection of the community against actual nuisances which interfere with the accustomed use of the passages.—Jackson v. People, 9 Mich. 111.

¶ 700. A conviction for obstructing an alley in violation of a city ordinance will be reversed where there was no evidence that the alley had ever been opened, used, or worked by the city authorities.—People v. McNamara, 143 Mich. 71.

§ 194. Encroachment of highway on abutter.

Withdrawal of abutter's lateral support, see post § 195.
Liability and remedies for injury to access, see post § 196.
Width of improved way and margins to be left, see also ante IV.
Driving out of way on abutting land as justification for assault, see Assault § 18.

¶ 701. To build an embankment for carrying a highway across a ravine and creek in which a dam has been formed in such manner that the foot of the embankment extends beyond the side boundaries of the highway and on the land under water of the adjoining abutting owner is trespass.—Schneider v. Township of Brown, 142 Mich. 45.

§ 195. Injury to or withdrawal of abutter's lateral support.

Actionable changes of grade, see ante § 119 et seq.

¶ 702. Where a street was marked out on a village plat, but a certain part of it in its natural condition was incapable of use as a way, and for forty years remained so without any act of the authorities to accept or improve it, and the street commissioner then entered and made excavation that he might use the earth in other parts of the town, and in so doing removed the lateral support for adjacent lands to their injury, held, that the commissioner was liable for this injury.—Buskirk v. Strickland, 47 Mich. 389.

§ 196. Liability and remedy for obstruction of access.

Prescriptive right to have tracks in street in front of land, see ante ¶ 650.

¶ 703. A commissioner of highways, or an overseer acting under his direction, incurs no liability to abutting owners if, in the proper exercise of his lawful discretion and

for the sole purpose of improving the highway, he runs a ditch in front of their premises which they have to bridge in order to reach the road (Comp. L. 1871, ch. 23).—Eagle Township Highway Com'rs v. Ely, 54 Mich. 173.

¶ 704. An owner of property, who is not entitled to notice of proceedings to vacate a street cannot recover damages for an alleged interference with his right of ingress and egress to a street against one who has caused the street to be vacated.—Beutel v. West Bay City Sugar Co., 132 Mich. 587.

¶ 705. Where one brought action for the obstruction of a highway across a part of which he had himself built a fence, without which his passage would not have been barred, he could not recover.—Roberts v. Fitzgerald, 33 Mich. 4.

¶ 706. An abutting owner whose frontage on a street will be cut off by a railroad crossing embankment and whose passage away from his premises in one direction will be cut off thereby increasing the distance he has to truck his goods, from warehouses on his lots, and reducing the value of the property, suffers a special damage so as to entitle him to maintain injunction proceedings to restrain the railroad from building the embankment.—Dean v. Ann Arbor R. Co., 137 Mich. 459.

XII. DEFECTIVE AND DANGEROUS WAYS AND SURROUNDINGS.

A. GENERAL DUTIES AND LIABILITIES OF COUNTIES, CITIES, VILLAGES, AND OFFICERS.

Construction, improvement and repair of highways, see ante IV.
Obstructions, encroachments and unauthorized uses and injuries to highway, see ante XI.
Right to use way and law of the road, see post XIII.
Injuries to travelers from negligence of other persons traveling on and using street or way, see post XIII, B.

§ 197. In general; nature and source of liability.

Public or private nature of road or way, see ante I.
What are regarded as highways, see ante I.
Extent of duty and care, see post § 199.
Liability for failure to construct, see post § 200.
Liability for defective plan and manner of construction, see post § 201.
Liability for failure to keep in repair, see post § 203.
Liability for failure to provide railings, barriers or warning signals, see post § 211.
Officer or municipality charged with the duty, see post § 214.
Notice of conditions and opportunity to repair as element of negligence, see post XII, B.
Duty and negligence towards vehicle users, see post XII, C.
Duty and negligence towards foot travelers, see post XII, D.
Duty and negligence towards persons other than travelers, see post XII, E.
Proximate cause and contributory negligence, see post XII, F.
Liability of abutters, private persons and corporations, see post XII, G.
Actions for injuries, see post XII, H.
Rights of action for highway injuries, see post § 265.
Notice of claim and injury to mature right to sue, see post § 266 et seq.
Necessity of referring to statute in declaration, see post § 273.
Responsibility of public for acts of third persons, see post § 253.
Liability of township for defects in road opened by landowner for access to private dock and ferry and used by public without objection, see also ante ¶ 52.
Inapplicability of liability statute to damages due to flooding of adjacent lands, see ante ¶ 387.
Nonliability of public for injuries on dedicated street never accepted by public, see Dedication ¶ 43.
General law of negligence, see Negligence.
Actionable death of person, see Death by Wrongful Act.
Inoperativeness of repeal of statute on pending actions, see Statutes, V.
Survivability of cause of action for injury from defect in way, see Abatement § 16.
General law of damages, see Damages.
All damages to individuals from defects in highways as special damages, see Damages ¶ 962.
State decisions on liability of municipalities as rule in Federal courts, see Courts § 29.
Liability of toll road as such, see Toll Roads.
General provisions creative of liability for injuries to person or property, see Comp. L. 1915, § 4584 et seq.
Statutory duty and liability of municipalities, see Comp. L. 1915, § 4584 et seq.
Statutory abrogation of so-called common law liability of officers and municipalities, see Comp. L. 1915, § 4588.
Statutory exemption from liability for injuries on roads in disuse for ten years, see Comp. L. 1915, § 4587.

¶ 707. The liability of municipal corporations for defects in their highways, streets and bridges is purely statutory; at common law no liability attaches.—Dermont v. City of Detroit, 4 Mich. 435; Niles Highway Com'rs v. Martin, 4 Mich. 557; City of Detroit v. Blackeby, 21 Mich. 84; McCutcheon v. Village of Homer, 43 Mich. 483; McArthur v. Saginaw, 58 Mich. 357; Davis v. Jackson, 61 Mich. 530; Roberts v. Detroit, 102 Mich. 64.

¶ 708. At common law neither the city nor the owner of the adjoining lot is liable for an injury caused by the absence of a sidewalk or by neglect to repair an existing walk.—Lynch v. Hubbard, 101 Mich. 43.

¶ 709. The liability of municipalities for injuries upon public highways is purely statutory, is in derogation of the common law, and cannot be enlarged by construction.—Brown v. Township of Byron, 189 Mich. 584.

¶ 710. The right to recover damages for injuries received upon the highways, etc., of the state, in consequence of the negligence of a municipality, is purely statutory, and the legislature has undoubted power to modify, abridge, or even abolish, that right by appropriate action.—Westgate v. Township of Adrian, 161 Mich. 333.

¶ 711. How. St. §§ 8313-14, giving a right of action for a fatal injury, though in derogation of the common law, is a remedial statute, and establishes a general rule which applies as well to townships as to other defendants, even though at the time of its adoption townships were not liable for such injuries but became so afterwards.—Merkle v. Township of Bennington, 58 Mich. 156.

¶ 712. An action brought under § 2 of the act of 1879 (How. St. §§ 1442-1446) is not affected by the repealing act No. 264 of 1887 (How. St. §§ 1446c-1446h), which substantially re-enacts the former act; and judgment in such suit for injuries to person or property may be rendered after the repeal.—Merkle v. Bennington T'p, 68 Mich. 133; Moore v. Township of Kenockee, 75 Mich. 332.

¶ 713. An action begun under How. St. § 1442, for injuries sustained because of a defective street, etc., was not affected by the repeal clause in Laws 1887, Act No. 264, which statute was a substantial re-enactment of the former act.—Alexander v. City of Big Rapids, 70 Mich. 224.

Liability of municipality for personal injuries resulting from defects or obstructions in or upon driveway or street, see note, 5 N. C. C. A. 428-448.

§ 198. Municipal charter provisions.

See also post ¶ 988.

Provisions of charter as to notice of claim, see post §§ 266, 267, 270.

Charter provisions as affecting abutting owners' liability over to the public, see post ¶ 1022.

Provisions imposing penalty on abutting owners for obstructing sidewalks, see post ¶ 995.

Charter exemption of city as class legislation, see Constitutional Law § 216.

Instructions as to duty of municipalities in respect to highways, see post § 346 et seq.

Municipal charters in general, see Municipal Corporations, II.

¶ 714. Inasmuch as Laws 1887, Act No. 264 (How. St. §§ 1446c-1446h) expressly charges cities with the duty of keeping their sidewalks in repair, provides for raising the necessary funds, and declares their liability for failure to perform such duty, it is immaterial whether the charter of a particular city does or does not charge a liability.—Campbell v. City of Kalamazoo, 80 Mich. 655.

¶ 715. The charter of the City of Marquette. ch. 7, § 1, sub. 16 (Local Acts 1895, No. 409) exempting the city from certain liability for sidewalk damages was not repealed by Local Acts 1899, No. 423, inasmuch as the provisions thereof are not in conflict.—Maclam v. City of Marquette, 148 Mich. 480.

¶ 716. A charter giving a city power to direct and regulate the planting, and to provide for the preservation of ornamental trees, does not thereby make it liable for an injury arising from its failure to trim the dead limbs from the trees.—Miller v. City of Detroit, 156 Mich. 630.

§ 199. Extent of duty and care in general.

Persons to whom duty owing, see post § 217.

Liability for defects in temporary road outside established highway in use during construction of viaduct, see also ante ¶ 9.

Evidence as to extent of duty and care, see post § 283.

Sufficiency of evidence to show negligence, see post § 297.

Instructions as to duty respecting safety of roadways, see post § 346.

City, county or township duty to build or repair bridges, see also ante §§ 107-110.

Duty and care of persons making use of streets, see post XIII.

General law of negligence, see Negligence.

Effect of usage as defining due care, see Customs § 9.

¶ 717. The liability for an injury caused by the condition of a street is purely statutory, and the purpose of the statute is to limit the responsibility to reasonable care.—McArthur v. City of Saginaw, 58 Mich. 357

¶ 718. Highways need not be kept absolutely safe for travel; that its highways shall be reasonably safe and fit for public travel is all that the statute requires of a township.—Harris v. Township of Clinton, 64 Mich. 447.

¶ 719. Reasonable care is the limit of a city's liability; all that the statute requires is that streets, bridges, etc., shall be reasonably safe and fit for ordinary public travel.—McArthur v. City of Saginaw, 58 Mich. 357; Woodbury v. City of Owosso, 64 Mich. 239; Shippy v. Village of Au Sable, 65 Mich 494.

¶ 720. The statutory duty resting upon a city to keep its streets in a condition reasonably safe and fit for public travel is entirely independent of the police power vested in the municipality, and requires everything to be done by the city necessary to make such travel reasonably safe.—Joslyn v. City of Detroit, 74 Mich. 458.

¶ 721. The safety required by the statute (Laws 1887, Act. No. 264) extends to travel by night as well as by day.—Sebert v. City of Alpena, 78 Mich. 165.

¶ 722. Municipalities are not required to keep their sidewalks in a perfect condition, and are only liable for injuries where they are not reasonably safe.—Lombar v. Village of East Tawas, 86 Mich. 14.

¶ 723. As cities are not required to keep their streets in a condition absolutely safe for travel, a crosswalk of parallel planks with cobblestone paving between, the planks being higher than the street and their ends being chamfered down to meet the level of the rails of a street railway, cannot be said to be negligent construction, when it is in accordance with the requirements of the locality, and when it is best adapted for the convenience of the public. A crosswalk must be reasonably safe in view of the purpose for which it is constructed, the necessary uses of the street, and all the varying conditions.—Bigelow v. City of Kalamazoo, 97 Mich. 121.

¶ 724. Under § 21, ch. 4, Act No. 283, Pub. Acts 1909, How. Ann. St., 2nd Ed., § 2252, a county is liable only for the neglect of a board of county road commissioners to keep the traveled portion of roads, bridges and culverts under its control in a condition reasonably safe for public travel.—Ferguson v. County of Muskegon, 181 Mich. 335.

¶ 725. An injury caused by negligence and an accident not prevented by negligence are very distinct in operation and effect; the first being covered by the statute imposing the duties of townships in maintaining its highways in a safe condition.—Beall v. Township of Athens, 81 Mich. 536.

§ 200. Liability for failure to construct.

See also post ¶ 760.

Duty and necessity of construction, see ante § 107.

Duty to provide railways and barriers, see post § 211.

Failure to construct sidewalk, see also ante ¶ 708.

Absence of sidewalk as defense in action by pedestrian for injuries, see post § 232.

Liability of abutting owners for failure to construct sidewalks, see post § 257.

¶ 726. A city is not liable for a personal injury caused by a defective cross-walk under Pub. L. 1879, p. 223, where the showing is that no cross-walk had ever existed or been provided for. So held where the common council had caused a street to be graded to a certain cross-street and no farther, and the sidewalk built by the city ended abruptly at the roadway and no continuing cross-walk was laid, so that a man, walking in darkness, stepped off the end of the sidewalk so suddenly that he was ruptured.—Williams v. City of Grand Rapids, 59 Mich. 51.

¶ 727. Pursuant to notice from the common council of a city, all of the lot owners but one in a given district constructed sidewalks in front of their lots. Plaintiff was injured after passing over the open space in front of this lot, by catching his foot in the walk on the other side. Held, by two justices, that there was no more danger in walking over the sidewalk than over those built with steps to crosswalks and streets; that plaintiff had no right to assume that no walk higher than the ground existed beyond the open space; that the case was not one where a sidewalk was out of repair, but where none had ever been built; and that a municipality is not liable for injuries resulting solely from a failure to construct a walk or a part thereof. A third justice concurred in reversing the judgment for plaintiff, and in refusing a new trial, on other grounds.—Shietart v. City of Detroit, 108 Mich. 309.

§ 201. Defective plan and manner of construction.

Instructions as to plan and construction, see post § 352.

Officer or municipality charged with the duty, see post § 214.

¶ 728. A city or village has the right of deciding as to the plan and manner of constructing its streets, bridges, cross-walks, etc., and will not be liable on the ground that the plan is defective.—Williams v. City Grand Rapids, 59 Mich. 51; Shippy v. Village Au Sable, 65 Mich. 494; Davis v. City Jackson, 61 Mich. 530; Woodbury v. City Owosso, 64 Mich. 239.

¶ 729. A municipality cannot construct a dangerous and unsafe road—one not safe and convenient for public travel—and shield itself behind its legislative power to adopt a plan and method of building and constructing in accordance therewith.—Malloy v. Township of Walker, 77 Mich. 448.

¶ 730. The statute of 1879 (How. St. §§ 1442-1446) extends to defects in construction as well as defects through omission to repair, and to neglect to keep the highway in a condition reasonably safe and fit for travel by day or by night.—Carver v. Detroit & S. Plank-Road Co., 61 Mich. 584.

¶ 731. Laws 1887, Act No. 264, requiring cities to keep streets safe for travel, applies to defects in construction as well as to neglect to repair, when the road is unsafe. —Sebert v. City of Alpena, 78 Mich. 165.

¶ 732. A defect in an improvement owing to the bad plan thereof does not subject the municipality to liability, as, where the injured party had fallen into a ditch which was dug across a highway, but was not covered to the full width of the road.—City of Lansing v. Toolan, 37 Mich. 152; Toolan v. City of Lansing, 38 Mich. 315.

¶ 733. Where the duty to build sidewalks rests on the owner or occupant of the adjacent premises, and the performance of it is in no sense the act of the city, the city cannot be sued for injuries resulting from the plan of constructing a walk; as where a step was left at one end of it.—City of Marquette v. Cleary, 37 Mich. 296.

¶ 734. When an appropriation has been made for repairing a street, the repairs made, and the expenses reported, and the bills therefor have been approved and paid by the department that had the authority to direct these things to be done in the first instance, this amounts to an approval of the work and a ratification of the plan upon which it was constructed, and the city is liable only for a defective execution of the work.—Davis v. City of Jackson, 61 Mich. 530.

Liability for injuries caused by excessively oiled highway, see note, 15 N. C. C. A. 530-534.

§ 202. ——Of culverts and bridges.

Duty to provide railings and barriers, see post § 212.

¶ 735. The city is not liable where the injury resulted from a wagon being overturned into a ditch because a culvert was built, in pursuance of its plan, too short.—City of Detroit v. Beckman, 34 Mich. 125.

¶ 736. A township is not negligent in constructing a bridge twenty feet long with one end a foot higher than the other, to conform to the formation of the adjacent land, or in constructing such bridge sixteen feet wide and one inch lower on one side than on the other.—Perkins v. Township of Delaware, 113 Mich. 377.

¶ 737. A county is not liable for the acts of its board of supervisors in causing a bridge to be erected over navigable waters, through a defect in which an injury occurs to an individual using the stream.—Larkin v. County of Saginaw, 11 Mich. 88.

¶ 738. In the absence of statute a city is not liable for an injury to a vessel resulting from its failure to maintain a draw in a bridge in such condition that it may be properly operated, where the city does not derive any benefit from the bridge, but simply maintains it for the public good.—Corning v. City of Saginaw, 116 Mich. 74.

§ 203. Duty to inspect and keep in repair.

Respecting sidewalks, footways and crosswalks, see post §§ 204, 205.
Respecting boulevards and parkways, see post § 206.
Respecting alleys, see post § 207.
Respecting ditches and gutters, see post § 208.
Respecting trees and overhanging or projecting objects, see post § 209.
Respecting bridges and culverts, see post § 210.
What constitutes specific negligence, see post XII, C, E.
Requisites of highways, generally, see ante § 8.
Degree of care required, see ante § 199.
Duty pending the making of repairs, see post § 218.
Obstructions and objects in streets, see post §§ 227, 236.
Notice of danger and opportunity to make safe, see post XII, B.
Duty to repair defects caused by acts or misconduct of third persons, see post § 253.
Enforcement of duty to keep highway in repair, see post § 265.
Presumptions as to repairs, see post § 280.
Burden of proof and presumptions as to notice of condition of streets, see post § 281.
Questions of law and fact as to safe condition of highway, see post § 305.
Instructions as to duty of municipality respecting highways, see post § 346 et seq.
Instructions as to duty and negligence respecting walks, see post § 351.
Construction, improvement and repairs in general, see ante IV.
Liability of abutters, private persons and corporations, see post XII, G.

¶ 739. Though a casual examination of a walk might be sufficient in ordinary cases, it might not be where the officer examining it had been notified of the general bad condition of the walk in the vicinity where an injury occurred.—Hunter v. Village of Ithaca, 141 Mich. 539.

¶ 740. The statute, R. S. 1846, chap. 119, How. St. §§ 8212-8218, does not authorize any action to be brought against township officers by their name of office, except for acts done or contracts made by them while acting within the scope of their official duty and authority, and was not intended to subject townships to any new liability, e. g., for damages sustained by individuals in consequence of the nonrepair of highways and bridges.—Niles Tp. Highway Com'rs v. Martin, 4 Mich. 557.

¶ 741. A city under the statute of 1879 (Gen. Laws 1879, p. 223) is liable to one injured by reason of a defect in one of its

streets along which he is passing.—City of Grand Rapids v. Wyman, 46 Mich. 516.

¶ 742. A township is liable under Laws 1879, Act. No. 244 (How. St. §§ 1442-1446) to one who is injured by reason of a defect in a public highway along which he is passing.—Burnham v. Byron Township, 46 Mich. 555.

¶ 743. It is the duty of a township, through its officers, to exercise reasonable supervision over its roads and bridges, and to see, within practical limits, that they are kept in a reasonably safe condition for public travel.—Moore v. Township of Kenockee, 75 Mich. 332.

¶ 744. The first clause of How. St. § 1446f, which provides a remedy for the failure of townships to keep highways in repair, limits the right to bring suit under the first and second sections of the act, for personal injury and injury to property, to public highways which have been in use for ten years.—McKeller v. Township of Monitor, 78 Mich. 485.

¶ 745. The rule that it suffices to keep the traveled portion of the way safe for travel does not apply to a place in a city street where the sidewalks intersected but outside of them and where there was a stone bearing the weight of a manhole cover over which the public might probably travel. The statute, 3 How. St. § 1446e, relating to the duty of keeping streets safe, is broad enough to cover all portions of the street.—Lincoln v. City of Detroit, 101 Mich. 245.

¶ 746. City streets are public highways like all other roads. The city's duty of keeping them in repair is a duty to the public, not to private individuals, the mere neglect of which is a nonfeasance only, and for an injury resulting from such neglect no action arises. In this respect there is no distinction between the liabilities of cities and that of towns and counties.—City of Detroit v. Blackeby, 21 Mich. 84.

¶ 747. Where a village has assumed to dedicate land to the public for highway purposes, and use has been made of the land accordingly, it is immaterial, as bearing upon the duty of the village to keep the way in repair, whether or not it ever became strictly a legal highway.—Williams v. Village of Petoskey, 108 Mich. 260.

¶ 748. The obligation to keep a public way in reasonable repair generally continues until such way is lawfully discontinued or closed.—Speck v. Township of Bruce, 166 Mich. 550.

Liability for defects in highways, streets or sidewalks, which are not within traveled part, see note, 12 N. C. C. A. 736-762.

Liability for permitting untraveled portion of highway to remain in dangerous condition, see note, 15 N. C. C. A. 136-146.

§ 204. ——Sidewalks and footways.

Statutory source of duty, see ante § 197.

Liability for failure to construct, see ante § 200.

Injuries from defective sidewalks and footways, see post § 232.

What constitutes negligence as to walks and towards foot travelers, see post XII, D.

¶ 749. Act 244 of 1879 (How. St. §§ 1442-1446), giving a right of action for injuries sustained by reason of defective public highways, streets, bridges, crosswalks and culverts, did not create a liability for injuries caused by defective sidewalks.—Detroit v. Putnam, 45 Mich. 263.

¶ 750. A plank walk built upon the approach to a bridge, connecting the sidewalk on the street leading to the bridge with a walk on the side of the bridge for foot passengers, is a sidewalk and not a part of the approach proper to the bridge or of the bridge; and prior to the passage of the statute making municipalities liable for defective sidewalks, an action would not lie against a township for injuries sustained by reason of defects in such walks.—Saunders v. Township of Gun Plains, 76 Mich. 182.

¶ 751. If a village causes a sidewalk to be built or assumes control of it, it is its duty to keep it in repair, whether the particular place where the injury occurs is wholly within the line of the public street or not.—O'Neil v. Village of West Branch, 81 Mich. 544.

¶ 752. Where a city charter expressly confers upon a common council the control of all sidewalks and imposes a liability for injury from neglect to repair, the city is liable although the sidewalk was constructed without its order by the abutting landowner.—Fuller v. City of Jackson, 82 Mich. 480.

¶ 753. It is no defense to an action against a village for injuries received from a defective sidewalk that the walk was constructed upon railroad property, if the care and control of the walk had in fact been assumed by the village.—Will v. Village of Mendon, 108 Mich. 251.

¶ 754. A village which has actual notice of a defect in a sidewalk cannot, by ordering it to be repaired by someone else, discharge its duty, so as to escape liability for an injury resulting from the defect, where the repairs were insufficient to render the walk reasonably safe for travel.—Atherton v. Village of Bancroft, 114 Mich. 241.

¶ 755. A city is under legal obligation to maintain in a reasonably safe condition for pedestrians that section of the highway at a street crossing which lies within the lines of the sidewalk if extended, where it appears, from the existence of a beaten foot path at such point, that the same is used for public

travel, even though the city has constructed a crosswalk on the opposite side of the street. —Comiskie v. City of Ypsilanti, 116 Mich. 321.

¶ 756. Where a township expends money and appropriates other money for the repair of a sidewalk situated in a village street, it has assumed care and control of the sidewalk so as to be liable for injuries to persons due to nonrepair, under 1 Comp. L. 1897, § 3441; and it is not necessary that the sidewalk should have been established under Act No. 60, Pub. Acts 1883, § 4203.—Welton v. Township of Crystal, 152 Mich. 486.

¶ 757. Where the repair of a village sidewalk is necessary to make a public highway safe and convenient for travel, the township board has power to control the same, as against the abutting owner, under 1 Comp. L. 1897, § 3441 et seq., and 2 Comp. L. 1897, § 4202 et seq.—Welton v. Township of Crystal, 152 Mich. 486.

§ 205. ——Crosswalks.

See also ante ¶ 723.
Liability for failure to construct, see ante § 200.

¶ 758. The walk outside of the extended boundaries of the abutting owner's lot at the intersection of streets held crosswalk, and not sidewalk, so that for a defect therein an injured person could recover under the act of 1879.—O'Neil v. Detroit, 50 Mich. 133.

¶ 759. The city of Detroit in levying sidewalk rates holds abutting owners liable for only so much walk as lies between the extended boundaries of their lots. This practical construction which excludes any part of the walk outside of the extended boundaries was followed where a foot-passenger was injured by a defect in the walk at the intersection of the streets, and the walk outside of such extended boundaries was regarded as part of the crosswalk.—O'Neil v. City of Detroit, 50 Mich. 133.

¶ 760. The statute of 1879 did not give a right of action against a city for not constructing a crosswalk, and imposed no duty of building such a walk; but when once built the duty to keep in repair arises.—Williams v. City of Grand Rapids, 59 Mich. 51.

¶ 761. The fact that a crosswalk was, under the charter of the village, built and repaired by assessment on the adjacent property, does not relieve the village from the duty of keeping the walk in safe condition for travel.—Shippy v. Village of Au Sable, 85 Mich. 280.

¶ 762. In order to render a township liable for injury caused by a defective crosswalk, such walk need not be one that extends across the entire street, nor does a sluiceway built by the township across the roadbed under the crosswalk as originally constructed deprive the walk of its character as a crosswalk.—Frary v. Township of Allen, 91 Mich. 666.

§ 206. ——Boulevards and parkways.

¶ 763. The Detroit Boulevard is a street or highway within How. St. § 1446c et seq. making the city liable for a defective sidewalk under the act, though the local management of it is not in the council but in a board specially created for that purpose. —Burridge v. City of Detroit, 117 Mich. 557.

¶ 764. The boulevard of the city of Detroit is a public highway within the meaning of the statute making municipalities liable for injuries from defective highways; the fact that the control of the boulevard has been confided to the commissioners of parks and boulevards (Local Acts 1889, No. 388), instead of the common council does not make it any the less a city enterprise.—Burridge v. City of Detroit, 117 Mich. 557.

§ 207. ——Alleys.

Duty to keep alleys in repair, see also ante ¶ 16.
Liability of abutting owner for injuries from defective alley, see post § 256.

¶ 765. A city is not liable for an injury arising from the defective condition of a public alley, there being no common-law liability, and an alley not being a highway or street within the meaning of Laws 1887, Act No. 264.—Face v. City of Ionia, 90 Mich. 104.

§ 208. ——Ditches and gutters.

See also ante ¶ 732.

¶ 766. A ditch running along the side of a village street and used to carry off surplus water is not, though covered for the purposes of a sidewalk, a culvert within the meaning of Laws 1879, Act No. 244, How. St. §§ 1442-1445), providing for the recovery of damages sustained from defective streets, bridges, crosswalks and culverts.—Kowalka v. Common Council of Village of St. Joseph, 73 Mich. 322.

§ 209. ——Trees and overhanging or projecting objects.

See also ante ¶ 716.

¶ 767. Where a statute creates a liability on the part of a city for failure to maintain its streets and sidewalks in safe condition, the court will not extend its scope so as to create a duty in the city to keep its trees safely trimmed of dead limbs, such statute being in derogation of the common law.—Miller v. City of Detroit, 156 Mich. 630.

¶ 768. Plaintiff was injured while on a city sidewalk by the falling of a dead limb of a tree standing between the sidewalk and the curb. Held, that Comp. L. 1897, §§ 3441-3443, requiring cities to keep the streets and

sidewalks in safe condition, did not lay on defendant city the duty to keep the tree trimmed.—Miller v. City of Detroit, 156 Mich. 630.

¶ 769. Comp. L. 1897, §§ 3441-3443, imposed a liability upon cities for failure to keep their streets and sidewalks in reasonable repair. Held, that this statute did not create a liability for failure to trim off a dead limb of a tree, in a street, which overhung the sidewalk and fell and injured plaintiff.—Miller v. City of Detroit, 156 Mich. 630.

¶ 770. An ordinance provided a penalty against the cutting or injury of trees in its streets by persons other than the adjoining proprietors. Held, this ordinance did not make the city liable for an injury arising from its failure to trim the dead limbs from its trees.—Miller v. City of Detroit, 156 Mich. 630.

Liability of city for injury to person on street caused by fall of tree or branches, see note, 11 N. C. C. A. 741-751.
Liability for injuries to persons struck by protruding or overhanging objects while driving, see note, 11 N. C. C. A. 954-980.

§ 210. ——Bridges and culverts.

See also ante ¶ 724.
As to ditches and gutters, see also ante § 208.
Officer or municipality charged with the duty, see post § 215.
Necessity of notice of defect, see post § 219.
Opportunity to make safe, see post § 225.
Questions of law and fact as to safety of bridges and culverts, see post § 321.
Instructions as to construction and maintenance of bridges and culverts, see post § 355.
Right to indemnity from person responsible for condition of bridge, see post § 264.

¶ 771. Means should be employed by township officers from time to time in making their examinations of bridges, such as will usually disclose the defects to be expected.—Stebbins v. Township of Keene, 55 Mich. 552.

¶ 772. Township officers must be on the watch for defects in township bridges; and their neglect of reasonable and ordinarily effective watchfulness will make the township liable for injuries resulting from such defects.—Stebbins v. Township of Keene, 55 Mich. 552.

¶ 773. A township is bound to make a reasonable inspection of highway bridges maintained by it, and is liable for injuries resulting from the failure to observe that duty.—Bettys v. Township of Denver, 115 Mich. 228.

¶ 774. Under the statute (Comp. L. 1879, p. 223) a township may or may not be liable for any injury sustained from the breaking down of a bridge because of a latent defect therein. Reasonable care and diligence on the part of the township officers in ascertaining the defect are required to absolve the township from liability.—Medina Tp. v. Perkins, 48 Mich. 67.

¶ 775. Laws 1861, Act No. 197 provided that for an injury sustained by an individual upon a public highway "by reason of neglect to keep in repair any bridge or culvert by any township or corporation whose duty it is to keep such bridge or culvert in repair," such township or corporation should be liable in damages. Held that as, before this statute, townships were under no legal duty or obligation to keep highways and bridges in repair, and as the act imposed no new duties upon them, therefore they were not liable under the act for damages occasioned by neglect to keep bridges and culverts in repair.—Township of Leoni v. Taylor, 20 Mich. 148.

¶ 776. One may recover for injury sustained in person and property by reason of the defendant city's neglect of its duty to keep in repair a bridge over which he was lawfully attempting to pass.—Woodbury v. City of Owosso, 64 Mich. 239.

¶ 777. In repairing a bridge it need only be put in the same condition of strength and soundness as new bridges of the same kind. (How. St. §§ 1442-1446.)—Fulton Iron & Engine Works v. Township of Kimball, 52 Mich. 146.

¶ 778. While a township is not required by the statute to change the plan or capacity of its bridges, or to build bridges for unusual loads, it is bound, if it keeps an old bridge, to keep it in such repair as is required by a bridge of that kind.—Stebbins v. Township of Keene, 60 Mich. 214.

¶ 779. Where the public is allowed to use indiscriminately a bridge built by mill-owners in a public highway, and also a public bridge side by side with the former, both equally inviting, without notice as to the private character of the former bridge, the city must keep such bridge in safe condition for travel and is liable for injuries resulting from the falling thereof.—Detwiler v. City of Lansing, 95 Mich. 484.

§ 211. Duty to provide railings, barriers or warning signals.

On bridges and approaches, see post § 212.
During construction work or as protection against excavations, see post § 213.
Officer or municipality charged with the duty, see post § 214.
Liability for failure to construct or for defective plan or manner of construction, see ante §§ 200, 201.
Liability to foot travelers for injuries from holes, excavations and depressions, see post § 233.
Failure to erect barriers and railings as proximate cause of injury, see post § 241.

Allegations of breach of duty to give notice of dangerous way, see post § 273.
Evidence as to usage and custom of erecting railings or barriers, see post § 283.
Questions of law and fact as to barriers, railings and warning signals, see post § 309.
Instructions as to duty to erect railings and barriers, see post § 348.

¶ 780. Where a roadway is built at such a height between hills, and so narrow, as to require barriers or railings to make it reasonably safe and fit for public travel, it becomes the duty of the township to erect them, and failing so to do it must be held liable for injuries resulting from a neglect of such duty.—Malloy v. Township of Walker, 77 Mich. 448.

¶ 781. It is not the duty of a township to provide a railing where a fill in a level highway is only three or four feet high though the fill is only from nine to eleven feet wide.—Canfield v. Township of Gun Plains, 175 Mich. 379.

Sufficiency of guard rail or barrier on bridges as dependent upon ability to withstand automobiles and other vehicles, see note, 9 N. C. C. A. 1022-1025.

§ 212. ——On bridges and approaches.

Liability for defective plan or manner of construction, see ante § 202.
Right of public to recover indemnity from person responsible for defective bridge, see post § 264.
Absence of railings as proximate cause of injury, see post §§ 244, 245.
Evidence as to condition of bridges and culverts, see post § 294.
Questions of law and fact as to guard railings, see post § 322.

¶ 782. The failure of the bridge tender to close the gates on the approach to a drawbridge while the bridge was up, resulting in the automobile going into the river and drowning an occupant riding with the owner, makes the city liable under Comp. L. 1897, §§ 5516-5517 (How. St., 2nd Ed., §§ 4239, 4240).—Beach v. City of St. Joseph, 192 Mich. 296.

Sufficiency of guard rail or barrier on bridges as dependent on ability to withstand automobiles and other vehicles, see note, 9 N. C. C. A. 1022-1025.

§ 213. ——During construction work or to protect against excavations.

¶ 783. A city, while grading and paving a street under the power conferred by its charter, must close to public travel, that portion thereby rendered unfit and unsafe, in order to suspend the duty imposed by statute to keep its streets which are open to public travel in good repair for that purpose.—Southwell v. City of Detroit, 74 Mich. 438.

¶ 784. A city is bound, when excavating in a public street for the purpose of laying water mains and pipes, to use reasonable care to protect travelers from accident.—O'Rourke v. City of Monroe, 98 Mich. 520.

¶ 785. At night, barriers and lights must be placed to give warning of danger; but the city is not required to place barriers to prevent the use of the street along the sides of which the excavation is being made.—O'Rourke v. City of Monroe, 98 Mich. 520.

¶ 786. A city is liable if, after removing a crosswalk and making an excavation, it does not render the descent into the latter safe, or protect it by lights and barriers.—Alexander v. City of Big Rapids, 76 Mich. 282.

¶ 787. The duty resting upon a municipality to cause excavations in the streets occasioned by the construction of a public sewer to be properly guarded and lighted cannot be shifted upon the contractor so as to relieve the city from its obligation.—Baker v. City of Grand Rapids, 111 Mich. 447.

¶ 788. A street need not be closed to travel because a new sidewalk is constructing. The utmost that is required is that the public be excluded from the part of the walk that is not reasonably safe and fit for travel while it is in that condition.—Walker v. City of Ann Arbor, 111 Mich. 1.

¶ 789. A city may avail itself of the placing of barriers and lights by the contractor or the property owner on a sidewalk under repairs, in an action against it for personal injuries received after the removal thereof, with the same effect as if they had been placed by the city itself.—Walker v. City of Ann Arbor, 111 Mich. 1.

¶ 790. In order to suspend the duty imposed by statute to keep streets which are open to public travel in good repair for that purpose, a city, while grading and paving a street under the power conferred by its charter, must close to public travel that portion thereof rendered unfit or unsafe.—Beattie v. City of Detroit, 137 Mich. 319.

¶ 791. A city, leaving a street which is being repaired in condition for travel, is bound to see that it is reasonably safe for travel not only at the time but also that it will remain so notwithstanding the effect of rain or storm which might reasonably be expected at that season of the year.—Beattie v. City of Detroit, 137 Mich. 319.

¶ 792. It is the duty of a city to give plain warning that there is danger in traveling its streets, and this is ordinarily done by displaying a red lamp; the city is not required to barricade its streets so as to preclude injury.—Karrer v. City of Detroit, 142 Mich. 331.

¶ 793. While a highway is undergoing repair, ordinary care must be taken to prevent

injuries to travelers thereon, and if the way becomes dangerous or impassable, it must be protected, and fences, barriers or other means must be used to warn travelers of the danger.—Speck v. Township of Bruce, 166 Mich. 550.

¶ 794. A barrier across a highway is one and may be the best or most usual means of giving notice that the highway is closed, but it is not the exclusive means, and it is sufficient if the public by other means equally efficient receives notice that a highway is closed.—Long v. Township of Weare, 195 Mich. 706.

¶ 795. Inasmuch as a city, by granting a permit to plumbers to make an excavation in the street has notice that an excavation is about to be made, it is liable to a third person for the loss of a horse due to leaving the excavation open and improperly guarded at night, and it is immaterial that an ordinance provided that no such excavation should be left open over night.—Repperd v. Chapin, 190 Mich. 19.

§ 214. Officer or municipality charged with the duty.

As to bridges and culverts, see post § 215.
As to joint roads and bridges, see post § 216.
Relative duties and powers of highway officers and districts, see ante VII.
Public duty to erect and repair bridges, officer or division charged with duty, see also Bridges, V.

¶ 796. The enabling act by which a village was incorporated under the general law (How. St., chap. 81) exempted the village from the superintendence of the commissioner of highways of the township in which it was located, and the inhabitants from the performance of highway labor, except as ordered by the village authorities, and forbade the levy by the supervisors of said township of any highway tax upon the taxable property of the village. Held not to relieve the townships from the duty imposed by How. St. § 2583, of keeping in repair bridges in highways leading into or through such village, and not laid out or established by the village authorities, nor to render the village liable for injuries sustained by reason of their nonrepair.—Quinlan v. Village of Manistique, 85 Mich. 22.

¶ 797. A township is liable under statute (How. St. § 1446e) for an injury caused by a defective crosswalk in an unincorporated village.—Frary v. Township of Allen, 91 Mich. 666.

¶ 798. As § 2, chap. 21, Act No. 283, Pub. Acts 1909, How. Ann. St., 2nd Ed., § 2450, expressly confers on townships and unincorporated villages power to establish, build and maintain sidewalks along roads and highways which are under control of boards of county road commissioners, whose jurisdiction extends over the traveled portion of highways only, a county that has adopted the county road system under such act is not responsible for injuries sustained by a pedestrian on a defective sidewalk in an unincorporated village.—Ferguson v. County of Muskegon, 181 Mich. 335.

¶ 799. The liability imposed by § 21, chap. 4, Act No. 283, Pub. Acts 1909, How. Ann. St., 2nd Ed., § 2252, on counties for the failure to boards of county road commissioners to keep roads under their control reasonably safe for public travel, applies to the traveled portion only of roads, bridges and culverts, and the fact that the liabilities imposed on cities, villages and townships for damages for injuries resulting from the failure to keep streets and sidewalks reasonably safe for travel is extended to counties, does not render a county answerable for injuries sustained on a defective sidewalk in an unincorporated village on a road under the control of such board.—Ferguson v. County of Muskegon, 181 Mich. 335.

¶ 800. That boards of county roads commissioners are vested by § 19, chap. 4, Act No. 238, Pub. Acts 1909, How. Ann. St., 2nd Ed., § 2250, with respect to roads, bridges and culverts, with all authority vested in township highway officers, does not disclose a legislative intent to impose upon a county liability for failure to keep sidewalks along roads under the board's control in a condition reasonably safe for travel.—Ferguson v. County of Muskegon, 181 Mich. 335.

Liability of highway officers for injuries caused by defects in highway, see note, 8 N. C. C. A. 133-144.

§ 215. ——Bridges and culverts and approaches thereto.

¶ 801. A graded approach to a bridge is a part thereof, and must be kept in reasonably safe condition by the corporation charged with the care of the bridge itself.—Shaw v. Township of Saline, 113 Mich. 342.

¶ 802. Under How. St. § 2853, making it the duty of the township in which an incorporated village is located to build, control, and keep in repair all bridges within the village limits in highways established by authority other than that of the village itself, the township, and not the village, has the duty of erecting and maintaining the railings and barriers necessary to render a graded approach to such a bridge reasonably safe for public travel.—Shaw v. Township of Saline, 113 Mich. 342.

¶ 803. It is the duty of the Bay County Bridge Commission, to which is given the control of all the bridges within a certain district, comprising two cities separated by a river, to keep in repair the approach to a bridge connecting the cities, theretofore in charge of the board of supervisors, who acquired it from the original construction company, where the approach was constructed upon unplatted land, and has always been

repaired by those owning and controlling the structure, and where the act establishing the commission (Local Acts 1889, No. 278, § 4) provides that all moneys raised thereunder shall be expended for the purpose of building, repairing, and operating bridges "and the approaches thereto."—People ex rel. Attorney General v. Bay County Bridge Commission, 115 Mich. 622.

¶ 804. Under 1 Comp. L. § 3441, and 2 Comp. L. §§ 5516-5521, the bridge commission acquiring a drawbridge from Bay County, and controlling the same, is acting in the interest of the public, and is not liable as an independent corporation for torts to third persons arising from the negligent operation of the bridge.—Scharman v. Bay County Bridge Commission, 158 Mich. 77. (Blair, C. J., Moore, Montgomery and McAlvay, JJ., dissenting.)

§ 216. ——Roads and bridges under joint control.

¶ 805. Under the statutes imposing the duty of upkeep for an injury caused to a traveler by the unsafe condition of a state road on the line between two townships, the township to which the care of that portion of the road whereon the accident occurred had been assigned is liable.—Sharp v. Township of Evergreen, 67 Mich. 443.

¶ 806. For an injury caused to a traveler by the unsafe condition of a state road on the line between two townships, the township to which the care of that portion of the road whereon the accident occurred had been assigned is liable.—Sharp v. Township of Evergreen, 67 Mich. 443.

¶ 807. Two townships contracted under Laws 1861, No. 163, § 4, that each should maintain specified divisions of a highway upon the township line between them, and the agreement was performed for many years. Subsequently one township knowingly allowed a bridge on its division to remain out of repair, whereby plaintiff was injured. Held, that plaintiff could recover, although the contract was not recorded as required by the statute.—Hunter v. Township of Dwight, 157 Mich. 634.

¶ 808. By Local Acts of 1879, No. 280, incorporating the village of Petoskey, it was provided that all bridges built and to be built across Bear river, within the limits of the village, should be maintained by the township of Bear Creek at large. The village afterwards constructed a raceway for its own use, running parallel with the river. Across the raceway and river a bridge was constructed by private subscription, which bridge was thereafter recognized by both village and township as a public way. Held that it was the duty of the village to keep in repair that part of the bridge which spanned the raceway.—Williams v. Village of Petoskey, 108 Mich. 260.

¶ 809. The township and not the village is liable for personal injuries caused by defective railing on a bridge over a mill race on a State road within the corporate limits of a village, the road having been laid and the bridge built before the incorporation of the village, under Comp. Laws, § 2775, and Public Acts 1909, ch. VIII, § 26, the authority to repair the bridge being vested in the township and not in the village, and hence the former and not the latter is liable.—McRae v. Township of Hart, 179 Mich. 325.

§ 217. Persons to whom duty owing.

See also ante ¶ 746.

Duty towards bicyclists, see post § 231.

What constitutes negligence towards vehicle users, see post XII, C.

What constitutes negligence towards foot travelers, see post XII, D.

Negligence towards licensees and wrongdoers, see post XII, E.

Negligence towards persons working in street or highway, see post § 239.

Right of action for injury from defective highways, see post § 265.

Parties to actions for injuries, see post § 272.

¶ 810. The provision (How. St. § 1446e), which requires municipalities to keep in reasonable repair all public highways, etc., does not give to everyone a right of action because it imposes a public duty; it must be construed with How. St. §§ 1446c, 1446d, by which are given certain rights of recovery for neglect to perform the duty thus imposed.—Roberts v. City of Detroit, 102 Mich. 64.

¶ 811. A city in this state in the discharge of its public duty in respect to keeping streets and sidewalks in order is under no higher or different obligation to a citizen of Ohio than to one of the state of Michigan.—Detroit v. Osborne, 135 U. S. 492, 34 L. ed. 260, 10 Sup. Ct. Rep. 1012; reversing 32 Fed. 36.

¶ 812. A city is not relieved from liability for a defective walk to a person injured thereby merely because he is the tenant of the premises abutting on the walk, where the defect is not in any way attributable to him.—Hendershott v. City of Grand Rapids, 142 Mich. 140.

Injury to automobile or occupants by defective highway, see note, 8 N. C. C. A. 922-941.

B. NOTICE AND OPPORTUNITY TO MAKE SAFE.

§ 218. In general; necessity of notice or knowledge of defect or danger.

Of defects in bridges, see post § 219.

Of condition of street upon which repairs are being made, see also ante § 213.

Duty to inspect and keep in repair, see ante § 203.
Pleading notice or knowledge of defect, see post § 275.
Burden of proof and presumptions as to notice and opportunity to repair, see post § 281.
Evidence as to notice and opportunity to make safe, see post § 291.
Sufficiency of evidence to show notice or knowledge of defect, see post § 300.
Questions of law and fact as to notice and opportunity to make safe, see post § 323.
Instructions as to notice or knowledge of defect, see post §§ 350, 353, 356.
Statutory notice of claim and injury as foundation for action, see post § 266 et seq.
Statutory provision dispensing with notice of defects in original plan, see Comp. L. 1915, § 4589.
Character and sufficiency of notice required, see Comp. L. 1915, § 4590.

¶ 813. A city cannot be held responsible for any defect in a sidewalk that is not known to any officer whatever, whether connected with the street department or not, or that is not generally known, or not apparent to ordinary observers.—Dewey v. City of Detroit, 15 Mich. 307.

¶ 814. No liability for injuries attaches to a municipality because of latent defects in a sidewalk unless the structure is of such a character that failure to examine would in itself be negligence. The defect must be such as to suggest unsafety.—Lombar v. Village of East Tawas, 86 Mich. 14.

¶ 815. A township is not bound to protect the public against latent defects in a highway which could not be discovered by reasonable diligence.—Wakeham v. Township of St. Clair, 91 Mich. 15.

¶ 816. A township is not liable for an injury resulting from an overflow of the highway where it has not had notice, actual or constructive, of the highway's defective condition.—Smith v. Township of Walker, 117 Mich. 14.

¶ 817. A city is not liable for an injury sustained by the plaintiff in slipping upon an icy sidewalk adjoining her home, where the ice was claimed to have been caused by water which flowed from a private hydrant not exceeding three days prior to the accident, and where the walk was off the business streets and there was no occasion for a city officer to go there until notified of the condition.—Corey v. City of Ann Arbor, 124 Mich. 134.

§ 219. ——Defective culverts and bridges.
Sufficiency of notice, see post § 223.
Duty to inspect and repair bridges and culverts, see ante § 210.
Questions of law and fact as to notice, see post § 325.
Instructions as to notice of condition of bridges and culverts, see post § 356.
Liability toward vehicle users, see post § 280.

¶ 818. A township can hardly be held liable for injuries caused by latent defects in a bridge over a mill-race where they do not affect the traveled part of the way and where the miller has apparently not been negligent in performing his statutory duty of looking after the condition of the bridge.—Abernethy v. Township of Van Buren, 52 Mich. 383; Beckwith v. Township of Van Buren, 66 Mich. 89.

¶ 819. A city can only be held liable for an injury from a defective bridge where it has had notice of the unsafe condition, or where the want of repair could have been discovered by reasonable diligence and continued so long that want of knowledge on the city's part would itself be negligence.—Woodbury v. City of Owosso, 64 Mich. 239.

¶ 820. A township cannot be held liable for injuries received through latent defect in the timber of a bridge, where its officers have no actual notice of the defect and where no neglect of duty on their part is pointed out.—Beckwith v. Township of Van Buren, 66 Mich. 89; Blank v. Township of Livonia, 79 Mich. 1.

¶ 821. A township cannot be held liable for injuries received from the breaking, on account of internal dry rot, of the stringer of a bridge, where such stringer was examined before the accident by chipping and sounding, without defects being found.—Blank v. Township of Livonia, 79 Mich. 1.

¶ 822. Actual or imputed knowledge or notice of a defect in a highway or bridge is necessary to establish liability on the part of a township under Act No. 283, Pub. Acts 1909, § 2463, How. St., 2nd Ed., for injuries sustained as the result of such defect.—Whitford v. Township of Washington, 184 Mich. 422.

§ 220. Sufficiency of notice or knowledge.
Proper person or officer through whom to impute notice, see post § 221.
Sufficiency of constructive notice, see post § 222.
Notice of condition of bridges and culverts, see post § 223.
Sufficiency of evidence to show notice or knowledge, see post § 300.
Necessity of notice, see ante § 219.

¶ 823. Actual notice of the generally broken and unsafe condition of a piece of sidewalk is sufficient to charge the municipality with negligence in not repairing the walk, although notice of the particular defect which caused the injury complained of

is not shown.—Fuller v. City of Jackson, 92 Mich. 197.

¶ 824. Under 1 Comp. Laws 1897, §§ 3441-3445, a general statute, cities are liable for injuries due to defective streets and sidewalks when it is shown that the city had reasonable time and opportunity after knowledge of the defect, to repair it, and has not used reasonable diligence. Act No. 566, Local Acts 1905, tit. 24, § 24, provides that the City of Saginaw shall be liable in such case only when written notice of the defect has been sent to the board of public works. Held, that the local act is a valid limitation on the general act.—Forsyth v. City of Saginaw, 158 Mich. 201.

¶ 825. Verbally telling a member of the street committee of a village of a loose plank in a sidewalk, without stating its location, is not sufficient to charge the village with notice of the defect.—Rogers v. Village of Orion, 116 Mich. 324.

¶ 826. A city has notice and knowledge that an excavation is about to be made by plumbers in a street where it grants a permit to the plumbers to do the work.—Repperd v. Chapin, 190 Mich. 19.

§ 221. ——Proper officer or person to affect with notice.

Powers and duties of the respective officers, see ante VII.

¶ 827. The words "after knowledge by or notice to such township," etc., in How. St. § 1446d, relating to the duty of a township in respect to supervision of bridges, do not mean express knowledge or information of defects; "notice" is not synonymous with "knowledge"; and the municipality is chargeable where its proper officer has been advised of defects.—Moore v. Township of Kenockee, 75 Mich. 332.

¶ 828. Notice to an officer charged with the control and supervision of streets, etc.—such as a street commissioner, an alderman, or the city marshal—of the unsafe condition of a cross-walk or sidewalk, is notice to the city.—Dundas v. City of Lansing, 75 Mich. 499; Fuller v. Jackson, 82 Mich. 480.

¶ 829. The city clerk is not an officer charged with the duty to see that sidewalks are kept safe for pedestrians so as to make his knowledge of the defective condition notice to the city.—Corey v. City of Ann Arbor, 134 Mich. 376.

¶ 830. Under Pub. Acts 1887, Act No. 264, imposing liability on municipalities for bodily injuries sustained by neglect to keep public highways in condition reasonably safe and fit for travel, a city was liable for an injury sustained by one who was thrown as the result of a vehicle colliding with stones which had been placed in a public

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condition live near it and frequently pass over the defective part, it is not necessary, in order to render the township liable for an injury, that complaints should be made to such officers.—Malloy v. Township of Walker, 77 Mich. 448.

¶ 840. It is the road-way that the statute (Laws 1887, Act No. 264) requires to be kept in a reasonably safe condition; and whether such way requires the use of the entire width of the street must depend entirely upon the necessities of travel in any given case, and of this the city authorities must take notice, at their own peril; so held where a stump had been left standing in a street.—Sebert v. City of Alpena, 78 Mich. 165.

¶ 841. Where an injury occurred near the line between two lots, it being somewhat uncertain what was the precise spot, and by charter of the city each abutter was required to build his own walk, and it appeared that one walk was in bad condition and unsafe while the other had recently been inspected and reported sound, the city cannot claim that only in case of actual notice of the defect in the walk reported sound could it be held liable; since the general bad condition where the walks join is some evidence of constructive notice.—Nestle v. City of Flint, 141 Mich. 153.

§ 223. ——Of condition of bridges and culverts.

See also ante ¶¶ 834, 835.
Presumptions as to notice or knowledge of condition of bridge, see post § 281.
Evidence as to notice, see post § 294.
Questions of law and fact as to notice of defects, see post § 325.
Opportunity to make safe, see post § 225.

¶ 842. When it is generally known that a bridge has become decrepit, or when it has stood so long that there is much suspicion of it, the officers of the township may not disregard the warning conveyed on the ground of want of actual notice of the dangerous infirmity.—Moore v. Township of Kenockee, 75 Mich. 332.

¶ 843. A city is chargeable with constructive notice of the defective condition of a bridge within its jurisdiction, where the defect is of such long standing and of such character as actually to arrest the attention of passersby, or of persons inspecting the bridge.—Snyder v. City of Albion, 113 Mich. 275.

¶ 844. Notice is imputable from failure to make a full examination when suspicious appearances are revealed when repairs are going on.—Stebbins v. Township of Keene, 60 Mich. 214.

¶ 845. A township which does not have actual notice of a defect in a bridge is not liable for an injury received by a traveler unless the defect was of such a character as to be obvious, and was permitted to remain for an unreasonable length of time.—Whitford v. Township of Washington, 184 Mich. 422.

¶ 846. A city was not liable for an injury sustained through the absence of a short board forming part of the floor of an iron bridge which was first observed to be loose on Saturday night preceding the Tuesday on which the accident occurred, where the board had been put back in place and thus gave no sign of the defect, and where the city had no notice and there was no evidence from which notice could be properly inferred; the mere neglect of the city to inspect not being actionable under Comp. L. 1897, § 3441 et seq., imposing liability for injuries sustained upon a defective bridge provided the city had reasonable notice of the defect.—Thomas v. City of Flint, 123 Mich. 10.

¶ 847. The fact that a hole in a plank culvert in the middle of a street remains from five o'clock in the morning until eight in the evening of the same day is not sufficient to charge a city with negligence, there being no evidence of actual knowledge on the part of, or notice to, the city; the time is too short.—Reed v. City of Detroit, 99 Mich. 204.

§ 224. Opportunity, time and means to repair or protect.

To repair or make bridge safe, see post § 225.
Means to repair as element in negligent failure to repair, see also Bridges § 10.
Burden of proof as to opportunity to repair, see post § 281.
Evidence as to opportunity to make safe, see post § 291.

¶ 848. It cannot be urged as a defense that there were but two street commissioners, and that they could not possibly supervise the streets of a large city so as to discover at once and remedy all defects in streets, etc.; the statute having imposed the duty of repair and the liability for neglect, the city, at its peril, must do whatever is needful to protect itself against actions for injury.—Grand Rapids v. Wyman, 46 Mich. 516.

¶ 849. A city must have not only notice of the defects, but a reasonable time and opportunity after the streets become unsafe, etc., to put them in proper condition before a liability attaches.—McKellar v. City of Detroit, 57 Mich. 158.

¶ 850. A township cannot be charged with negligence in not repairing a hole in its highway by the fact that the overseer of highways found such hole the day before the accident for which suit is brought, where,

owing to water which continued to rise and overflow the road there was no opportunity to make repairs.—Smith v. Township of Walker, 117 Mich. 14.

¶ 851. Where it appears from the evidence that a plank in a sidewalk had been loose for two months, the fact that a futile attempt was made three days before the injury therefrom to remedy the defect will not relieve the city from liability.—Moon v. City of Ionia, 81 Mich. 635.

¶ 852. Where a city sought to escape from liability for an injury sustained by reason of a defective sidewalk by claiming that the statute (Laws 1887, Act No. 264), imposing liability in such cases became operative so short a time before the accident that the city could not raise by tax the money necessary to make repairs, the council being prohibited from pledging the city for such purpose, the city could not escape liability if there were funds in the treasury raised on the individual credit of members of the council for the purpose of making repairs. —Moon v. City of Ionia, 81 Mich. 635.

¶ 853. Where, in a suit for personal injuries received by falling upon a defective sidewalk, the testimony, if believed, shows that the walk was repaired and placed in a condition reasonably safe for public travel the day before the accident, it cannot be said that a sufficient length of time had elapsed from which notice of the defective condition of the walk could be inferred, or that the city had had a reasonable time within which to repair the defect.—Dittrich v. City of Detroit, 98 Mich. 245.

¶ 854. Failure to put a sidewalk in proper condition within a reasonable time after notice of a defect therein is essential to the liability of a municipal corporation for personal injuries caused by such defect, whether the notice of the defect be actual or constructive.—Burleson v. Village of Reading, 110 Mich. 512.

¶ 855. Where a village has knowledge of a defective condition of a sidewalk, it is its duty to put it in a reasonably safe condition for travel and this duty is not discharged by sending a man to repair it.—Styles v. Village of Decatur, 131 Mich. 443.

§ 225. ——Bridges and culverts.

See also post ¶ 1107.

Officer or municipality charged with duty to keep bridges in safe condition, see ante § 215.

¶ 856. Want of means is not pleadable by a township which elected to maintain its highways and bridges, not by general taxation as provided by the general highway act, Comp. L. 1897, §§ 4104-4114, but by the labor of the inhabitants, under chapters 2 and 3, sections 4072-4103, since it was not relieved from the obligation to keep its highways in repair as provided by Pub. Acts 1887, Act No. 264; the township had authority to make repairs under sections 1, 2 and 3 of chapter 7 of the highway act.—Pearl v. Township of Benton, 136 Mich. 697.

C. DUTY AND NEGLIGENCE TOWARDS VEHICLE USERS; WHAT CONSTITUTES DEFECTS IN WAY.

§ 226. Improper condition of street or highway, in general.

Extent of duty and care generally, see ante § 199.

Liability for failure to construct, see ante § 200.

Liability for defective plan and manner of construction, see ante § 201.

Duty to inspect highways and keep them in repair, see ante § 203.

Trees on or overhanging way, see also ante § 209.

Duty to provide railings, barriers and warning signals, see ante § 211.

Officer or municipality charged with duty to keep highway in safe condition, see ante § 214.

Notice of conditions and opportunity to make safe, see ante XII, B.

Contributory negligence of vehicle users, see post § 247.

Proximate cause and concurrent causes, see post § 241.

Sufficiency of evidence to show negligence, see post § 299.

Questions of law and fact as to condition and safety, see post §§ 305, 306.

Instructions as to duty and negligence respecting roadways, see post § 346.

Actions for injuries, see post XII, H.

Notice and statement of claim, see post § 266.

Duty and negligence toward foot travelers, see post XII, D.

Injuries to vehicle users from other users of road, see post XIII.

Statutory liability for injuries to horses and vehicles, see Comp. L. 1915, § 4585.

Provisions for erection of railing along narrowed way in lieu of widening same, see Comp. L. 1915, § 4396.

¶ 857. While a roadway otherwise reasonably safe for public travel is not usually made unsafe, within the meaning of the statute, because of natural accumulations of ice or snow thereon, a road may, however, be constructed in such manner as to become unsafe for ordinary travel whenever its surface becomes slippery, and especially when it is covered with snow or ice, and in such case the township may be liable for personal injuries received therefrom.—Stanton v. Township of Webster, 170 Mich. 428.

Injury to automobile or occupants by defective highway, see note, 8 N. C. C. A. 922-941.

§ 227. Obstructions and objects in streets.

Liability of abutting owner for obstructions left in streets, see post § 256.

Declaration for injuries from obstructions in streets, see post § 273.
What constitute obstructions and improper uses, see ante XI.
Proceedings and actions to remove obstructions and open way, see ante XI.

¶ 858. Where a man was thrown out of his buggy and killed in consequence of striking a pile of lumber that projected over the street to the traveled part of the way but not over the latter, which was in proper repair, his administratrix could not recover against the municipality for his death as for an injury caused by failing to keep the street in repair and safe for travel.—McArthur v. City of Saginaw, 58 Mich. 357.

¶ 859. The act "for the collection of damages sustained by reason of defective public highways, streets," etc. (How. St. §§ 1442-1446), covers such defects only as are due to want of repair, and has nothing to do with the presence in the street of building material or other objects that do not affect its condition in that particular.—McArthur v. City of Saginaw, 58 Mich. 357.

¶ 860. The unauthorized or excessive use of portions of the street by an abutting owner in putting lumber or materials thereon, is an abuse to be rectified under the police powers of the city, and does not belong to the making or repairing of the highway.—McArthur v. City of Saginaw, 58 Mich. 357.

¶ 861. A city is not liable for an injury from a boulder temporarily left in the street by the side of the traveled part during steps taken to remove it; allowing things that are not part of the street to stand therein is not putting it out of repair.—Agnew v. Corunna, 55 Mich. 428.

¶ 862. Where a highway has existed for over fifteen years an obstruction therein is not excused by the fact that similar obstructions are common in other roads which, not having been in use for ten years, are not public highways under How. St. § 1315.—Langworthy v. Township of Green, 88 Mich. 207.

§ 228. Operations and conditions frightening horses.

Questions of law and fact as to fright of horses, see post § 311.
Instructions as to fright of horses, see post § 347.
Fright of horses caused by other users of road, see post § 376.
Contributory negligence in driving and handling horses, see post § 247.
Fright or other cause as proximate to injury, see post § 244.

¶ 863. A city is not liable in damages to a person riding in a buggy on the public streets and whose horse became frightened and ran away because of the fact that firemen were flushing the street from a fire hydrant, where it appears that the hydrant had never been used for any other purpose than fire purposes, that no water had ever been sold by the city or used by it for any other purpose than extinguishing fires, and that the sole object of opening and flushing this hydrant was to remove accumulations and obstructions.—Brink v. City of Grand Rapids, 144 Mich. 472.

¶ 864. A city is not liable in damages for injuries sustained by a horse becoming frightened by the flushing of a city fire hydrant, where the city had no pecuniary interest in establishing or maintaining the hydrant and received no compensation for its use, it was maintained entirely by taxation upon the entire city, and its use was for the sole benefit of the entire city, and it was constructed, maintained, and used in a governmental capacity.—Brink v. City of Grand Rapids, 144 Mich. 472.

¶ 865. An action for personal injuries sustained by one riding in a buggy on the public streets by reason of his horse taking fright because of firemen flushing a street from one of the city's fire hydrants cannot be maintained under the statutory liability that a city must keep its streets in a condition reasonably safe for public travel.—Brink v. City of Grand Rapids, 144 Mich. 472.

Horses frightened by various objects on or near highways, see note, 3 N. C. C. A. 859-866.
Liability for injuries caused by frightening horses on streets or highways, see note. 12 N. C. C. A. 145-173.
Duty of persons conducting operations in streets to prevent frightening horses, see note, 12 N. C. C. A. 255-277.

§ 229. Towards users of heavy vehicles or engines.

On bridges and culverts, see post § 230.
Instructions as to opportunity to make repairs, see post §§ 354, 356.

¶ 866. Pub. Acts of 1909, No. 283, chap. XXII, § 1, How. 2nd Ed., § 2462, imposing the obligation upon a municipality to keep and maintain its highways in a condition reasonably safe and fit for travel applies even to the use of the streets by automobiles and heavy motor trucks, as such vehicles must now be regarded as in common use.—Cone v. City of Detroit, 191 Mich. 198.

§ 230. ——On bridges and culverts.

Notice or knowledge of defective condition, see ante §§ 219, 223.
Duty to inspect and repair bridges and culverts, see ante § 210.
Duty to provide railings, barriers or warning signals on bridges, see ante § 211.

Ditches and gutters as culverts within meaning of statutes as to inspection and repair, see ante § 208.
Liability for defective plan and construction, see also ante § 202.
Duty to provide railings and barriers, see ante § 212.
Proximate cause of injury upon bridges and culverts, see post §§ 245, 246.
Contributory negligence in using bridges and culverts, see post § 249.
Pleading issues and variance, see post §§ 273, 278.
Presumption of contributory negligence from knowledge of defects, see ante § 250.
Presumptions as to repairs of bridge, see post § 280.
Evidence as to construction, strength and condition of bridges and culverts, see post § 294.
Evidence to show notice of claim, see post § 303.
Want of railing on bridge as proximate cause of injury, see also Bridges § 11.
Condition of snow on bridge frightening horses, see also Bridges ¶ 22.
Liability of toll bridge company for failing to guard drawbridge, see Toll Roads.
Statutory duty to provide gates and barriers for draw bridges or swing bridges, see Comp. L. 1915, § 4432 et seq.
Statutory width and minimum load limit for bridge or culvert, see Comp. L. 1915, § 4427.

¶ 867. Whether changed conditions in modes of travel and transportation render a repeal of Pub. Acts 1903, No. 71, How. 2nd Ed., § 4235, providing in part that no township shall be liable in damages for damage sustained by the breakage of any bridge or culvert by any steam engine or steam vehicle weighing more than six tons, advisable, held purely a question for legislative determination.—Lundstrom v. Township of Ellsworth, 196 Mich. 502.

¶ 868. A municipality putting up public bridges is not obliged to anticipate every conceivable strain to which they may be subjected, such, for instance, as the passage of heavy machinery of a kind not used when the bridge is built.—Fulton Iron & Engine Works v. Township of Kimball, 52 Mich. 146.

¶ 869. If a bridge is reasonably safe and fit for the ordinary modes of travel in use at the time of its construction, the city cannot be held liable for any injury occasioned by unanticipated and extraordinary use of the same,—such as running steam-engines over it by self-propulsion.—Woodbury v. City of Owosso, 64 Mich. 239.

¶ 870. The duty is only to provide reasonably safe bridges under existing conditions and not to provide structures that will sustain loads that could not reasonably be anticipated.—Moore v. Township of Hazelton, 118 Mich. 425.

¶ 871. Where the driver of an engine was warned to use planks in crossing a bridge, and told by the highway commissioner that it would be safe if planks were used and probably was safe anyway, and planks were used but the engine fell off the planks and through the bridge, the township, not being an insurer, was not liable though the running off the planks was not due to plaintiff's negligence.—Comstock v. Township of Georgetown, 137 Mich. 541.

¶ 872. Pub. Acts 1903, No. 71, How. 2nd Ed., § 4235, providing in part that no township shall be liable for any damage sustained by the breakage of any bridge or culvert by any steam engine or steam vehicle weighing more than six tons, held to embrace reasonable questions of legislative discretion not inhibited by any constitutional provision.—Lundstrom v. Township of Ellsworth, 196 Mich. 502.

§ 231. Towards bicyclists.

Contributory negligence of bicyclist using bridge, see post § 249.
Questions of law and fact, see post § 305.
Instructions in actions for injuries to bicyclists, see post §§ 345, 348.

¶ 873. No recovery can be had for injury to a bicyclist caused by a defective pavement where the street was in a reasonably safe condition for ordinary travel, since How. St. § 1446 et seq., requiring that streets be kept in a reasonably safe condition applies to ordinary vehicles such as wagons and carriages and has no application to travel by means of bicycles.—Leslie v. City of Grand Rapids, 120 Mich. 28.

¶ 874. The riding of a bicycle on a sidewalk is not unlawful at common law.—Lee v. City of Port Huron, 128 Mich. 533.

¶ 875. Under Comp. L. 1897, § 3441, requiring sidewalks to be kept in reasonable repair and fit for travel, a city is liable for injuries sustained by a bicyclist riding upon a defective sidewalk where the defect is such as to be dangerous for the ordinary traffic on the walk.—Lee v. City of Port Huron, 128 Mich. 533.

D. DUTY AND NEGLIGENCE TOWARDS FOOT TRAVELERS, AND WHAT CONSTITUTE DEFECTS.

Actionable injuries to pedestrians from other persons driving on street, see post XIII. B.

§ 232. Defective walks and crosswalks in general.

Holes, excavations and depressions in walk or way where persons walk and dangers beside way, see post §§ 233, 234.
Water, snow or ice on walk, see post § 235.
Obstructions and objects in way, see post § 236.

Defective and unsafe roadways or drives, see post § 237.
Speeding or racing in roadway, see post § 238.
Extent of duty and care, generally, see ante § 199.
Liability for failure to construct, see ante § 200.
Liability for defective plan or manner of construction, see ante § 201.
Duty to inspect and keep in repair, see ante § 203 et seq.
Duty to provide railings, barriers or warning signals, see ante §§ 211 et seq., 226.
Officer or municipality charged with duty of keeping highway in safe condition, see ante § 214.
Notice of danger and opportunity to make safe, see ante XII, B.
Proximate cause of injury, see post § 241.
Contributory negligence of foot travelers, see post § 250.
Actions for injuries, see post XII, H.
Notice and statement of claim to municipality, see post § 266.
Declaration in action for injuries, see post § 273.
Burden of proof, see post § 280.
Sufficiency of evidence to show negligence, see post § 299.
Questions of law and fact as to condition and safety of streets, see post § 305 et seq.
Liability of abutters, private owners and corporations, see post XII, G.
Liability of corporations and persons constructing, repairing or using streets, see post § 260.
Statutory provisions as to railings on narrowed ways, see Comp. L. 1915, § 4396.

¶ 876. Where a village has constructed and maintained a crosswalk on a level with the sidewalk, and an adjoining land-owner in remodeling the sidewalk creates a step or fall to the crosswalk, and the crosswalk at this point is out of repair, the village, after notice, becomes liable for injuries resulting from the obstruction and defect.—Shippy v. Village of Au Sable, 85 Mich. 280.

¶ 877. A rise in a crosswalk, caused by one end of a plank, lying lengthwise in the walk, being raised two inches above the adjoining plank, is not a defect in the walk, so that it is not reasonably safe, within the meaning of How. St. § 1446e.—Weisse v. City of Detroit, 105 Mich. 482.

¶ 878. An abrupt rise of two inches above the level of a sidewalk caused by laying planks lengthwise thereon to permit teams to pass to adjoining premises does not render the walk not "reasonably safe" for public travel.—Yotter v. City of Detroit, 107 Mich. 4.

¶ 879. An earth walk that connects sidewalks on intersecting streets, and that, because of a difference in grade, inclines twelve inches in the three feet of its length, cannot be said to be unsafe.—Wesley v. City of Detroit, 117 Mich. 658.

¶ 880. A city could not defend an action for damages to a pedestrian who fell off the end of a sidewalk into the space left where some 50 feet of the sidewalk had been torn up, on the ground that no sidewalk existed at the point where the accident occurred.—Belyea v. City of Port Huron, 136 Mich. 504.

§ 233. Holes, excavations and depressions in walk.

Duty to provide railings, barriers or warning signals, see ante § 211.
Proximate cause of injury from stepping in holes and depressions, see post § 242.
Contributory negligence in failing to avoid holes and depressions, see post §§ 247, 251.
Avoidance of holes, excavations and depressions, see post § 251.
Proximate cause of the injury, see post § 242.
Declaration for injuries from holes and excavations, see post § 273.
Questions of law and fact as to holes, depressions and excavations, see post § 308.

¶ 881. How. St. § 1445, making it a city's duty to keep its crosswalks in repair, renders a city liable for failure to replace and keep in repair a crosswalk torn up in grading leaving an excavation into which plaintiff fell and was injured.—Alexander v. City of Big Rapids, 70 Mich. 224.

¶ 882. Where a city by tearing up a sidewalk and excavating under it, in the improvement of a street, makes the place a part of the street and allows it to remain so, it is liable to one who without fault on his own part falls into such excavation and is hurt. —Alexander v. City of Big Rapids, 70 Mich. 224; Alexander v. City of Big Rapids, 76 Mich. 282.

¶ 883. Where a city tears up a crosswalk and makes an excavation into which plaintiff, slipping on the sidewalk, falls, the fact that plaintiff's fall began on the sidewalk will not prevent recovery for injuries received, although at the time the city was not liable for injuries from defective sidewalks. —Alexander v. City of Big Rapids, 76 Mich. 282.

¶ 884. A city is not liable for injury to a person walking with a cane caused by the cane going through the walk between the planks which were slightly decayed along the edges, where the walk was in a reasonably safe condition for ordinary travel. Harden v. City of Jackson, 137 Mich. 271.

¶ 885. It is not negligence for a city to use plank walks though they have cracks and knot holes through which a cane might go, since the traveler must know that this is

unavoidable.—Harden v. City of Jackson, 137 Mich. 271.

¶ 886. Municipalities are not required to keep their streets and sidewalks absolutely smooth, and a condition of reasonable safety only is required; a depression in a cement sidewalk of only 1⅞ inches, probably caused by the excavation of a sewer underneath in refilling which the ground had not been solidly packed does not constitute such negligence as to make the city liable in an action for injuries sustained.—Bennett v. City of St. Joseph, 146 Mich. 382.

Liability of city for personal injuries resulting from coal holes and other openings in sidewalks, see note, 6 N. C. C. A. 407-415.

§ 234. Holes and dangerous conditions beside walk or way.

Defects and dangers in roadway, see post §§ 237, 238.
Road conditions causing vehicles to leave road and run upon walk, see post ¶ 899.

¶ 887. A township is liable for negligence in leaving unguarded in a highway for an unreasonable length of time a hole so near the highway intended for travel that persons would be likely to get into it in seeking to avoid a hole in the beaten track.—Wakeham v. Township of St. Clair, 91 Mich. 15.

¶ 888. Public travel is not supposed to occupy all parts of a country highway leading out of a village, though within its limits, and the public authorities cannot be expected to put the road in condition as if it were. So held where a woman in leaving the pathway at the side of such a road to go cross-lots fell into a hole.—Keyes v. Village of Marcellus, 50 Mich. 439.

Liability of municipal corporation for personal injury sustained from fall of billboard, see note, 5 N. C. C. A. 954-967.

§ 235. Accumulations of water, snow and ice.

Contributory negligence in walking on icy walks, see post § 252.
Declaration for injuries from accumulations of snow and ice, see post § 273.
Presumptions as to notice or knowledge of icy condition, see post § 281.
Questions of law and fact as to accumulations of ice and snow, see post § 314.
Injuries to vehicle users from accumulations of ice and snow, see ante § 226.

¶ 889. Pub. Acts 1879, p. 223 (How. St., §§ 1442-1446) extends to townships, villages and cities alike, but applies only to injuries that are due to defects from being out of repair, and not to such as are caused by the mere accumulation of ice and snow.—McKellar v. City of Detroit, 57 Mich. 158.

¶ 890. A city is not liable for injuries sustained by slipping on ice in the highway where such ice was by natural causes, through the stoppage of a catch basin but without fault on the city's part, formed from snow that had fallen in the highway.—Kannenberg v. City of Alpena, 96 Mich. 53.

¶ 891. A city is not liable for an injury caused by the accumulation along the sides of the streets and at street crossings of snow removed from sidewalks for foot travel, and from the middle of the street for the passage of vehicles, which snow has been changed by the weather to ice; the legislative intent to impose such liability not appearing in the statute requiring municipalities to keep their streets and walks in a condition reasonably safe for travel.—Hutchinson v. City of Ypsilanti, 108 Mich. 12.

¶ 892. The duty of a municipality to keep sidewalks in a condition reasonably safe for public travel cannot be extended so as to render it liable for injuries received by reason of the formation upon a walk of a thin strip of ice, caused by the discharge, at a point two feet away, of water conducted through a pipe from a sag in an eaves trough.—Gavett v. City of Jackson, 109 Mich. 408.

¶ 893. A city is not liable for injuries received in consequence of a fall on a sidewalk which fall was occasioned by the accumulation upon the sidewalk from natural causes of ice and snow.—Rolf v. City of Greenville, 102 Mich. 544; Wesley v. City of Detroit, 117 Mich. 658.

¶ 894. A city is not negligent in failing to remove from sidewalks accumulations of snow and ice due to natural causes.—Jefferson v. City of Sault Ste. Marie, 166 Mich. 340.

¶ 895. Although a city had made an attempt to clean its sidewalks by the use of a snow plow, it is not liable for a fall caused by the accumulation of ice from water for which the city was in no way responsible or from snow which was trodden down and tramped in and frozen, or from crowning snow left on the walk through the inability of the city to scrape off the hard snow.—Jefferson v. City of Sault Ste. Marie, 166 Mich. 340.

¶ 896. A municipality owes no duty to pedestrians to provide drains for sidewalks that are so situated that accumulations of water and ice can form thereon.—Mayo v. Village of Baraga, 178 Mich. 171.

Liability of municipality for negligence in removing ice and snow from streets or sidewalks, see note, 5 N. C. C. A. 463-482.

§ 236. Obstructions and objects on sidewalk.

Injuries from manhole in roadway, see post ¶ 898.

¶ 897. Where a street is rendered unsafe and unfit for public travel because of the act of a municipality in leaving a pile of sheet steel 30 inches high and weighing 600 pounds on a sidewalk against a building but in so nearly an upright position as to be easily toppled over, the municipality is liable for injuries to a pedestrian received as a result of the tipping over of the steel by some small boys who were playing about it.—Brown v. City of St. Johns, 187 Mich. 641, 14 N. C. C. A. 440.

§ 237. Defective and unsafe roadways.

¶ 898. Plaintiff, while attempting to cross diagonally the intersection of two city streets, was injured by stepping on the edge of a manhole situated just outside the sidewalk, and at the corner formed by the intersection of the two crosswalks with the sidewalk. Held, that it was the city's duty to render the manhole sufficiently safe with reference to the uses the public would probably make of it, but the space covered by the manhole need not be kept as smooth as a sidewalk.—Lincoln v. City of Detroit, 101 Mich. 245.

¶ 899. A city is liable for the death of a person who is killed by an automobile fire truck driven by city firemen where the truck, because of the unreasonably defective condition of the pavement, runs off the street and strikes decedent, and it is immaterial under such theory of the case whether or not the city's employees were negligent.—Cone v. City of Detroit, 191 Mich. 198.

§ 238. Speeding or racing in roadway.

Liability of driver for injuries to other users of road from racing and immoderate driving, see post § 378.

Injuries from fire truck running off the street, see ante ¶ 899.

¶ 900. Comp. L. 1897, chap. 91, relating to recovery of damages for the failure to keep village streets safe and fit for travel, does not cover a case for an injury sustained by a plaintiff by being struck by one of a number of horses engaged in racing in a street under permission of the village officers; the street having been in proper and safe condition.—McCarthy v. Village of Munising, 136 Mich. 622.

E. DUTY AND NEGLIGENCE TOWARDS OTHER PERSONS, LICENSEES AND WRONGDOERS.

Actionable injuries from construction or repair of streets or roads to adjacent property, see ante § 111.

Persons entitled to sue for water diversion, see ante ¶ 389.

Instruction in action for diverting waters, see ante ¶¶ 388, 390.

§ 239. Persons working in street or highway.

Extent of duty and care generally, see ante § 199.

Duty to inspect highways and keep them in repair, see ante § 203.

Persons to whom duty owing, see ante § 217.

¶ 901. The rule that a municipality is liable to strangers in the lawful use of the street, though it let an independent contract to perform the work, has no application to an action for damages by an employee of the contractor for village sewer work, through the caving of the ground where he was digging.—Lenderink v. Village of Rockford, 135 Mich. 531.

¶ 902. A person employed by the fire department of Detroit as an engine driver may claim damages from the city for an injury to him resulting from a defective street and received while driving his engine to a fire.—Coots v. City of Detroit, 75 Mich. 628.

§ 240. Children or others playing in street.

Proximate cause of injury to child, see post § 241.

Contributory negligence of children injured on highways, see post ¶¶ 934, 969.

Duty and negligence of vehicle users towards children and incapables, see post § 373.

Coasting in highway as nuisance, see ante § 177.

¶ 903. An ordinance prohibiting the playing of any game of nine or ten pins, ball, wicket, or other games in any street or other public place, has no application to a child playing at children's games, who was injured on a defective sidewalk while so playing. The "other games" are ejusdem generis of those named.—Beaudin v. Bay City, 136 Mich. 333.

¶ 904. Under Comp. L. 1897, § 3441, providing that any person or persons sustaining bodily injury upon any public street, sidewalk, etc., by reason of neglect in keeping the same reasonably safe for travel, may recover, for his injuries, a child who sustains injury upon a defective sidewalk while at lawful play, which involves travel, is to be regarded as within the spirit of the law and protected.—Beaudin v. Bay City, 136 Mich. 333.

¶ 905. Defendant city strung its electric wire over the grassplot between the sidewalk and the public street. During a storm the wire broke and an end hung down near the ground. Plaintiff, a child of five, stepped upon the plot and was injured by coming in contact with the wire. The evidence was not clear as to how the accident happened, plaintiff being found after the accident, lying on the ground under the wire. There was evidence from which an inference might be drawn that the plaintiff first touched the wire with her head and then with her hand. Held, plaintiff could not be considered a tres-

passer for "meddling" with the wire.—Johnson v. City of Bay City, 164 Mich. 251.

¶ 906. Defendant city strung its electric wire above the ornamental grassplot included between the public sidewalk and the street curb. The wire broke during a storm and one end of it hung down near the ground. Plaintiff, a child, went upon the grassplot and came into contact with the wire. In a suit for personal injuries, held, plaintiff was not a trespasser in stepping upon the plot.—Johnson v. City of Bay City, 164 Mich. 251.

Liability for injuries caused by or while coasting on or on across public street or highway, see note, 3 N. C. C. A. 514-523.

F. PROXIMATE CAUSE, CONTRIBUTORY NEGLIGENCE, AND ACTS OF THIRD PERSONS.

§ 241. Proximate cause and concurrent causes.

Particular causes and conditions, see post §§ 242-246.

Contributory negligence as a cause, see post § 247 et seq.

Injuries caused by acts of third persons, responsibility of public, see post § 253 et seq.

Questions of law and fact as to proximate cause, see post § 327.

Instructions as to proximate cause, see post § 358.

Proximate cause of injury to users of highway from other users, see § 381.

General law of proximate cause, see Negligence, III.

Proximate consequences of injury as compensable damages, see Damages, I-III.

¶ 907. A township is only liable, under How. St., §§ 1446c-1446e, for injuries sustained by reason of its neglect to keep its highways in repair, where such neglect is the proximate cause of the injury.—McKeller v. Township of Monitor, 78 Mich. 485; Beall v. Township of Athens, 81 Mich. 536.

¶ 908. A five-year-old child may recover against a city for an injury caused by the defective condition of a temporary walk approaching an excavation that was recently barricaded, the defective support of the walk and not the want of a good barrier being the cause of injury.—Brydon v. City of Detroit, 117 Mich. 296.

¶ 909. In an action by a traveler on a sidewalk, for injuries sustained by glass falling from a building, negligence in maintaining a window in such a condition that it was liable to fall out, was the proximate cause of the accident, although wind may have been a concurring circumstance.—Detzur v. Stroh Brewing Co., 119 Mich. 282.

¶ 910. Where the playfulness of a colt forced its team mate off the wrought portion of a highway at a point where one might drive at right angles in safety for thirty feet, beyond which an obstruction was struck and an accident resulted, the proximate cause was the action of the colt and not the failure of the defendant township to erect barriers along the highway.—Irwin v. Township of Byron, 183 Mich. 345.

¶ 911. Plaintiff was injured by a runaway team. The evidence showed that the team had become frightened at steam from a furnace before reaching a certain railroad crossing, were prancing and shying, but were not at that time beyond the driver's control. At the railroad crossing the defendant city had permitted the snow to be piled up, so that the team had to make a sharp descent upon the tracks, where the driver was thrown out, and the team being further affrightened by this descent, the runaway followed. Held, the condition of the snow was the proximate cause of the runaway so as to make defendant city liable.—Johnson v. City of Marquette, 154 Mich. 50.

§ 242. ——Pedestrians stepping or falling into holes or depressions.

Liability for injuries to pedestrians from holes and depressions, see ante § 233.

Contributory negligence in failing to avoid holes and excavations, see post § 251.

¶ 912. Where a horse fastened by a third person to a plank in a sidewalk suddenly jerked it out of place just as plaintiff came along, so that the latter stepped into the aperture, and was hurt, the defect in the walk cannot be said to be the primary cause of the injury.—Hembling v. City of Grand Rapids, 99 Mich. 292.

¶ 913. Municipalities are not required to keep sidewalks in a perfectly safe condition and are liable for injuries sustained by pedestrians only when the walks are not reasonably safe, and when it appears that a person is injured by stepping into a hole in an artificial stone walk caused by the breaking of the top cement, and the wear of the grouting beneath, causing a depression about two feet in diameter, and about one and one-half to three inches deep, it cannot be said that the defect renders the walk not reasonably safe.—Jackson v. City of Lansing, 121 Mich. 279.

¶ 914. Where a pedestrian in walking on a rainy day upon an old and rotten sidewalk having several holes, slipped into one of the holes and sustained injury, the slipping was not the proximate cause of the accident.—Burrell v. City of Greenville, 133 Mich. 235.

¶ 915. The doctrine of proximate and remote cause had no application in favor of a defendant city where plaintiff fell into an unguarded excavation in a street in the nighttime, while attempting to board a street car which it was contended by the city had neg-

ligently stopped near such excavation.—Monje v. City of Grand Rapids, 122 Mich. 645.

¶ 916. Not the filling up with snow but the digging of a drain fifteen inches deep in the snow on a crosswalk of a paved street which became filled up with light snow so that one traveling on the crosswalk could not see the drain, is the proximate cause of injuries to one who steps into the drain and is injured.—Morrison v. City of Ironwood, 189 Mich. 117.

§ 243. ——Horses stepping into or shying at holes.

Frightening of horses, see post § 244.

¶ 917. Where the owner of a horse is injured by the animal's struggles in seeking to extricate itself from a hole in a township bridge into which it has stepped, the township's negligence in failing to repair the bridge is the proximate cause of injury.—La Duke v. Township of Exeter, 97 Mich. 450.

¶ 918. Where a horse was drowned by slipping on and falling while attempting to break through ice formed over a hole or depression was not the proximate cause of the ~~pression was not the proximate cause of the~~ accident, if but for the ice the passage would have been made safely.—Smith v. Township of Walker, 117 Mich. 14.

§ 244. ——Frightening of horses.

See also ante ¶ 911.

Horses stepping into or shying at holes, see ante § 243.

Backing and turning in fright, see also post § 245.

Questions of law and fact as to fright of horses, see post § 311.

Instructions as to fright of horses, see post § 347.

Liability for operations and conditions frightening horses, see ante § 228.

¶ 919. The statute making a municipality liable for an injury that is due to a street's being out of repair (Laws 1879, Act No. 244), applies only where the want of repair is the immediate cause of the injury; and it is not putting a highway out of repair to let things stand in it for a time that form no part of it. So held where a horse was frightened at the sight of a boulder that had been dug out of the road-bed and left between the gutter and the traveled part of the way until it could be removed by a person who had asked for and obtained it for building purposes.—Agnew v. City of Corunna, 55 Mich. 428.

¶ 920. While plaintiff was driving in a highway in a place where the road-bed had been raised above the surrounding level by an unguarded embankment from nine to fourteen feet wide at the top, his horse shied at a log lying in the highway below the embankment, and, being struck by the whip, plunged down and upset plaintiff's buggy. Held, that the primary cause of the accident was not the negligence of the township in leaving the embankment unguarded, but was the horse's taking fright at the log—for the presence of which, in the place stated, the town was not liable—and the driver's act in whipping him.—Beall v. Township of Athens, 81 Mich. 536.

¶ 921. Where a horse is frightened by the falling of an object from an upper window in a building in front of which he is hitched, and he breaks away, and runs into a lot of iron rails piled in the street for use in rebuilding a street-railway track, and is injured, the proximate cause of the injury is the frightening and running away of the horse.—Bleil v. Detroit St. R. Co., 98 Mich. 228.

¶ 922. A township was not liable for an injury sustained by plaintiff through the tipping of his buggy into a ditch at the side of the roadway in question, because of the fright of the horse; the proximate cause of the accident having been the fright of the horse, and not the absence of railings along the sides of the roadway at its approach to the bridge.—Doak v. Township of Saginaw, 119 Mich. 680.

¶ 923. A township is not responsible for injuries to a driver of a vehicle, caused by a horse being frightened because of a large crack in the snow on the bridge, as the want of barriers was not the proximate cause of the injury, but a remote cause, and the township is liable only where the negligence complained of is the proximate cause of the injury.—White v. Township of Riley, 121 Mich. 413.

¶ 924. Where a horse became frightened by boys in a tree, on a township roadbed 17 feet wide in good condition, while approaching a bridge over a river having no barriers on either side of its approach, and was struck by its driver and could not be kept within the road and went down an embankment and threw the driver; the fright of the horse and not the absence of barriers was the cause of the accident.—Bell v. Village of Wayne, 123 Mich. 386.

¶ 925. The doctrine that a township is not liable for an injury where, though negligent, such negligence was not the proximate cause of the injury, applies in a case where a horse while being driven in a village road became frightened and went down an embankment despite efforts to control it; such not being a mere "shying" of a horse within the rule that mere shying will not absolve the township.—Bell v. Village of Wayne, 123 Mich. 386.

§ 245. ——Backing or turning from side of bridge or culvert.

¶ 926. The statutory liability of a township for injuries from the defective condition

of a bridge (How. St. § 1443, as amended by Laws 1885, Act No. 214, § 2) extends to the injury of the driver due to the horse's taking fright at a defect in the bridge and backing through a railing; such is not an indirect and remote injury within the meaning of words used in Agnew v. City of Corunna, 55 Mich. 428, at page 430, which had reference to fright at an object outside of the highway.—Smith v. Township of Sherwood, 62 Mich. 159.

¶ 927. Where plaintiff's horse, frightened by a hole in a bridge, backed against the railing of the bridge, which gave way and threw plaintiff below, the defective condition of the bridge is the proximate cause of the injury.—Smith v. Township of Sherwood, 62 Mich. 159.

¶ 928. Whether the railing of a scow provided by a city as a temporary bridge over a river was sufficiently strong or not is immaterial in an action against the city to recover for the loss of plaintiff's horse which, backing against the rail, fell into the river in consequence of the rail's giving way, if the backing of the horse was not occasioned by the defective condition of the temporary bridge; for in that case defendant's negligence was not the proximate cause of the injury.—St. Clair Mineral Springs Co. v. City of St. Clair, 96 Mich. 463.

¶ 929. Plaintiff, after safely crossing a bridge in defendant's township, stopped to converse with a neighbor. His horse got the checkrein over one of the thills, began backing, and, disregarding both command and whip, backed the vehicle upon and off the bridge. Held, that the absence of railings, conceding that it was the township's duty to provide them, was not the proximate cause of the accident.—Kingsley v. Township of Bloomingdale, 109 Mich. 340.

¶ 930. A township which permits the side railing of a bridge to become and remain out of repairs is liable for injuries occasioned by its giving way and allowing a horse, which shies against it, to fall with the driver to the ground below, where the fright of the horse was due to the tipping of planks improperly nailed; but if some object outside of the bridge was the proximate cause of the horse's taking fright, the township is not liable.—Minkley v. Township of Springwells, 113 Mich. 347.

¶ 931. The fact that the immediate cause of a horse's backing over the unguarded approach to a bridge was that he took fright at a crack in the flooring of the bridge, which, by reason of the action of wind and snow, had apparently largely increased in width, does not render the absence of barriers on the approach so remote a cause of the accident as to prevent a recovery therefor against the township having control of the bridge, based upon its negligence in this respect, if the situation was such as to be calculated to frighten horses of ordinary gentleness.—White v. Township of Riley, 113 Mich. 295.

¶ 932. The absence of side railings along the banked approach to a bridge is the proximate cause of an accident to one who, while driving in the usual track, without fault on his part, is precipitated over the embankment by reason of his horse's slipping on ice, stumbling and falling down over the bank.—Shaw v. Township of Saline, 113 Mich. 342.

§ 246. ——Collapse of bridge under load.

Overloading as contributory negligence, see post § 249.

Evidence as to care or negligence on part of plaintiff, see post § 296.

Duty toward users of heavy vehicles, see ante § 230.

¶ 933. Where, by the breaking of a bridge over a creek crossed by a public highway, an engine and the horses drawing it are precipitated beneath and the horses scalded by steam and hot water escaping from the engine's boiler, such breaking is the proximate cause and the township, if negligent in maintaining the bridge, is liable for the injury from such scalding.—McKeller v. Township of Monitor, 78 Mich. 485.

§ 247. Contributory negligence.

Departing from usual or better way, see post § 248.

In use of bridge, see post § 249.

In use of private ways and drives, see post § 420.

Contributory negligence of foot travelers, see post § 250 et seq.

Contributory negligence to negligence of other drivers, see post §§ 382, 383.

Contributory negligence of bicyclist riding off unrailed bridge, see also Bridges ¶ 27.

Driving unshod horse on slippery bridge approach as contributory neglect, see also Bridges ¶ 65.

Coasting in highway as nuisance, see ante § 177.

Liability to one injured while driving on Sunday, see Sunday.

Burden of proof as to contributory negligence, see post § 280.

Evidence as to contributory negligence, see post §§ 296, 301.

Questions of law and fact as to contributory negligence, see post §§ 328-336.

Instructions as to contributory negligence, see post § 359.

General law of contributory negligence, see Negligence, IV.

Doctrine of contributory negligence of children as dependent on their lesser discretion and knowledge, see Negligence, IV.

Imputed negligence of one person to another, as of driver to passenger, see Negligence, IV.

Last clear chance doctrine or doctrine of gross negligence imposing liability notwithstanding plaintiff's contributory neglect, see Negligence, IV.

¶ 934. The liability of a city is coextensive with its duty respecting the ordinary use of its public streets, but such liability cannot be extended beyond that limit, where a child, attracted by the machinery employed in the construction of a public sewer, is thereby induced to climb upon or over the barriers or guards into the excavation; it appearing that that part of the street was closed against travel, and guarded against accident to persons in the ordinary use of the same.—Hamilton v. City of Detroit, 105 Mich. 514.

¶ 935. If a hole in a highway is so open and notorious that one using ordinary care would observe and avoid it, it is contributory negligence to drive into it.—Wakeham v. Township of St. Clair, 91 Mich. 15.

¶ 936. Plaintiff's intestate, while driving along a street-car track in a narrow and unpaved street, was thrown from his wagon by the wheels dropping into a rut outside of the rails and was killed. The accident occurred in the daytime when the condition of the street and of the tracks, and the liability of the wheels to drop into the rut, were apparent. Held, that there could be no recovery against the city, the danger being an ordinary one incident to the use of the track for driving purposes.—Kornetzski v. City of Detroit, 94 Mich. 341.

¶ 937. As to contributory negligence where a horse was driven upon a trot over cobble-stones scattered about the street, see McCool v. City of Grand Rapids, 58 Mich. 41.

¶ 938. A city when excavating in a public street should leave sufficient room for the passage of vehicles; travelers may use the street if they choose, but, unless the excavation is being negligently made, they assume the risk of fright to their horses.—O'Rourke v. City of Monroe, 98 Mich. 520.

¶ 939. One who, while driving along a highway that is covered with ice, urges his horses forward after they have broken the ice and when they are getting deeper into the water, is so contributorily negligent as to prevent his recovering against the township for a defect in the road.—Smith v. Township of Walker, 117 Mich. 14.

¶ 940. One driving a horse which is accustomed to shy at various objects and at ruts and holes in the road, and, paying no attention to the horse or the road, but admiring the scenery and leaving the lines loose, is guilty of contributory negligence where the horse shies at a washout which is in plain view in a high grade causing the horse, buggy and occupant to roll down the embankment.—Tracey v. Township of South Haven, 132 Mich. 492.

¶ 941. A ditch ran along the east side of defendant township's public road, which ditch was from one foot to eighteen inches wide and from eight to eighteen inches deep. On a hill in said road, said ditch meandered toward the middle of the road, leaving barely space for a wagon to pass on the west side of the road. Plaintiff in the daytime drove his wagon past said ditch on the way to town and stopped and examined same with a view of determining how he might get by on returning after dark from town. Upon returning after dark he stopped upon approaching said ditch, got off his wagon, went ahead and examined same, and decided he could drive by with his wagon. In attempting so to do the wagon slid into the ditch, injuring plaintiff's horse. Held, in a suit to recover for the loss of the horse, plaintiff was not precluded from recovery on the ground of contributory negligence.—Highland v. Township of Garfield, 168 Mich. 538.

¶ 942. One who drives at a trot along a street, upon a dark night, within four or five feet of a lighted red lantern displayed near the center of the street, and seen by him when several rods distant, is guilty of contributory negligence precluding a recovery for injuries sustained by falling into an excavation thus sought to be guarded.—Smith v. City of Jackson, 106 Mich. 136.

¶ 943. In an action against a township for damage to a threshing outfit, where the evidence shows that plaintiff failed to keep the separator traveling behind the engine in moving it on the highway, and the separator slid into a ditch, plaintiff is guilty of contributory negligence and cannot recover. Canfield v. Township of Gun Plains, 175 Mich. 379.

¶ 944. A municipality filled in a water main trench at the side of a street, leaving a roadbed thirty feet in width for travel. The earth had been returned by hand and there was no evidence that it had been tamped, but the trench had been filled so that it was rounded. Plaintiff saw the situation, attempted to drive across the trench after a heavy rain, not at a street intersection, and was injured. Held, the municipality was not liable.—Patow v. Village of Oakwood, 176 Mich. 351.

Use of defective highway or street with knowledge of defect as contributory negligence, see note, 14 N. C. C. A. 366-377.

Use of street or highway during progress of repairs or improvements as contributory negligence, see note, 10 N. C. C. A. 228-241.

Taking blind horse upon highway as negligence, see note, 14 N. C. C. A. 512-520.

Negligence of fireman or police officer in driving at excessive speed as affecting right to recover for injury, see note, 9 N. C. C. A. 665-676.

Driving motor vehicle at excessive speed as contributory negligence barring recovery by operator in action to recover damages for injuries to person or property, see note, 10 N. C. C. A. 820-833.

Violation by driver of automobile of statute or ordinance as to speed as constituting negligence, see note, 13 N. C. C. A. 982-1009.
Intoxication of driver of motor vehicle as precludng recovery for personal injuries, see note, 9 N. C. C. A. 915-916.

§ 248. ——Deviating from traveled portion of street or highway.

As to what constitutes traveled part of the road, see also post ¶ 1465.
Directing verdict because of contributory negligence, see post § 343.

¶ 945. A traveler who deviates from a beaten track in a highway where there is nothing to indicate that any part of the roadbed is unsafe does not, if he uses ordinary care, incur the risk of latent defects in the road.—Wakeham v. Township of St. Clair, 91 Mich. 15.

¶ 946. One who drives in the daytime upon a street railway track laid on an unpaved street with ruts alongside the rails takes his chances of the dropping of a wheel into a rut worn outside the rail.—Kornetzski v. City of Detroit, 94 Mich. 341.

¶ 947. A township's duty to erect guards along a highway which passes over an embankment depends somewhat upon the width of the traveled way; and one who, instead of keeping near the center of a traveled way forty feet wide, unnecessarily drives a strange horse near an embankment, and is injured by the horse's taking fright at an object outside of the way and going over the embankment, is guilty of such contributory negligence as bars recovery.—Kuhn v. Township of Walker, 97 Mich. 306.

¶ 948. In an action to recover damages against a township for personal injuries sustained while plaintiff was driving over a public road, where it appeared that plaintiff was traveling over the center track of the road which had been recently graded in a place of perfect safety which he left for another track so as to get to his home to dinner, held that this was not such an emergency as to relieve plaintiff from a charge of contributory negligence for an injury incurred by reason of so leaving the center track.—Long v. Township of Weare, 195 Mich. 706.

§ 249. ——Using bridges and culverts.

Questions of law and fact as to contributory negligence in use of bridges and culverts, see post § 332.
Instructions as to contributory negligence, see post § 361.

¶ 949. There is contributory negligence in driving across a bridge recklessly and turning off from it abruptly so as to catch the wheel in or upon some crack or obstruction not in the traveled part of the way.—Abernethy v. Township of Van Buren, 52 Mich. 383; Beckwith v. Township of Van Buren, 66 Mich. 89.

¶ 950. A bicyclist was not negligent as matter of law where, misled by the moonlight and shadows on a bridge, which is not in alignment with the road, he turns from one side of the road to the other for a better path and thereby falls off the bridge, which is not protected by a rail.—Lauder v. Township of St. Clair, 125 Mich. 479.

¶ 951. One's recklessness in driving off a bridge and turning abruptly is not excused by the practices of other drivers where he was not familiar with the bridge, and so could not rightfully rely on what they did.—Abernethy v. Township of Van Buren, 52 Mich. 383; Beckwith v. Township of Van Buren, 66 Mich. 89.

¶ 952. One is not contributively negligent as matter of law in not going ahead of his team on a bridge without railings, in the nighttime, though he was familiar with the bridge.—Priebe v. Township of Moorland, 162 Mich. 110.

¶ 953. Where on the opening of a temporary bridge across a stream at the side of a defective highway bridge, the plaintiff's intestate saw the first vehicle cross and turn in safety onto the adjoining land, and also saw the occupants of the second rig thrown from their buggy by the wheels dropping into an open ditch as the driver attempted to turn back into the traveled portion of the road, and the plaintiff's intestate chose the latter route and was thrown from his rig and killed by the dropping of the forward wheels into the ditch, he was guilty of contributory negligence as a matter of law.—Hayden v. Township of Bangor, 182 Mich. 601.

¶ 954. One who crosses a bridge with an unusually heavy load does so at his own risk.—Fulton Iron & Engine Works v. Township of Kimball, 52 Mich. 146.

§ 250. Contributory negligence of foot travelers.

Failure to avoid holes and depressions, see post § 251.
Going on icy walks, see post § 252.
Contributory negligence of vehicle users injured from defective highway, see ante, § 247.
Burden of proof as to contributory negligence, see post § 280.
Evidence as to plaintiff's care or negligence, see post § 296.
Sufficiency of evidence to show contributory negligence, see post § 301.
Questions of law and fact as to contributory negligence of foot travelers, see post § 333.
Directing verdict on ground of contributory negligence of pedestrian, see post § 344.
Instructions as to contributory negligence of foot travelers, see post § 360.

¶ 955. The fact that plaintiff in an action for injuries sustained by reason of a defective sidewalk was familiar with the unsafe condition of the walk does not preclude a recovery, if, in passing over the walk, he used such care and caution as a prudent man would ordinarily exercise in view of the danger.—Schwingschlegl v. City of Monroe, 113 Mich. 683.

¶ 956. While contributory negligence is not to be presumed from knowledge of the existence of a defect in a sidewalk, such knowledge enjoins upon the party possessing it a degree of care commensurate therewith. —Dittrich v. City of Detroit, 98 Mich. 245.

¶ 957. In determining whether a traveler who sustained personal injuries as a result of a defect in a city street, the existence of which defect was known to him, was guilty of contributory negligence, the true test is: Was the danger arising from the defect obviously of such a character that no person in the exercise of ordinary prudence would attempt to pass over the street at that point? —Sherman v. Consumers' Power Co., 199 Mich. 543.

¶ 958. A pedestrian about to cross on a portion of the street just outside the walk where a manhole cover rests on a stone support presenting an uneven surface must take notice thereof, and must use such care as is commensurate with the situation as measured by ordinary prudence.—Lincoln v. City of Detroit, 101 Mich. 245.

¶ 959. The plaintiff's knowledge of defects in a walk holds her to a higher degree of care than she would otherwise be required to exercise.—Wolverton v. Village of Saranac, 171 Mich. 419.

¶ 960. A woman cannot be charged with negligence for walking at 8:30 in the evening over a sidewalk which she knew was defective, though she could have avoided it by going across lots by a path but did not consider it safe to do so at that time of the evening.—Oesterreich v. City of Detroit, 137 Mich. 415.

¶ 961. A person who in the dark walks along a strip of sidewalk, which he knows to be out of repair and dangerous, without taking the precaution of going around the dangerous place, is guilty of contributory negligence. (By divided court, per Grant; Ostrander, Hooker and McAlvay, JJ., concurring; Blair, C. J., Montgomery, Brooke and Moore, JJ., dissenting.)—Sargeant v. City of Detroit, 156 Mich. 291.

¶ 962. In an action for personal injuries sustained from falling upon a defective sidewalk where the plaintiff while "walking real fast" was injured through his companion stepping on a loose board which flew up and caught him between the legs, and the condition of the sidewalk had been known to him for two years as defective, and his attention had not been reasonably diverted from existing conditions except by the conversation with his companion, his own conduct created his danger, the circumstances negativing the exercise, and there was such negligence in not noticing and realizing the danger as precluded recovery.—Hodge v. City of St. Louis, 146 Mich. 173.

¶ 963. If a woman has attempted to pass over an unguarded and unlighted crosswalk, where there were no signals to warn her of danger, she is not chargeable with contributory negligence because of the fact that she knew that the walk was partly torn up eight days before.—Finn v. City of Adrian, 93 Mich. 504.

¶ 964. Running upon the lighted sidewalk, in order to avoid being struck by a snowball, is not per se such an act of negligence as will bar a recovery for injuries received from falling into an unguarded excavation which plaintiff saw but not in time to stop, though at walking speed he might have stopped.—Penrose v. Fehr, 113 Mich. 517.

§ 251. ——Avoidance of holes, excavations and depressions.

Avoidance of obvious danger, see also ante § 250.

Sufficiency of declaration to show due care on plaintiff's part, see post § 273.

¶ 965. Unless the place is so dangerous that a prudent man would not travel there one is not negligent because he walks upon a sidewalk knowing of a hole in it.—Germaine v. City of Muskegon, 105 Mich. 213.

¶ 966. In determining plaintiff's contributory negligence in a sidewalk accident case, her efforts to avoid the holes in the walk, the darkness of the night and the speed at which she was walking, together with the other circumstances of the case, should be considered with her knowledge of the defects of the walk, in determining whether she exercised the care which an ordinarily prudent person would under the circumstances.—Wolverton v. Village of Saranac, 171 Mich. 419.

¶ 967. A woman running for a doctor in the dark fell into a ditch where the bridging had been torn up earlier in the evening, and was injured. A judgment holding the municipality liable was left standing by an equally divided court.—Dotton v. Albion Common Council, 57 Mich. 575.

¶ 968. One who comes to a hole in a sidewalk is justified in stepping over it and upon a plank a foot beyond, unless he knows that the plank is weak or broken; the hole is not constructive notice to him that the surrounding planks are defective.—Fuller v. City of Jackson, 82 Mich. 480.

¶ 969. A township is not liable for injuries sustained by a schoolgirl 14 years of age by stepping in a hole in the road which she had known of and walked around for several months, she testifying that she did not think of it at the time.—King v. Township of Colon, 125 Mich. 511.

¶ 970. Under the rule that a party is not precluded from traveling over a highway or sidewalk simply because of knowledge that there is a defect in it, but is bound to exercise such care as a prudent man would exercise in view of the danger; a man 54 years old who on a dark night fell off the end of a sidewalk where it had been torn up and into the space left thereby, was not precluded from recovering where he knew of the condition but was on the lookout for it.—Belyea v. City of Port Huron, 136 Mich. 504.

§ 252. ——Walking on icy walks.

Liability to pedestrians for injuries from accumulations of snow and ice, see ante § 235.

Questions of law and fact as to safety of walks covered with snow and ice, see post § 314.

¶ 971. One who voluntarily attempts to pass over an icy sidewalk, knowing it to be dangerous, is guilty of contributory negligence, precluding a recovery for injuries received from falling thereon.—Black v. City of Manistee, 107 Mich. 60.

¶ 972. A pedestrian who was aware of the risk of passing over an icy sidewalk and took the risk of passing over it, although there was a way of avoiding the danger by stepping out into the street for a short distance, cannot recover against the abutting owner for injuries sustained by stepping on the walk.—Howey v. Fisher, 122 Mich. 43.

§ 253. Responsibility for acts of third persons.

See also ¶ 921.

General duties and liabilities in respect to highways, see ante XII, A.

Injuries caused by boys tipping over sheet steel left in street, see ante ¶ 897.

Liability of drivers for injuries to others from excessive speed or reckless driving, see post § 378.

General doctrine of respondeat superior, see Master and Servant, IV; Agency, II.

Tort liability of municipality, see Municipal Corporations, XII.

¶ 973. Municipal liability for injuries arising from defects in the public ways is the same, so far as concerns innocent persons, whether the condition of the way is due to wear and decay or to the misconduct of individuals in tearing it up; the obligation to repair speedily is the same.—Dotton v. Albion Common Council, 50 Mich. 129.

¶ 974. The duty to keep a crosswalk in repair is as imperative where the defects arise from individual misconduct in tearing it up as where they are due to wear and decay.—Dotton v. Common Council of Albion, 50 Mich. 129.

¶ 975. The statutory duty imposed upon a city to keep its streets in good repair is one which the city itself is required to perform, and continues although the city is obliged under its charter to enter into an engagement with an independent contractor for grading and paving such streets, through whose fault an injury occurs.—Southwell v. City of Detroit, 74 Mich. 438.

¶ 976. A city is liable for injury to a person traveling on its street caused by a timber projecting from a building which, under the license of the city council, was being moved in the street subject to the city marshal's supervision, and which was left unguarded at night.—Hayes v. City of West Bay City, 91 Mich. 418.

¶ 977. A city on one of whose streets a traveler by night has received personal injuries by reason of a plank projecting from a building in course of being moved under the city marshal's supervision, the same having been left unguarded, is not excused by the failure of electric-light contractors to light a lamp near the building, which, if lighted, would probably have been a sufficient warning of the position and condition of the building in the street.—Hayes v. City of West Bay City, 91 Mich. 418.

¶ 978. A township is liable for a defect in the highway though within the right of way of a railroad existing at the time the highway was laid out.—Gage v. Township of Pittsfield, 120 Mich. 436.

§ 254. ——Acts of public contractors.

General liability for act of independent contractor, see Independent Contractors.

¶ 979. It is the duty of a municipality to keep its streets reasonably safe and fit for travel, and it is not relieved of that duty because the street is made unsafe by the act of a third person, such as a contractor working on the street.—Davis v. City of Adrian, 147 Mich. 300.

¶ 980. A city cannot relieve itself by contract of its statutory liability to keep its streets reasonably safe for public travel by turning it over to a contractor.—Barker v. City of Kalamazoo, 146 Mich. 257.

¶ 981. A city cannot escape liability for personal injuries caused by a defective temporary sidewalk placed over a ditch on the ground that the work was in the hands of an independent contractor.—Beattie v. City of Detroit, 129 Mich. 20.

¶ 982. In an action against a city for personal injuries received by the plaintiff as

the result of the overturning of a wagon driven by her in running over in the nighttime a pile of gravel left by a contractor unlighted and unguarded, it is immaterial that an ordinance requires proper warning and danger signals; it being the city's duty to see that they are furnished or that the street is closed.—Joslyn v. City of Detroit, 74 Mich. 458.

¶ 983. A city having the responsibility of constructing sewers and their connections under its charter, was liable for an injury sustained by a pedestrian in falling into an excavation, left unguarded in the night time by a plumber licensed to dig up the streets.—Monje v. City of Grand Rapids, 122 Mich. 645.

¶ 984. A city is liable in damages for injuries sustained through the construction and maintenance of a faulty and unsafe crossway constructed while street improvements were being made where the work though done by a contractor was under the supervision and control of city officials.—Barker v. City of Kalamazoo, 146 Mich. 257.

¶ 985. In an action for personal injuries resulting from falling through an opening in the sidewalk from which the grating had been removed where the evidence showed that the grating had been removed from two to five weeks, and that the city officials had knowledge of the situation, the city is liable for damages, even though the situation may have been caused by the acts of a city contractor working on the sidewalks.—Davis v. City of Adrian, 147 Mich. 300.

§ 255. Acts of abutting owners or their agents or contractors.

Sidewalk raised above crosswalk by abutting owner, see ante § 232.

Liability of abutting owners for defects in highway, see post § 256.

¶ 986. The city was not estopped from denying that the space between the street line and the front of a buildng on the lot abutting was a part of the sidewalk, to be kept in repair by such city; where, in an action against such city for personal injuries, it appears that the plaintiff was injured by being struck by a billboard fastened to the front of such building but wholly within such space, and outside of the highway, and where there was no evidence that the city exercised any control over such strip, or that it was covered by any walk built or ordered by such city.—Temby v. City of Ishpeming, 140 Mich. 146.

¶ 986a. A city is not liable under Comp. L. 1897, § 3441, providing for the abatement of a nuisance, for injuries received by a traveler from a billboard fastened to the front of a building facing a street, where such billboard was wholly outside the highway and upon the premises of the owner of such building; since the municipality has no authority to invade private premises and remove therefrom property belonging to the proprietor which may be thought dangerous.—Temby v. City of Ishpeming, 140 Mich. 146.

¶ 987. A city is not liable for injuries sustained by a billboard being thrown by the wind against one who was passing on the street where it appears that the billboard was wholly outside of the highway and upon private ground, and about three feet back of the street line, the sidewalk extending beyond the street line to the building against which the billboard was placed, and it did not appear that the city had ever exercised any control or care over the sidewalk in dispute.—Temby v. City of Ishpeming, 146 Mich. 20.

¶ 988. Under charter provisions of the city of Marquette, ch. 7, § 1, sub. 16 (Local Acts 1895, No. 409), the city is exempted from liability for damages resulting from obstructions made by an abutter on the sidewalk notwithstanding the liability imposed by the general statutes of the state.—Maclain v. City of Marquette, 148 Mich. 480.

¶ 989. A city may be held liable for an injury to the plaintiff caused by the upsetting of her wagon in running over, in the nighttime, an unlighted and unguarded pile of sand in the street in front of a house which a contractor was building for the owner of the adjoining lot.—Joslyn v. City of Detroit, 74 Mich. 458.

¶ 990. A charter provision requiring the city council to "see that all ordinances and resolutions relating to the building, rebuilding and repairing of sidewalks * * * and the keeping of the same free from ice and snow and from all obstructions * * * are strictly enforced," does not make the city liable for an injury caused by an improperly constructed barrier placed along a newly constructed walk by the contractor who built the walk under contract with the owner of the adjoining lot.—Thompson v. City of West Bay City, 137 Mich. 94.

¶ 991. Comp. L. 1897, §§ 3441, 3442, making a muncipality responsible for injury caused by negligence in keeping highways, streets and sidewalks in a reasonably safe condition for travel, and providing that the municipality must have had reasonable notice and time to repair, makes the municipality liable only for its own negligence or for that of one for whose conduct it is legally responsible, and hence it is not liable for the negligence of one who is constructing a sidewalk under contract with the owner of the adjacent property.—Thompson v. City of West Bay City, 137 Mich. 94.

¶ 992. A city is not liable for injury caused by an improperly constructed barrier to keep people off a newly constructed walk placed

there by the contractor under contract with the adjoining owner for the construction of the walk, where the duty of building sidewalks was not imposed on the city by law.—Thompson v. City of West Bay City, 137 Mich. 94.

¶ 993. A city is not liable for personal injuries caused by the negligence of a contractor constructing a sidewalk under a contract with the owner of the abutting property, since the city exercised no supervision or control over such construction. (Thompson v. City of West Bay City, 137 Mich. 94, followed.)—Wright v. City of Muskegon, 140 Mich. 215.

¶ 994. Where an obstruction has been placed in a city street by a private contractor preparatory to building a sidewalk, which renders it unfit and dangerous for public travel, there is created, under 1 Comp. Laws 1897, § 3441, a liability against the city for personal injuries resulting therefrom after the city has actual or constructive notice thereof.—Walls v. City of Detroit, 171 Mich. 612.

G. LIABILITY OF ABUTTERS, PRIVATE PERSONS AND CORPORATIONS.

1. To persons injured on highway.

§ 256. In general; abutters' liability.

For defective sidewalks or absence of walks, see post § 257.
For defects in walls and fences, see post § 258.
For falling objects, see post § 259.
Liability of corporations using streets or conducting operations therein or adjacent thereto, see post § 260.
Liability to licensees and trespassers, see post § 261.
Corporations or persons under duty to keep in repair, see post § 262.
Liability over to public to indemnify it, see post §§ 263, 264.
Liability of city for acts of abutting owners, see ante § 255.
Liability of city for neglect of abutting owners' duty to build sidewalk, see ante ¶ 733.
Liabilities for injuries on private ways and drives, see post § 420.
Burden of proof and presumptions as to negligence of abutter or private person, see post § 282.
Admissibility of evidence in actions against abutters, see post § 295.
Sufficiency of evidence, see post § 304.
Issues and variance, see post § 279.
Questions of law and fact in actions against abutters and private parties, see post § 317.
Questions of law and fact as to notice of defective condition, see post § 326.
Questions of law and fact as to contributory negligence, see post § 337.
Instructions in actions against private persons and abutters, see post § 357.
Instructions as to contributory negligence, see post § 362.
Joint and several liability of joint tort feasors and participants, see Torts.
Liability as between landlord and tenant as to injuries from condition of building, see Landlord and Tenant, IV, D.
Coliability of abutter's agent with abutting owner, see Agency § 85.
Duty of carrier as to ways connecting stations and grounds with streets for passengers, see Carriers § 155.
Duty of railroad towards other than passengers, see Railroads, VIII; Master and Servant, III.

¶ 995. A provision in a city charter imposing a penalty upon the owners of buildings for obstructing the sidewalks is designed to create a duty to the public, and a violation of such provision resulting in personal injuries, does not render the owners liable to a private person.—Maclam v. Hallam, 165 Mich. 686.

¶ 996. Inasmuch as an alley is not a highway plaintiff cannot recover for injuries received by falling into an open area opening upon a platform in an alley adjoining defendant's premises, the platform being constructed for storing and handling bulky merchandise handled by defendant.—Krause v. Lewis, 144 Mich. 549.

¶ 997. The construction by an adjacent owner in an alley of a platform to store and handle merchandise was not such as to constitute an invitation to the general public to use the alley as a highway.—Krause v. Lewis, 144 Mich. 549.

¶ 998. The owner of land who has without need or cause left a heap of stones in the highway outside of the traveled road and near his own fence with ample space for travel is liable for an injury occurring therefrom to a horse turned loose in the road.—Bennett v. Hazen, 66 Mich. 657, affirming lower court by equal division.

Liability of abutting owner for personal injuries caused by ice which formed from water cast upon street by artificial means, see note, 3 N. C. C. A. 137-144.

§ 257. ——Absence of or defective sidewalks.

See also ante ¶ 759.
Liability of city for failure to construct sidewalks, see ante § 200.
Liability of city for injuries from defective walks, see ante § 232.

¶ 999. An abutting landowner, not subject to requirements valid under a municipal charter, is not obliged to build or keep up a sidewalk in the highway, and is not liable for injuries sustained by a pedestrian because such sidewalk is too narrow or otherwise defective.—Fletcher v. Scotten, 74 Mich. 212.

¶ 1000. Neither at common law nor by statute has one who has been injured because of a defective sidewalk a right of action against the owner of the adjoining lot.—Lynch v. Hubbard, 101 Mich. 43.

¶ 1001. A lot owner in Detroit is not liable to one who has been injured by his failure to construct or repair a sidewalk in front of his premises; his liability is to the city after the latter has been compelled to pay damages to the injured person, and he is not liable in any event except for his failure to construct or repair within ten days after notice served on him and after the common council has ordered such construction or repair.—Lynch v. Hubbard, 101 Mich. 43.

Liability of abutting owner for personal injury to sidewalk pedestrian from contact with stationary object not projecting into highway area, see note, 15 N. C. C. A. 481-484.

Liability of abutting owner for personal injuries resulting from maintenance of openings in sidewalks, see note, 6 N. C. C. A. 455-480.

§ 258. ——Defective walls and fences.

Liability of building proprietor for defects endangering other persons, see Buildings.

¶ 1002. The law imposes upon the owner of a building partially destroyed by fire the duty of making it reasonably safe for pedestrians in lawful use of the highway and to protect against walls falling in all ordinary weather and such extraordinary occurrences as are likely to happen.—Lauer v. Palms, 129 Mich. 671.

¶ 1003. The owner of a building partially destroyed by fire is liable for personal injuries to a pedestrian on the street caused by a falling wall notwithstanding he has employed competent architects and builders to make the walls safe.—Lauer v. Palms, 129 Mich. 671.

¶ 1004. The owner of a building partially destroyed by fire is liable for personal injuries to a pedestrian on the street caused by a falling wall notwithstanding the tenant of the building has objected to the repair and threatened an injunction; the owner has the power and the duty to enter upon the premises and make them safe.—Lauer v. Palms, 129 Mich. 671.

§ 259. ——Objects thrown or falling into streets and alleys.

Liability to by-passer for injuries from explosives and combustibles, see Explosives and Combustibles, ¶ 28.

¶ 1005. It is negligence to throw bales of hay from the loft of a barn, facing a public street, upon the sidewalk, without first looking into the street and upon the sidewalk, to see if any one is near by, and giving sufficient warning to prevent approach.—Dehring v. Comstock, 78 Mich. 153.

¶ 1006. The maintenance for private purposes of a sign suspended over a crowded city street, which, if permitted to fall, is liable to kill or injure persons lawfully using the sidewalk, imposes a very high degree of care on the one maintaining the sign to keep it in safe condition, and such duty is not lessened by the fact that the sign was erected with consent of the municipal authorities, or that the city might be liable for failing to require the removal of the sign as a nuisance.—Hass v. Booth, 182 Mich. 173.

¶ 1007. A certificate of a city building inspector that he had examined a sign suspended above a sidewalk and found it in safe condition, does not relieve the owner of the sign from liability for an injury to a pedestrian by its fall, since the certificate did not show whether the inspection was adequate, nor tend to prove that the fall of the sign was due to a latent instead of a patent defect.—Hass v. Booth, 182 Mich. 173.

¶ 1008. That a sign over a sidewalk was erected by an independent contractor two years before it fell and injured a pedestrian, does not relieve the owner of the sign from liability.—Hass v. Booth, 182 Mich. 173.

Injury to pedestrians by fall of workman from building, see note, 9 N. C. C. A. 208-222.

§ 260. Liability of corporations and persons constructing, repairing or using streets.

See also ante ¶ 787.

Liability of city for defects caused by public contractors, see ante § 254.

Necessity of notice or statement of claim, see post ¶ 1030.

Declaration in action for injuries, see post § 273.

Issues and variance, see post § 279.

Burden of proof and presumptions as to negligence, see post § 282.

Sufficiency of evidence to show contributory negligence, see post § 301.

Questions of law and fact as to damages caused by excavations and construction work, see post § 319.

Questions of law and fact as to notice of defective condition, see post § 326.

Liability of railroad for injuries to persons or property beside or near to tracks, including frightening horses near by, see Railroads, VIII, E.

Liability of railroad for excavating near roadway and causing injury to traveler, see also Railroads, VIII, E.

Liability of railroad for failure to place surface of road in proper condition at crossing, see Railroads, VIII, D.

Duty of carrier to warn passengers being set down near dangerous or unsafe place in roadway, see Carriers § 184.

Injuries by operation of street railways to persons in street, see Street Railways, IV.
Injuries by railroads operating in or across streets and roads, see Railroads, VIII.
Injuries by interurban railway to animals driven on road, see Street Railways, IV.
General law as to construction and safety of electrical appliances, see Electricity.
Liability of light company for dangerous condition of arc light over public street, see Electricity ¶ 9.

¶ 1009. A street railway company is bound to exercise such care and diligence in clearing its track of snow as not to interfere needlessly with the safety and convenience of persons lawfully using the street; and, if an extraordinary snowfall takes place, it must make extraordinary efforts to dispose of it.—Bowen v. Detroit City R. Co., 54 Mich. 496.

¶ 1010. Any disposition of the snow cleared from a street railway track must be made with due regard to the rights of travel on the highway; and it cannot be charged as a matter of law that the fact that the general level of the road was left above the level of the railway track would not make the disposition of the snow unlawful.—Wallace v. Detroit City Ry. Co., 58 Mich. 231.

¶ 1011. A street railway company which allows material taken from between its rails while repairing its track to remain in the street by its track for a few hours in the daytime is not therein guilty of negligence.—Zanger v. Detroit City R. Co., 87 Mich. 646.

¶ 1012. A street railway company is not guilty of negligence in merely excavating and throwing up earth in the street while engaged in repairing and laying its track; and a declaration in an action for damages for personal injuries stating only the above acts and omissions shows no cause of action.—Cowan v. Muskegon R. Co., 84 Mich. 583.

¶ 1013. It is the duty of a lighting company to restore a city street in which it has laid its cable to a condition of reasonable safety.—Sherman v. Consumers' Power Co., 199 Mich. 543.

¶ 1014. Notice to a lighting company of the dangerous condition of a city street as a result of its imperfect repair thereof after the laying of its cable therein is not necessary in order for it to be chargeable with negligence in the matter.—Sherman v. Consumers' Power Co., 199 Mich. 543.

¶ 1015. A telephone company, in introducing its wire into a store which it did not own or control, lifted up a loose plank in the sidewalk, and replaced it in the same condition. The company having nothing to do with maintaining the sidewalk, and not having created the danger, was not liable to one who thereafter stepped on the plank and was injured.—Davis v. Michigan Bell Tel. Co., 61 Mich. 307.

¶ 1016. One who, in contracting with the city to grade a street, agrees to maintain barriers around all excavations and to indemnify the city against damage occasioned by his negligence in doing the work, is not liable for injuries caused to a vehicle by the defective filling of an excavation where the barrier placed by him is removed and the excavation filled by his servants acting under the direction of the city's board of public works.—Kulwicki v. Munro, 95 Mich. 28.

¶ 1017. In an action for injury to a paving foreman caused by the fall of a telephone pole which was being removed from the street 35 feet from which he was working, the fact that he knew that the wires were being cut and removed, and that some of them had fallen in the street near where he was working, is not sufficient as notice to him that the pole would fall.—Kyes v. Valley Tel. Co., 132 Mich. 281.

¶ 1018. Where the warning lights about an excavation made by a street railway company in a public street were extinguished by an unusual and extraordinary storm, it is not answerable for injuries sustained by a pedestrian who fell into the excavation before a reasonable time had elapsed in which to restore such lights.—Norris v. Detroit United Ry., 185 Mich. 264.

Liability of gas company for injury from escape of gas due to breaking of pipes in use or repair of street or highway, see note, 11 N. C. C. A. 561-580.
Duty of persons conducting operations in streets to prevent frightening horses, see note, 12 N. C. C. A. 255-277.
Liability of electric companies to persons injured by electric wires in public highways (recent cases), see note, 5 N. C. C. A. 926-946.
Injuries to pedestrians caused by charged guy wires, see note, 12 N. C. C. A. 447-467.
Injury by contact with, or fall of, arc lamp, see note, 12 N. C. C. A. 84-98.

§ 261. Liability to licensees and trespassers.

Liability of city to children injured from defective streets, see ante § 240.
Liability of municipality for acts of trespassers, see ante § 253.

¶ 1019. A seven-year-old child, watching a gang of telephone employees stringing cable through a snatch block left unguarded in the street and operated by a team of horses a block away, who had put his hand on the block and it had been crushed by being drawn in, is not a trespasser in the sense that a recovery is barred for the injury sustained.—O'Leary v. Michigan State Tel. Co., 146 Mich. 243.

Liability for injury to or death of volunteer attempting to adjust lights used for street lighting, see note, 11 N. C. C. A. 1063-1071.

§ 262. Corporation or person under duty to keep in repair.

¶ 1020. For injury to a pedestrian by defective planking a railroad company which built a bridge over its tracks under contract with a city under which the company agreed to maintain the masonry and foundations at its own expense and to deliver the bridge to the city, was not liable after the bridge was turned over to the city, as the company was under no legal obligation to maintain the bridge, and the superstructure was to be under the control of the city to be maintained at its expense.—Wetherbee v. Michigan Cent. R. Co., 122 Mich. 1.

¶ 1021. Since the public must use a bridge constructed over a mill race on a highway, negligence of the owner in failing to construct or repair the bridge may support an action by an individual lawfully using the highway and injured by defects in the bridge.—McRae v. Township of Hart, 179 Mich. 325.

2. To indemnify or exonerate the public.

§ 263. Liability over to public in general.

See also ante ¶ 1001.

Injuries on bridges, see post § 264.

Judgment against city in action for injuries from highway as res adjudicata in action by city against abutting owner, see Former Adjudication, ¶ 355.

General law of indemnity, see Indemnity.

Liability on express contracts of indemnity, see Indemnity, I.

Indemnification of public by primary wrongdoer to bridge, see Bridges § 24.

¶ 1022. The charter of Detroit of 1883, § 57, authorizes the common council to provide by ordinance that whenever any sidewalk requires to be built or repaired the owner, etc., of the adjacent lot shall be notified to build or repair the same, and declares that if he neglect to do so for a time to be specified in the ordinance, it shall be the duty of the board of public works to build or repair the same, the expense thereof to be assessed upon such lot. Held, that the imposition of the duty upon the board does not relieve the lot-owner of his neglect to repair, and if the city is compelled to pay damages for injuries caused by nonrepair after the time specified has expired, the lot-owner is liable over to the city.—City of Detroit v. Chaffee, 70 Mich. 80.

¶ 1023. A paving contractor who agreed to keep the city harmless from loss by reason of his negligence, and who upon being made defendant with the city in an action for negligence, by arrangement with plaintiff caused the suit to be dismissed apparently without notice to or consent of the city, was not entitled to any notice from the city to defend, as a prerequisite to his liability over to the city for the amount of the judgment against it.—City of Detroit v. Grant, 135 Mich. 626.

§ 264. Injuries from bridges and culverts.

¶ 1024. Where a person, without authority from a township or from the owner of a mill-race, who built and maintained a bridge, took down a good railing thereon and later put up a temporary and inadequate one, and a person using the bridge was injured as a result of leaning on such defective railing and falling into the stream, the township, upon payment of a judgment recovered against it and the owners of the mill-race, may recover indemnity from the person who erected the inadequate railing, although it had notice of its defective condition, as the doctrine of no contribution between joint tort feasors is inapplicable.—Township of Hart v. Noret, 191 Mich. 427.

¶ 1025. In an action by a township to recover indemnity against a person who wrongfully took down a good railing on a bridge over a mill-race, which was built and maintained by the owners of the mill-race, and substituted a temporary and inadequate one without authority from either the township or the owners of the mill-race, the township having paid a judgment in favor of a person injured as a result of falling into the stream while attempting to lean on the railing, a declaration that defendant wrongfully and without authority removed and took away substantial railings from the bridge and later substituted defective railings; that the plaintiff in the former action against the township, while lawfully passing over the bridge, and without any fault on his part, came into contact with such railing, and, as a result of its defective condition, was precipitated into the stream and injured, and that such person recovered a judgment, of a certain amount, which was paid by the city, held sufficient.—Township of Hart v. Noret, 191 Mich. 427.

H. ACTIONS FOR INJURIES.

1. Actionable rights and form of action.

[Note. It is not intended to encroach on the general law of practice and procedure in this division. It is restricted to matters distinctively applicable to actions for damages for injuries to person or property by reason of defective or dangerous highways, streets, walks, and bridges. Actions for injuries occurring on highways but not by reason of any defect or condition of the way are treated post XIII, B, 2 (actions for injuries by negligence in use of way by other drivers), and in Railroads, VIII, D (crossing cases), and in Street Railways, IV (injuries from or incident to operation). Actions for injuries to the

highway are treated, ante § 192, and actions for injuries from change of grade or disturbance of ingress or egress or withdrawal of lateral support or diversion of surface waters are treated, ante §§ 111, 114, 119, 124, 195, 196.

Topics treating of general law of practice, such as Parties; Pleading; Process; Evidence; Trial; and the like, should be consulted.]

Matters of practice peculiar to actions against municipalities, townships, counties, and public officers, but not peculiar to highway injury cases, see Counties, VIII; Municipal Corporations, XVI, A; Townships, VIII; Process; Pleading; Trial; etc.

§ 265. Right of action in general.

General duties and liabilities, see ante XII, A.

Nature and statutory source of liability for injury from defective highways, see ante, § 197.

Effect upon pending action of repeal of statute defining municipality's liability, see ante § 197.

Persons to whom municipality owes duty of keeping highways safe, see ante § 217.

Proper and necessary parties, see post § 272.

Time to sue and limitations of the actions, see Limitations.

¶ 1026. The right to recover for injuries arising from want of repair of sidewalks, etc., is a purely statutory one in this state; and, it being optional with the legislature whether it would confer upon persons injured a right of action therefor or leave them without remedy, it could attach to the right conferred any limitations it chose, and it alone, and not the court, can decide whether or not such limitations are reasonable.—Moulter v. City of Grand Rapids, 155 Mich. 165.

¶ 1027. The duty imposed upon townships by How. St. § 1446d, to keep their highways in reasonable repair, etc., may be enforced by information or indictment where the highway has not been used as a public highway for ten years, but a personal action for damages will not lie in such cases.—McKeller v. Township of Monitor, 78 Mich. 485.

¶ 1028. Loss to a husband of the services of his wife, and money expended for surgical attendance and nursing, while she is suffering from injuries received by falling upon a defective sidewalk, do not constitute an injury to "other property," within the meaning of How. St. § 1446d, and the husband has no right of action under said statute for the same.—Roberts v. City of Detroit, 102 Mich. 64.

¶ 1029. The words "other property," as used in How. St. § 1446d, which provides that if any horse or other animal, or any cart, carriage, or vehicle or other property, shall receive injury or damage from defective highways, etc., the municipal corporation in fault shall pay the owner just damages, etc., being preceded by several words descriptive of particular kinds of property, are limited to things of a like kind.—Roberts v. City of Detroit, 102 Mich. 64.

§ 266. Notice and statement of claim.

Description of injury, damages and place of occurrence, see post § 267.

Waiver of notice, see post § 268.

Notice as limitation on amount recoverable or as estoppel, see post § 269.

Appearance or examination on hearing of claim, see post § 270.

Allegations as to notice of claim, see post § 276.

Evidence as to making claim and notice thereof, see post §§ 297, 302.

Action of council upon claim as accrual of action setting limitations in motion, see Limitations, IV.

Statutory notices to municipalities of claims not special to cases of injuries on highways but required in damage claims generally, see Municipal Corporations, XIV, XVI, A.

Uniform provisions for notice of injury and claim for damages, see Comp. L. 1915, § 4591.

Mode and sufficiency of service of notice and officers competent to be served, see Comp. L. 1915, § 4591.

¶ 1030. Where a city charter requires notice to the city of a personal injury suffered on its streets, such fact does not require plaintiff to give like notice in a suit against a paving contractor for leaving a street unguarded at night.—Williams v. Sager, 165 Mich. 635.

¶ 1031. Section 485, Act No. 593, Local Acts 1905, requires that in all cases of injuries resulting from defects in sidewalks, streets, highways, etc., in the City of Grand Rapids, two notices of the claim must be given to the common council before suit can be maintained, one being a "preliminary notice," to state briefly the location of the defect and its general character, and the other a "specific notice," to specify in detail plaintiff's claim.—Moulter v. City of Grand Rapids, 155 Mich. 165.

¶ 1032. Taking chap. 16, § 2, of the charter of the City of Kalamazoo, relating to claims for personal injuries because of defective sidewalks, as an entirety and giving the words their ordinary meaning, it is clear that claims for personal injuries must be presented within four months after such claims shall have arisen.—Woodworth v. City of Kalamazoo, 135 Mich. 233.

¶ 1033. Under Local Acts 1901, No. 468, chap. 6, § 18, requiring a person injured on a public street to present his verified claim

to the comptroller within 60 days next after the injury, such person has 60 days excluding the day of the injury for the presentation of his claim.—McEvoy v. City of Sault Ste. Marie, 136 Mich. 172.

¶ 1034. The provisions of a city charter requiring persons claiming damages for injuries sustained on streets and sidewalks to give notice within a fixed period, and providing that no action shall be brought until the common council shall have had a reasonable opportunity to investigate and pass upon the claim, was complied with, where a plaintiff filed her verified claim on September 7th and thereafter met a committee, who laid over the matter for a week, when further witnesses were to be produced, and where suit was commenced late in October without plaintiff having produced such witnesses.—Monje v. City of Grand Rapids, 122 Mich. 645.

¶ 1035. The 1901 amendment of the city of Saginaw charter, by adding a new section, viz., No. 46, to title 17, covered the entire ground relating to notices of injuries sustained upon defective sidewalks, and such act was in direct conflict with the notice provided for under section 17, of tit. 6, of the charter as amended in 1899, and consequently a notice given under the old act was void.—Chamberlain v. City of Saginaw, 135 Mich. 61.

§ 267. ——Description of injury and specification of claim.

Contents and particularity required in notice, see Comp. L. 1915, § 4591.

¶ 1036. Notice to corporation counsel of a claim against the city for personal injuries due to a defective sidewalk is sufficient if it specifies the time, place, cause and nature of the injury in general terms.—Oesterreich v. City of Detroit, 137 Mich. 415.

¶ 1037. A notice of claim for injury from a defective sidewalk is sufficient under the charter of the city of Adrian where the facts as to the time, place, and manner of injury and the amount and nature of damages are set forth without the details as to the way in which the city was in default, and especially so where the city made no suggestion for a more detailed statement of the claim, which had been referred to a committee of the council and rejected.—Davis v. City of Adrian, 147 Mich. 300.

¶ 1038. Notice of a claim for personal injuries against the city under Act No. 344, Local Acts 1901, tit. 7, § 20, is not a pleading, and if sufficiently specific otherwise need not allege the negligence of the defendant.—Knudsen v. City of Muskegon, 158 Mich. 185.

¶ 1039. A notice of a sidewalk injury under the Detroit Charter, § 86, is sufficient which describes the situs as on the "east side of" a given street "between" two other named streets where the council did not ask for more specific information, but by its consideration of the claim implied that the notice was satisfactory.—Wheeler v. City of Detroit, 127 Mich. 329.

¶ 1040. A notice to a city council of a sidewalk injury is sufficiently specific as to the place of the injury where it describes the locus as the north side of a given street in front of a given residence setting out the name of the owner, the house number, the name of the street, the ward and the city.—Wilton v. City of Flint, 128 Mich. 156.

¶ 1041. A notice claiming damages "by reason of personal injuries sustained by falling on a sidewalk" is not sufficiently descriptive of the nature of the injuries to satisfy Detroit Charter, chapter 11, § 46, requiring notice to the legal department of the nature of the injury, notwithstanding reasonably strict construction in favor of the injured party.—Tattan v. City of Detroit, 128 Mich. 650.

¶ 1042. A notice of injury is sufficiently specific, which states that it was caused by a defective sidewalk on the south side of 5th avenue just east and off from S. street, said accident happening on west line of lot occupied by G., the street number of such house being 508, and on or near the east line of the residence occupied by R. (giving his number), specifying that plaintiff's right foot was caught by a board tipped up in said walk, and that the walk was out of repair and had been unsafe for travel and notoriously bad for a long time.—Nestle v. City of Flint, 141 Mich. 153.

¶ 1043. Plaintiff's notice of injury served upon the defendant village, which states that by reason of being tripped on a defective sidewalk, she "sustained personal injuries," is not sufficiently specific to comply with Comp. L. 1897, § 2775, which requires the notice to set forth substantially the extent of such injury; nor is the defect remedied by plaintiff's affidavit, accompanying such notice, in which she avers that she has suffered since such injury and believes she will continue to suffer "great pain and inconvenience" therefrom.—Miller v. Village of Birmingham, 145 Mich. 470.

¶ 1044. A notice of claim for personal injury sustained because of a defective sidewalk which merely gives the location of the action as "sidewalk at the corner of Howard and Twenty-First streets" is insufficient under Local Acts 1895, No. 463, § 46 (the charter of the city of Detroit), requiring that a notice of claim of "the time, place, and cause," as the place is not located with sufficient certainty, there being four corners at the place designated in the notice.—Barribeau v. City of Detroit, 147 Mich. 119.

¶ 1045. A notice of a sidewalk injury to a city council in itemizing the injury need not attach to each item an aliquot part of the damages claimed.—Wilkins v. City of Flint, 128 Mich. 262.

¶ 1046. A notice of the sustaining of injuries upon a sidewalk resulting in the death of the person injured, served upon a village, was not rendered invalid because the administratrix therein demanded one gross amount for various claims for damages, viz.: for the estate under the survival act, for the next of kin under the death act, and for plaintiff and the next of kin individually. —Hunter v. Village of Ithaca, 135 Mich. 281.

¶ 1047. Section 2775, 1 Comp. Laws 1897, as amended by Act No. 223, Pub. Acts 1899, providing that no village shall be liable for damages sustained by any person by reason of a defective sidewalk unless such person shall serve a notice of his claim in writing upon the clerk of the village, and that the notice shall contain certain information as to the accident and damages received, clearly recognizes that as to some injuries the damage cannot be stated exactly, but that the notice should state "the extent of the injury so far as the same has become known." Therefore a claim for permanent damages is not defeated by failure to state in the itemized claim for damages the amount of damages claimed under the head of permanent injuries.—Haney v. Village of Pinckney, 155 Mich. 656.

¶ 1048. Under 1 Comp. Laws 1897, §§ 2754, 2775, as amended by Pub. Acts 1899, No. 223, relating to auditing of accounts against villages and notice of claims for injuries, a notice of claim specifying damages claimed for loss of time, medical attendance, bodily and mental pain, etc., separately, is not rendered insufficient because it includes an item for "permanent injury," but leaves the amount thereof unspecified.—Haney v. Village of Pinckney, 155 Mich. 656.

Sufficiency of statutory notice to municipal corporation of time, place, cause and extent of injury on sidewalk or highway, see note, 2 N. C. C. A. 137.

§ 268. ——Waiver of notice or defects therein.

Necessity of notice and statement of claim, see ante § 266.

Evidence of waiver verified notice as constituting variance, see post ¶ 1082.

¶ 1049. Comp. L. 1897, §§ 2754 and 2755, requiring that a verified claim and a written notice within 60 days be filed before any recovery can be had for personal injuries resulting from defective streets or sidewalks, is not waived where plaintiff's son without any showing of authority appeared before the council just before adjournment and stated that his mother had been injured and had a claim for damages and wanted to know what the village was going to do about it, and the matter was referred to a committee but this did not meet and made no report but a member of the committee at some time told the son that he ought to file a written statement with the clerk.—Blumrich v. Village of Highland Park, 131 Mich. 209.

¶ 1050. Failure to verify the notice of a claim against a village for personal injuries due to a defective sidewalk, as required under Comp. L. 1897, §§ 2754, 2775, is waived where the notice was received without objection to the lack of verification, and the village council appointed an investigating committee which employed physicians who subjected plaintiff to a painful physical examination.—Hunter v. Village of Durand, 137 Mich. 53.

¶ 1051. Any action taken by the village council relative to a claim for personal injuries after the expiration of the statutory period for the filing of notice of such claim, is not a waiver of defects in such notice and does not revive the claimant's right of action, such claim being in tort; where claimant filed a defective notice of injury with the proper village officer within the statutory period.—Miller v. Village of Birmingham, 145 Mich. 470.

§ 269. ——Estoppel or limitation on recovery by claim.

General law of estoppel, see Estoppel.

¶ 1052. Defendant city's charter required that claims for personal injuries against it must be presented to it for allowance before bringing suit. Plaintiff filed a claim for $5,000 damages. Held, she was not prevented from later suing for a sum in excess of this amount, since the said charter provision required only that the facts relating to the claim be filed, and the statement by her of the amount of damages was immaterial.—Johnson v. City of Bay City, 164 Mich. 251.

§ 270. Appearance or examination on hearing of claim.

Presentation and audit of claims in general, see Municipal Corporations, XIV; Townships, VI; Counties, VI.

Provisions for calling and examination of claimant and witnesses before municipal authorities, see Comp. L. 1915, § 4591.

¶ 1053. Under Marquette City Charter (Loc. Acts 1893, No. 323, chap. 11, §§ 19-22) providing that a city shall not be liable in damages for injuries sustained on a defective sidewalk unless the person claiming damages shall within 30 days after the injury give written notice thereof to the mayor, recorder or city attorney, and within 90 days present a sworn statement to the comptroller under oath, stating the time, place, cause and manner of the injury and

the witnesses present, if any; the council has no right as a condition precedent to its acting, to demand that the injured person appear personally and with his witnesses before either the council or a committee appointed by it.—Dollar v. City of Marquette, 123 Mich. 184.

¶ 1054. Under Marquette City Charter (Loc. Acts 1893, No. 323, chap. 11, §§ 19-22) providing that a city shall not be liable in damages for injuries sustained on a defective sidewalk, unless the person claiming damages shall within 30 days after the injury give written notice thereof to the mayor, recorder or city attorney, and within 90 days present a sworn statement to the comptroller under oath, stating the time, place, cause and manner of the injury and the witnesses present, if any, and providing for appeal to the circuit court if the claim be disallowed or the party be dissatisfied with the amount awarded; a person so injured who has literally complied with the provisions of the act cannot be required to appear personally and with his witnesses before either the council or a committee appointed by it, and where upon his failure to do so, the claim is laid on the table, there is nothing to appeal from and such person has the right to bring his original action for damages against the city.—Dollar v. City of Marquette, 123 Mich. 184.

§ 271. Nature and form of remedy.

Form of action for injuries to other users of highway, see post § 384.

¶ 1055. Case is the proper action for damages to one's wagon and sleigh from loads of stone deposited by defendant in a public highway through which plaintiff had to drive to reach his own premises.—Green v. Belitz, 34 Mich. 512.

2. Parties and pleading.

§ 272. Parties.

Right of action, see ante § 265.
Persons to whom duty to keep highways and bridges in repair, owing, see ante § 217.
Person entitled to sue for damage by diverted waters, see ante ¶ 388.
General law as to parties, see Parties.
Discontinuance as to defendants joined with municipality, see Discontinuance § 2.

¶ 1056. The owner of the mill race and the township in which the bridge was situated may properly be joined as parties defendant, where a railing gave way on a bridge over a race, since though legal defense is open to one defendant it may not have been open to the other, as both defendants owed ultimately the same duty.—McRae v. Township of Hart, 179 Mich. 325.

§ 273. Pleading.

Allegations as to place and nature of highway, see post § 274.
Allegations as to notice and knowledge of conditions, see post § 275.
Allegations as to giving notice of claim, see post § 276.
Issues under the pleadings and variances in proof, see post §§ 277-279.
Description of injury and specifications of claim in notice of claim, see ante § 267.
General law of pleading, see Pleading; Trespass.
Amendments of declaration, see Pleading, VI.
General rules as to pleading negligence, see Negligence, V.
Pleading damages, see Damages, X.
Amendment of pleadings as ground for continuance, see Continuances § 4.

¶ 1057. A declaration against a village for personal injury from a defective street need not refer expressly to the statute.—Clark v. Village of North Muskegon, 88 Mich. 308.

¶ 1058. A declaration which, in an action against a city, avers that defendant negligently permitted a building, in course of being moved by third parties by permission of the council, to remain in a public street on a certain night, with a timber projecting from under it, and without any lights, danger signals or other suitable warning to persons passing along the street, and that plaintiff, without negligence on her part, while riding along the street, ran against the building and timber, and was then and there thrown out of the buggy in which she was riding, and sustained certain specified injuries, is sufficient to charge defendant with its statutory liability in regard to streets.—Hayes v. City of West Bay City, 91 Mich. 418.

¶ 1059. In an action for an injury caused by obstructions which in the first instance are lawfully in the street, but which defendant is bound to remove as speedily as possible, it is not necessary to allege that they were left there for an unreasonable time; the offense of leaving them there relates back so that it becomes unlawful from the beginning, and the time necessary for their removal is matter of justification and defense.—Bowen v. Detroit City R. Co., 54 Mich. 496.

¶ 1060. In an action for damages to a buggy which was upset by being driven at night against earth thrown up by defendant, a street railway company, in repairing its track, the declaration failed to aver that the earth was allowed to remain for an unreasonable time, or without lights and barriers in the nighttime. Held, that no cause of action was stated; merely excavating and piling up earth not being negligence on defendant's part.—Cowan v. Muskegon R. Co., 84 Mich. 583.

¶ 1061. If the negligence relied upon for recovery in an action against a township for an injury from a defective highway is that

the overseer of highways should have given notice that the way was dangerous, the declaration should count upon such negligence.—Smith v. Township of Walker, 117 Mich. 14.

¶ 1062. An allegation that the city negligently allowed a crosswalk to be and continue in a dangerous condition and unguarded, and by reason thereof and "for want of proper and sufficient care in keeping said crosswalk in safe condition, and in allowing said excavation to remain open and unguarded," plaintiff while walking on the crosswalk fell into the excavation and was hurt, is sufficient to plead that plaintiff's injury was the joint product of tearing up a crosswalk and excavating in the street under it.—Alexander v. City of Big Rapids, 76 Mich. 282.

¶ 1063. On the authority of McKellar v. City of Detroit, 57 Mich. 158, a complaint is demurrable which alleges that a previous snowfall had been tramped and beaten down by walking thereon while the snow was soft, after which it had melted on the sides of the walk leaving the center uneven and irregular and higher than the sides of the walk.—Rolf v. City of Greenville, 102 Mich. 544.

¶ 1064. A declaration relating to a single transaction,—the falling of plaintiff into a hole in a sidewalk, and her attempt to extricate herself,—alleging that this occurred notwithstanding she then and there exercised all due care and caution, and was not guilty of negligence, sufficiently shows, in the absence of a demurrer, that she used such care and caution in the attempt to extricate herself.—McKormick v. City of West Bay City, 110 Mich. 265.

¶ 1065. In a declaration against a city for negligent injuries, a count that defendant failed to light its streets, and that it left a dangerous hole in a sidewalk, into which, the walk being unlighted, plaintiff fell and was injured, is good, as predicating negligence in maintaining a bad walk at a dark place.—Griswold v. City of Ludington, 116 Mich. 401.

¶ 1066. A declaration in an action for a sidewalk injury sufficiently apprises the defendant of the plaintiff's claim where it states that the walk had been taken up leaving a depression covered with planks which had become warped and arose above the level of the walk and were unsafe and describes the manner of the injury in detail.—Wilton v. City of Flint, 128 Mich. 156.

¶ 1067. One count alleging negligence on the part of the city in leaving a meter box uncovered is not inconsistent with another count alleging that it was improperly covered by placing loose boards over it.—Knudsen v. City of Muskegon, 158 Mich. 185.

§ 274. ——Allegations as to place of injury and public nature of way.

Variance as to place of accident, see post § 277.

Burden of showing place of accident a public highway, see post § 280.

Rules for pleading place or locality in general, see Pleading.

¶ 1068. A declaration against a city or village for injury from a defective sidewalk, brought under How. St. § 1446f, need not allege that the street has been in use as a public highway for ten years and is open to public travel.—Fuller v. City of Jackson, 92 Mich. 197, overruling Clark v. Village of North Muskegon, 88 Mich. 308.

¶ 1069. In an action declaring on Comp. L. 1897, § 3444, for injuries because of the dangerous conditions of a highway, an exception providing that the highway must have been in use ten years prior to the injury need not be negatived, this being a matter of defense.—Schelske v. Township of Orange, 147 Mich. 135.

¶ 1070. A declaration against a village for a negligent injury sufficiently describes the place where the accident happened if it describes such place as being on the south side of a specified street in front of the premises of the person named.—Clark v. Village of North Muskegon, 88 Mich. 308.

¶ 1071. A declaration in an action for injuries sustained by reason of a defective highway, which alleges that the defendant township had control of that part of the highway which was situated between G. township and defendant township, "being the highway between" certain sections and being "what is known as a town line road" and that the defect in question consisted of a hole of stated dimensions on the north side of and in the traveled portion of said highway, between the sections indicated, is not open to the objection, after a plea of the general issue, that it does not sufficiently describe the place of the injury.—Whoram v. Township of Argentine, 112 Mich. 20.

¶ 1072. An allegation that plaintiff was injured on a defective sidewalk, at a point 125 feet west of a certain street, is to be interpreted as indicating the estimated and not the exact distance.—Williams v. City of Lansing, 152 Mich. 169.

¶ 1073. An allegation in a declaration that Warren Avenue was on the day of the accident, and for a long time previous thereto had been, used and occupied as a public highway, etc., and that Remington Avenue was also a public highway, is a sufficient allegation that the place of an accident occurring at the intersection of said streets was at the time a public highway.—Williams v. Sager, 165 Mich. 635.

§ 275. ——Allegations as to notice or knowledge of defect.

Questions of law and fact as to notice, see post § 323.
Necessity and sufficiency of notice, see ante XII, B.
Evidence as to notice or knowledge, see post §§ 291, 300.
Instructions as to notice, see post §§ 350, 356.
Burden of proof as to notice or knowledge, see post § 280.
Necessity of notice of defect, see ante XII, B.
Pleading in actions for injuries to other users of highways, see post § 385.

¶ 1074. A declaration, in a personal injury case, averring that the accident occurred upon one of the principal streets of a city, by reason of a defective sidewalk, which defect was a dangerous one, and had existed for three months, and that defendant then and there knew that the sidewalk was unsafe and not fit for travel, sufficiently states knowledge or notice of the defect by defendant.—Tice v. Bay City, 78 Mich. 209.

¶ 1075. A declaration for a negligent personal injury which avers that the defendant city well knew, or by the exercise of reasonable care ought to have known, of the dangerous and unsafe condition of the sidewalk upon which plaintiff was injured, avers sufficiently, in the absence of a demurrer, that the defect had existed for such a length of time before the accident as to justify a presumption of notice, which takes the place of actual notice.—Germaine v. City of Muskegon, 105 Mich. 213.

§ 276. ——Allegations as to notice of claim.

¶ 1076. Under Act No. 566, Local Acts 1905, tit. 24, § 24, in a suit for personal injuries due to a defective sidewalk, a declaration which fails to allege that the board of public works had written notice of the defect prior to the accident, is subject to demurrer.—Forsyth v. City of Saginaw, 158 Mich. 201.

§ 277. Issues and variance.

In actions for injuries on bridges and approaches, see post § 278.
In actions against abutters and corporations, see post § 279.
In actions for injuries to other users of highway, see post § 386.
In actions for injuries on private ways, see post § 421.
General law as to issues and variance, see Pleading, IX, X.

¶ 1077. There is no material variance between an allegation of the obstruction of a highway in a specified township and proof that a street in a certain village was obstructed, if it appears that the village was in the township.—Patterson v. Detroit, L. & N. R. Co., 56 Mich. 172.

¶ 1078. Where the declaration in an action for injury from a defective sidewalk alleged that defendant was negligent in permitting the whole sidewalk in front of the premises where the accident occurred to be out of repair, and was not demurred to as too general, the evidence need not be confined to the condition of the walk at a particular place where the accident occurred, but defendant's negligence might be proved as stated in the declaration.—Campbell v. City of Kalamazoo, 80 Mich. 655.

¶ 1079. Under a declaration charging defendant with permitting a sidewalk to become and remain rotten and out of repair, plaintiff may show that the walk had not been rebuilt or repaired for upwards of twenty years.—Haynes v. City of Hillsdale, 113 Mich. 44.

¶ 1080. Plaintiff in an action for personal injuries alleged to have been caused by falling at night into a hole in a sidewalk in front of a particular lot, will not be required, because of evidence of more than one hole in such walk into which she might have fallen, to elect to rely on a particular hole in a particular place; it being sufficient that she show to the satisfaction of the jury that the accident occurred as alleged in the declaration.—Hall v. City of Cadillac, 114 Mich. 99.

¶ 1081. Proof that plaintiff in an action against a city was injured upon the street curb near a chain suspended above and parallel to the curbing and attached to a bridge brace and an upright, was not a variance from an allegation in the declaration that the plaintiff was injured by tripping upon such chain; it appearing that it would have been next to a physical impossibility for plaintiff to have fallen over the curb without getting his other foot under the chain.—Milliken v. City of St. Clair, 136 Mich. 250.

¶ 1082. Evidence of waiver of a requirement of verification is admissible under a declaration alleging performance of a requirement of verified notice to a village of a claim for personal injuries.—Hunter v. Village of Durand, 137 Mich. 53.

¶ 1083. In an action against a city for personal injuries sustained by reason of a defective sidewalk where the declaration averred in substance that the sidewalk was constructed of a plank running lengthwise of the walk resting upon stringers laid crosswise of the walk, that the end of one of the planks had become rotten or broken off which allowed the plank to drop down and rest upon the ground ten inches below the level of the sidewalk, and that plaintiff stepped into the hole, and her foot being caught she fell and received the injuries, but the proof showed that the board looked to be in place but when stepped on went

down with plaintiff's weight, and the board was rotten there was no misleading variance.—Epelett v. City of Sault Ste. Marie, 144 Mich. 392.

¶ 1084. Where plaintiff alleged that she was injured on a defective sidewalk, at a point 125 feet west of a certain street, and her proof showed the point to be 93 feet, the allegation of 125 feet is to be interpreted as an estimate, and there is no case of a variance.—Williams v. City of Lansing, 152 Mich. 169.

¶ 1085. In an action against a county to recover damages for injuries alleged to have been caused by defendant's maintenance of a temporary way on an incline sloping down from its roadway to a side ditch, where the proof showed that the accident was due to a hole at the bottom of the incline into which one runner of plaintiff's sleigh went, turning it over, held that plaintiff had no legal right to go to the jury upon a claim of negligence not alleged in his declaration.—Johnson v. Muskegon County, 195 Mich. 722. (Moore, J., dissenting.)

§ 278. ——In actions for injuries from bridges and approaches.

¶ 1086. A declaration for injuries on "a bridge" on Lake street in defendant village "constructed across Bear river and flume, as aforesaid," further alleging that for want of a railing plaintiff fell from the bridge over the raceway (flume), is sufficient to allow recovery respecting negligence in keeping up the bridge over the flume, which was a duty of the village; though there were in fact two adjacent bridges, one over the flume and one over the river, and it was the duty of the township at large to keep up the bridge over the river.—Williams v. Village of Petoskey, 108 Mich. 260.

¶ 1087. There is no variance between allegations that the planks in the bridge where the accident occurred were loose, and the stringers uneven, so that the planks were liable to slip off and turn over, and thereby to trip horses, and that decedent's horses became entangled in the loose planks and thereby tripped, and evidence that there was a broken plank and a hole in consequence thereof, and that one of the horses driven by decedent had stepped into the hole, whereby the team became frightened, resulting in the injury complained of.—Merkle v. Township of Bennington, 68 Mich. 133.

¶ 1088. Under a declaration that plaintiff's horse, while alarmed at a hole in the bridge, backed against the railing, which giving way the vehicle and its contents were precipitated below, it is immaterial whether the proof shows that plaintiff was precipitated from the bridge itself or from the abutment of the bridge.—Smith v. Township of Sherwood, 62 Mich. 159.

¶ 1089. In an action for injury from a defective highway, which injury was caused by a horse's backing off from an unguarded approach to a bridge, a variance of four feet between the evidence and the averment in the declaration as to the distance from the end of the bridge to the point at which the horse backed off is not fatal.—Ross v. Township of Ionia, 104 Mich. 320.

¶ 1090. Plaintiff's intention to rely upon structural as well as surface defects in a bridge, by the collapse of which she claims to have been injured, is sufficiently indicated by the averment in her declaration that defendant allowed its sidewalk and bridge "to become and remain broken, torn up, and out of repair, and not reasonably safe and convenient for public travel," and that, "while the plaintiff was walking over said walk and bridge, said sidewalk and bridge, by reason of its being in an unsafe, broken, torn up, and out of repair condition, broke and fell into the river." So held, at least, where, though no demurrer had been interposed, want of notice of the exact nature of the claim was urged to defeat the verdict.—Snyder v. City of Albion, 113 Mich. 275.

¶ 1091. An allegation in a declaration in an action for personal injuries against a township caused by the falling of a bridge, that the original construction of the bridge was defective in that the bridge which crossed a drain, rested on mudsills which were not sunk below the bottom of such drain, and that the bridge was not properly braced and strengthened and no piling or posts were driven to prevent the mudsills from dropping into the drain, does not warrant recovery on the ground of negligent construction, where each count showed that no such claim was relied on but that the accident was ascribed to a subsequent deepening of the ditch whereby the undermining by the action of the water occurred.—Pearl v. Township of Benton, 123 Mich. 411.

¶ 1092. In an action against a township for failing to maintain a bridge in proper condition the declaration alleged fully the defective condition of the bridge, and that because of such condition plaintiff's horse became frightened and sprang suddenly forward with great violence, whereby his wagon came against loose planks, and was suddenly checked, causing plaintiff to be jerked and thrown forward. Held, that proof of the dangerous condition of the bridge and that the horse stepped into holes caused by the loose planks, whereby the progress of the wagon was suddenly checked and plaintiff was thrown forward, sufficiently supports the declaration.—Hunter v. Township of Dwight, 157 Mich. 634.

§ 279. ——In actions against abutters and other private persons or corporations.

¶ 1093. A declaration in an action against a street railway company for an injury re-

sulting from its negelect to properly clean the snow from its tracks, in consequence of which a horse harnessed to a double bobsled was thrown down, described the ridges of snow as "along and very near to said street railway track, and between the double tracks thereof," and stated that as the sleigh struck the ridge between the tracks the horse stepped on the steep and slippery bank piled "along and near said" track. Held, that this distinguished between the two places; and as a like distinction was kept up in further recitals, there was no variance arising out of the question whether it was one ridge or the other that caused the injury.—Wallace v. Detroit City Ry. Co., 58 Mich. 231.

¶ 1094. The variance is fatal, where the declaration in an action for frightening a horse alleges that defendant forced great quantities of steam from his engine near the highway at the time plaintiff was driving by, but the proof shows that the engine of defendant was a gasoline engine, and the horse was frightened by the noise of the exhaust pipe.—Hoyt v. Garlock, 145 Mich. 632.

¶ 1095. In a suit for personal injuries due to the falling of materials from a building in the course of construction, negligence of the defendant must be proved, and the negligence proved must be the negligence charged in the declaration.—Brown v. Bryant, 166 Mich. 180.

3. Burden of proof, presumptions and evidence.

§ 280. Burden of proof and presumptions.

As to notice or knowledge and opportunity to repair, see post § 281.

As to negligence by abutter or private party, see post § 282.

Weight and sufficiency of evidence to sustain burden, see post § 298.

In actions for injuries from other users of highway, see post § 387.

General law of presumptions and burden, see Evidence, II.

Presumptions and burden as to negligence and contributory negligence in general, see Negligence, V.

Res ipsa loquitur rule, see Negligence, V; and see also Carriers, § 210.

Burden on plaintiff to show that neither he nor driver of vehicle was contributively negligent, see Negligence, V.

¶ 1096. In an action to recover damages for injuries received because of a defective sidewalk, plaintiff need not show that the village whose duty it was to keep the walk in order either constructed it or ordered its construction.—Argus v. Village of Sturgis, 86 Mich. 344.

¶ 1097. The provision of How. St. § 1446f, limiting the liability thereby created for injuries sustained from defective highways to those which have been in use ten years, applies only to public highways in townships and expressly excludes streets, sidewalks, etc., in cities and villages; hence plaintiff in a suit for injury from a defective sidewalk need not allege or prove that the street has been used as a highway for ten years.—Fuller v. City of Jackson, 92 Mich. 197, overruling Clark v. Village of North Muskegon, 88 Mich. 308.

¶ 1098. In an action against a city for injuries caused by a defective sidewalk, plaintiff has the burden of showing that she was exercising due care at the time of the accident.—McGrail v. City of Kalamazoo, 94 Mich. 52.

¶ 1099. In an action for personal injuries alleged to have been caused by being thrown from a vehicle because its wheel dropped into a ditch excavated by defendant railway company in the street, it is error to direct a verdict for defendant on the ground that plaintiff had not shown that defendant was acting without authority in constructing its road as it did, the burden of such proof not being on plaintiff.—Kaiser v. Detroit & N. W. Ry., 131 Mich. 506.

¶ 1100. In the absence of any knowledge on the subject or anything apparent to observation that would lead to a contrary opinion, it may be presumed that a township has repaired a weak and shaky bridge after a lapse of a year from the time that it was known to be in that condition.—Moore v. Township of Hazelton, 118 Mich. 425.

Application of doctrine of res ipsa loquitur in action for injuries caused by open coal hole, see note, 5 N. C. C. A. 54.

§ 281. ——As to notice or knowledge and opportunity to repair.

Sufficiency of evidence to show notice or knowledge of defect, see post § 300.

Allegations as to notice or knowledge, see ante § 275.

Questions of law and fact as to notice, see post § 323.

Instructions as to notice, see post §§ 350, 353, 356.

Needlessness of proof of notice of defect in original plan of construction, see Comp. L. 1915, § 4589.

¶ 1101. In an action against a city for injuries from a defective sidewalk, notice to the city of want of repair cannot be presumed unless the defects were so open and notorious, of so long a standing, and of such a character as would naturally arrest the attention of passers-by; and the burden of showing these facts is upon plaintiff.—McGrail v. City of Kalamazoo, 94 Mich. 52.

¶ 1102. Knowledge of one defect in a sidewalk is not inferable from neglect to repair

another.—Fuller v. City of Jackson, 82 Mich. 490.

¶ 1103. Notice on the city's part that the sidewalks in the vicinity are out of repair does not show notice of a particular defect in a crosswalk which caused the injury complained of.—Dundas v. City of Lansing, 75 Mich. 499.

¶ 1104. In an action for a sidewalk injury against a city, notice to the city is not inferred, in the absence of proof that the defective condition was notorious, or that any officer had been over it, from the fact that the icy condition had existed for four days.—Corey v. City of Ann Arbor, 134 Mich. 376.

¶ 1105. Notice of the dangerous condition of a sidewalk is not inferred from the fact that the icy condition existed for several days, the president of the council lived across the street from the place of the accident, two patrolmen were frequently seen on the street, and the city clerk passed over the walk the day before the accident.—Corey v. City of Ann Arbor, 134 Mich. 376.

¶ 1106. A city must be presumed to have knowledge of the defect in the street where the rails of an abandoned side track have been permitted to remain, for two and one-half years, slightly covered so as not to be visible but so near the surface as to be dangerous in wet weather.—Cutcher v. City of Detroit, 139 Mich. 186.

¶ 1107. It is not actionable to fail to keep a bridge in a reasonably safe condition for travel unless knowledge or notice of the existence of the defect and an opportunity to remedy it is shown, and such notice is not inferable from a mere failure to seasonably inspect.—Pearl v. Township of Benton, 123 Mich. 411.

§ 282. ——As to negligence of abutter or private person or corporation.

¶ 1108. In a suit for personal injuries arising from the falling of materials from a building, the fact that an injury has resulted from certain conduct of defendant does not establish the further fact that said conduct was negligent.—Brown v. Bryant, 166 Mich. 180.

§ 283. Admissibility of evidence.

Admissibility of particular matters or of evidence to prove particular issues, see post §§ 284-297.

Subsequent acts, facts and conditions and occurrences at other times or places, see post §§ 286-290, 292, 298.

Evidence variant from the allegations, see ante § 277.

Weight and sufficiency of evidence, see post § 298.

General law of evidence, see Evidence.

Judicial notice respecting highway, including sidewalk, construction, see Evidence § 14.

Judicial notice of travel conditions and customs, see Evidence § 13.

Judicial notice of propensities of horses to be frightened as given objects, see Evidence § 4.

Reasonable safety for travel as conclusion for jury and not for witness, see Evidence § 229.

Admissions and declarations of agents as evidence against principal, see Evidence, VII, C, D.

Admissions by road officers as evidence against public, see Evidence § 436.

Planks and like objects from place of accident as evidence, see Evidence, IX.

Proper field and limits of direct and cross-examination, see Examination of Witnesses.

Admissibility of cross-examination of witness as to being heavy taxpayer to affect him with bias, see Examination of Witnesses § 60.

Evidence that it was witness' duty to inspect as corroboration of his testimony, see Witnesses, VI.

¶ 1109. In determining the standard of diligence required from them by law it is proper to consider the size of the township, the sparsity of the population, the number and remoteness of the roads and bridges, and the improbability of finding road officers with exceptional qualifications.—Medina Tp. v. Perkins, 48 Mich. 67.

¶ 1110. As the statute (How. St. §§ 1442, 1443, 1445) requires townships to keep their highways in repair so as to be safe for public travel, the usage and custom generally in regard to erecting railings or barriers along embankments cannot be shown.—Malloy v. Township of Walker, 77 Mich. 448.

¶ 1111. Evidence that it was customary for people to cross a street diagonally in the direction taken by plaintiff when he was injured by falling into a manhole, and that a path had been worn across the street at that point, is admissible on the question of plaintiff's care.—Baker v. City of Grand Rapids, 111 Mich. 447.

¶ 1112. In an action against a city for injuries sustained by a traveler who after crossing a bridge over a small stream, turned to cross the street and in passing between one of the bridge braces and an upright for electric wires, tripped over a chain which, according to custom, swung between the brace and upright, while the draw was closed, there was no error in admitting testimony tending to show a common practice of crossing at the point in question.—Milliken v. City of St. Clair, 136 Mich. 250.

¶ 1113. In an action for injuries received on an alleged defective sidewalk testimony

as to whether witness had any trouble in passing over the walk in question and to the effect that such walk was built after the pavement was laid is incompetent and is properly excluded.—Warner v. City of Wyandotte, 175 Mich. 695.

¶ 1114. In an action against a city to recover damages for personal injuries sustained by plaintiff driving in a buggy due to a collision with a wagon standing without a light on one of defendant's streets, evidence offered to show how a certain buggy was driven, held properly excluded where there was no offer to show that such buggy was the one in which plaintiff was riding. —Hall v. City of Flint, 195 Mich. 638.

§ 284. ——Negative testimony as to defects or negligence.

Admissibility of negative evidence, see also Evidence § 80.

¶ 1115. In an action against a city for an injury from a defective street, the defense cannot show that persons living in the immediate vicinity had not noticed the defect, which had existed for several days.—City of Grand Rapids v. Wyman, 46 Mich. 516.

¶ 1116. Where constructive, not actual, notice to a defendant city of a defect in its sidewalk is claimed, testimony of witnesses that they have frequently passed over the walk and would have noticed a defect if one had been there is admissible.—McGrail v. City of Kalamazoo, 94 Mich. 52.

§ 285. ——As to identity, nature or gravity of defects.

¶ 1117. In an action for injuries received by stepping into a hole in a sidewalk the evidence showed that there were several holes, and some of the witnesses could not identify the one into which the plaintiff stepped. Held, that it was not error to ask those witnesses as to the location of the holes they observed, where the court charged that plaintiff could not recover unless the city had notice of the actual hole into which plaintiff stepped, and that the existence of the others could not be used to show notice of this particular defect.—Tice v. Bay City, 84 Mich. 461.

¶ 1118. In an action against a township for damages resulting from a dangerous highway, plaintiff may show as bearing on negligence in keeping up the road the condition of the highway, and whether there were any railings or guides to indicate the position of the highway embankment at a narrow place when covered with water, and to protect persons from the danger of falling off.—Harris v. Township of Clinton, 64 Mich. 447.

¶ 1119. Where, in an action for an injury from a defective sidewalk, a witness has testified that at the place of the accident and for a time before, planks were loose, that he replaced one of them several times, that the sills were decayed, and that one plank was broken in two, his further testimony that when going across the walk great care was necessary if a person stepped on one end or close to the sill, the witness explaining that there was danger of tipping the plank up and throwing it out, was admissible.—Edwards v. Common Council of Village of Three Rivers, 102 Mich. 153.

¶ 1120. A widow of one who is killed as a result of being struck by an automobile fire truck which ran off the street because of a defect in the pavement is not accorded a reasonable opportunity to make actual measurements as to the size and depth of the hole where the defect is repaired within a few days after the accident, and consequently may introduce evidence as to the size and depth of the hole based upon estimates.—Cone v. City of Detroit, 191 Mich. 198.

§ 286. ——Subsequent conditions at or near place.

In actions against abutters and third persons, see post § 295.

Evidence as to conditions at times other than pleaded, see also Evidence § 94.

¶ 1121. In an action for personal injuries sustained by driving an automobile into an excavation on the street evidence of the condition of the pavement the next morning is admissible.—Karrer v. City of Detroit, 142 Mich. 331.

¶ 1122. Where plaintiff sues for an injury sustained by him in consequence of striking a log while he was traveling in the highway at night, it is competent to show the result of a measurement made four weeks after the accident of the size and height of the log, it appearing that the log was firmly imbedded in the earth and that there was no probability of an intervening change of situation.—Langworthy v. Township of Green, 88 Mich. 207.

¶ 1123. In an action against a village for personal injuries to a child resulting from a defective sidewalk it was proper to allow the child's mother to testify that she examined the place of the accident the next morning, where it appeared that the accident had happened after dark the night before, and it could not be well examined before, and it further appeared that the same condition had existed for weeks before. —Shippy v. Village of Au Sable, 85 Mich. 280.

¶ 1124. One who in the morning examines a sidewalk where she was injured the evening before may testify as to its condition in the morning as tending to show its condition at the time of the accident.—Fuller v. City of Jackson, 92 Mich. 197.

¶ 1125. Evidence is admissible, in an action against a city for injuries alleged to have been caused by falling over a loose plank in the sidewalk, to show that upon taking up the walk shortly after the accident the stringers were found to be badly decayed, since such evidence tended to show the actual condition at the time of the accident.—Brown v. City of Owosso, 130 Mich. 107.

¶ 1126. In an action against a city for personal injuries alleged to have been caused by a defective sidewalk, evidence of the condition of the walk on the morning following the injury, is not so remote as to be inadmissible there being no claim that there had been any change in its condition.—Lindley v. City of Detroit, 131 Mich. 8.

¶ 1127. On the question of the condition of a walk alleged to have had decayed stringers and loosened planks, examinations made two or three months after the injury and tests then made are not too remote.—Hunter v. Village of Ithaca, 141 Mich. 539.

¶ 1128. In a case involving the faulty construction of the crosswalk whereon an injury had been sustained a witness may testify that he saw the walk the morning after the accident and that the boards were then loose, such evidence not being too remote and being material to one feature of the case.—Barker v. City of Kalamazoo, 146 Mich. 257.

¶ 1129. A witness testified as to the condition of the sidewalk near the place of plaintiff's injury, as observed by him a week or two after the accident. The court below stated that this evidence was admitted on the understanding that proof was to be offered that no changes had been made in the sidewalk, and that the testimony was only to show that had the city used reasonable diligence, it would have discovered the defect in question. Held, this evidence was properly admitted.—Williams v. City of Lansing, 152 Mich. 169.

¶ 1130. In an action against a city to recover damages for injuries due to a defective sidewalk, held that it was improper for defendant to introduce evidence that the walk was again washed out by flood two years after the accident where the accident was in May following a storm of an hour or two, and the second flood in March two years later followed a storm of longer duration when some snow was still on the hillsides and there were other differences.—Kethledge v. City of Petoskey, 199 Mich. 659.

¶ 1131. In an action for an injury received from a defective sidewalk, there was no error in allowing a witness to testify that he was employed by the city to take up the walk soon after the accident, and that he found the stringers rotten, and had no difficulty in lifting the boards therefrom, the claim being that it was in bad condition so long as to imply notice.—Alberts v. Village of Vernon, 96 Mich. 549.

§ 287. ——Subsequent repairs or precautions.

Nonadmissive character of subsequent repairs and precaution, see also Evidence §§ 399, 400.

¶ 1132. The existence of an actionable defect in a sidewalk cannot be predicated upon the fact of repairs subsequent to the accident for which suit is brought; but where there is abundant proof of the existence of the defect, prior to such accident, the admission of testimony showing such repairs is not prejudicial error.—Lombar v. Village of East Tawas, 86 Mich. 14.

¶ 1133. In an action for injury caused by a log lying in a highway, the fact that the overseer of highways has since the accident cut off the exposed part of the log is inadmissible to show that the township has recognized the dangerous condition of the highway.—Langworthy v. Township of Green, 88 Mich. 207.

¶ 1134. Evidence that a witness had repaired the defective walk for the village, and the proceedings of the council in relation to such repairs, are admissible as bearing on the control of the walk.—Will v. Village of Mendon, 108 Mich. 251.

¶ 1135. In an action for sidewalk injury evidence of repair of the walk after the injury is inadmissible as substantive testimony of negligence.—Zibbell v. City of Grand Rapids, 129 Mich. 659.

§ 288. ——Conditions at other places.

¶ 1136. Evidence by plaintiff, as bearing on the city's negligence, that similar defects had often been suffered to continue for a considerable time without attention from the public authorities, is wholly immaterial, but could not have been injurious to defendant.—City of Grand Rapids v. Wyman, 46 Mich. 516.

¶ 1137. In an action for injury from a defective crosswalk, evidence that sidewalks in the vicinity were out of repair is inadmissible.—Dundas v. City of Lansing, 75 Mich. 499.

¶ 1138. In an action for injury from a defective sidewalk, evidence that the walk's condition was bad at other places beyond the defect that caused the injury is inadmissible.—Tice v. Bay City, 78 Mich. 209.

¶ 1139. Where, in a personal injury action against a city by a pedestrian, the defect complained of was a particular hole large enough to admit plaintiff's foot, evidence offered by plaintiff of other similar holes in the walk, but at points in no way connected

with the place of the accident, is inadmissible.—Tice v. Bay City, 78 Mich. 209.

¶ 1140. Where the defect in a sidewalk which occasions an injury arises from a cause which naturally affects the condition of the entire walk, as where it is occasioned by age and subsequent decay, the jury may take into consideration the existence of loose planks in the sidewalk near the place of the accident as evidence that the identical plank on which plaintiff tripped had been loose in such manner as to make defendant negligent in regard to it.—Girard v. City of Kalamazoo, 92 Mich. 610.

¶ 1141. In an action for damages for injuries sustained by a horse becoming frightened from the flushing by firemen of a city fire hydrant, where the particular hydrant was shown never to have been used for any other purpose than in the extinguishment of fires, evidence of the use of other hydrants for other purposes, and uses to which other hydrants had been put is immaterial and is properly excluded.—Brink v. City of Grand Rapids, 144 Mich. 472.

§ 289. ——Other accidents and mishaps in vicinity.

¶ 1142. In an action for an injury from a defective sidewalk, evidence that others had stepped into the same hole in the walk before the time of plaintiff's injury is admissible to show the existence and character of the defect and constructive notice to defendant.—Lombar v. Village of East Tawas, 86 Mich. 14.

¶ 1142a. In an action for injuries sustained because of a defective sidewalk, it was proper to allow a witness who had testified as to the condition of the walk to be asked how he discovered its condition prior to the accident, and to admit his answer that the boards were loose and "jiggled" under his feet and that he stumbled on the boards and had seen others stumble, but had not fallen himself.—Thompson v. Village of Quincy, 83 Mich. 178.

¶ 1143. In an action for injuries caused by being tripped by a loose board in the sidewalk, a witness' testimony that he was tripped by a board in the walk eight months before the accident is admissible as tending to show that the boards were loose, in connection with proof that no repairs were made subsequently and until after the accident to plaintiff.—Alberts v. Village of Vernon, 96 Mich. 549.

¶ 1144. In an action against a city for personal injuries received in a fall caused by a defect in a sidewalk, evidence that three others, walking abreast with plaintiff, also fell down, and from the same cause, is admissible to show the nature of the defect. —Abbott v. City of Detroit, 150 Mich. 245.

¶ 1145. In a personal injury case for injuries sustained through an automobile running into an excavation on the street evidence that on the evening in question two other automobiles went into the same excavation seems to be admissible for the purpose of showing the character and existence of the excavation but not for the purpose of showing any reasonable care on the part of plaintiff.—Karrer v. City of Detroit, 142 Mich. 331.

¶ 1146. Where a city is sued for injuries from a defective bridge, evidence that a few days before the accident another person drove over it and found the planks loose, by reason of which his horses fell through, is competent as tending to show the bridge's condition before the accident complained of occurred, there having been no repairs meantime.—Woodbury v. City of Owosso, 64 Mich. 239.

§ 290. ——As to fright of other horses.

¶ 1147. In a suit against a township for injuries received by plaintiff in being thrown from a bridge through the backing of his horse which took fright at a hole in the bridge it is competent to show particular instances of other horses being frightened at the hole; such evidence tended to show the dangerous character of the bridge, and knowledge thereof on the part of the township authorities.—Smith v. Township of Sherwood, 62 Mich. 159.

¶ 1148. In an action against a township for injuries caused by a horse taking fright at building material stored near a highway for use in a bridge, it cannot be shown that other horses were previously frightened by such material.—Boos v. Township of Northfield, 186 Mich. 386, 12 N. C. C. A. 145.

§ 291. ——As to notice and opportunity to make safe.

Evidence as to existence of other holes, see ante § 285.

Previous conditions, see post § 292.

Previous accidents as bearing on notice, see post § 293.

Negative testimony as to noticeability of the defect, see ante § 284.

Admissibility of admissive declarations by highway commissioner to bind township on question of notice, see Evidence § 436.

¶ 1149. Testimony by president of a village sued for an injury from a defective sidewalk, that he knew of the walk's condition, that defect could have been repaired in twenty minutes, and that before accident he called the village marshal's attention to such defect, is admissible to show negligence on defendant's part, and defendant cannot rebut its effect by showing that such president did not give like information to

chairman of street committee.—Edwards v. Village of Three Rivers, 96 Mich. 625.

¶ 1150. In an action against a village for injuries from a defective sidewalk, evidence that notice was given to the corporate authorities that the walk "from the school house to the village," which included the walk on which the accident occurred, was in a dangerous condition, is admissible to charge defendant with notice of the defect in question.—Strudgeon v. Village of Sand Beach, 107 Mich. 496.

¶ 1150a. The capacity of white pine for holding nails when sound, and its lasting qualities, as compared with other timber, may properly be shown in an action wherein defendant is claimed to have had constructive notice, by reason of the lapse of time, of the decay of a bridge built of such material; since the durability of such wood is some evidence as to the time for inspection.—Snyder v. City of Albion, 113 Mich. 275.

¶ 1151. On the question of notice of a defect remaining after the village street commissioner had inspected the sidewalk in response to a direction by a member of the common council, it is competent to show that the attention of the street commissioner and the workman who made the repairs was called to the condition of the walk throughout the block where the defect was.—Hunter v. Village of Ithaca, 141 Mich. 589.

¶ 1152. Notice to a village of the defects in its walks may be shown from conversations of witnesses with the street commissioner.—Wolverton v. Village of Saranac, 171 Mich. 419.

¶ 1153. In an action for injuries sustained from a defective sidewalk, resolutions of the village council passed during the previous two years ordering the repair of the sidewalk are admissible to show knowledge on the part of the village of the defective condition, when accompanied by evidence that the repairs were not made.—Thompson v. Village of Quincy, 83 Mich. 178.

¶ 1154. In an action against a village for injuries from a defective sidewalk a resolution of the village council, adopted not long before the injury, requiring a new walk to be laid from a point east of the place of the accident to a point west thereof is admissible to show knowledge on the part of the authorities of the condition of the walk.—Grattan v. Village of Williamston, 116 Mich. 462.

¶ 1155. In an action against a city for personal injuries resulting from a fall on a sidewalk, rendered defective by the settling of the walk, so as to leave the stump of a tree projecting, resolutions of the city council, requiring the tree to be cut down, are not evidence of notice actual or constructive to the city of the defect, inasmuch as they were passed while the tree was standing.—Lappread v. City of Detroit, 95 Mich. 255.

§ 292. ——Previous or existing conditions as bearing on notice.

See also ante ¶ 1131.
Previous accidents as bearing on notice, see post § 293.

¶ 1156. In an action against a village for injuries resulting from a defective sidewalk evidence of the general defective condition of the sidewalk in the vicinity of the place of the accident is competent.—Styles v. Village of Decatur, 131 Mich. 443; Weitzel v. Village of Fowler, 143 Mich. 700.

¶ 1157. In an action against a city for injuries due to a defective sidewalk, evidence as to the condition of the walk in the vicinity of the place where the accident occurred, at and prior to the time, is admissible upon the question of notice.—Canfield v. City of Jackson, 112 Mich. 120.

¶ 1158. In an action for injury from a defective sidewalk plaintiff has a right, as bearing upon the question of notice, to show the generally bad condition of the walk in front of the premises described in his declaration.—Rodda v. City of Detroit, 117 Mich. 412.

¶ 1159. In an action for injuries caused by a defective sidewalk, evidence of other defects of long standing, and in close proximity to the defect which caused the injury complained of, is admissible as tending to show notice to the corporate authorities of the defective condition of the walk, and of the particular defect which caused the injury.—O'Neil v. Village of West Branch, 81 Mich. 544.

¶ 1160. In an action for injuries caused by being tripped by a loose board in a sidewalk, that was old and the stringers of which were rotten, evidence that no repairs had been made in the walk for more than a year prior to the accident was admissible as tending to show a long continuance of the defective condition of the walk, from which it might be inferred that defendant had notice of such condition.—Alberts v. Village of Vernon, 96 Mich. 549.

¶ 1161. In an action for an injury caused by a defective sidewalk, evidence that other parts of the walk, built at the same time as that part whereon the accident occurred, were out of repair, was admissible on the question of notice.—Haynes v. City of Hillsdale, 113 Mich. 44.

¶ 1162. Testimony is admissible, in an action against a city for injuries alleged to

have been caused by falling over a loose plank in a sidewalk, to show the condition of the walk at places other than the immediate place where the accident occurred, the strip of walk being of uniform material and laid at the same time, since such walk may reasonably be supposed to wear out and decay with some degree of uniformity.—Brown v. City of Owosso, 130 Mich. 107.

¶ 1163. In an action against a city for personal injuries sustained through a defective sidewalk, where the declaration alleged that the planks and boards of the walk on the west side of a street between two named streets were loose, etc., and where the defect causing the injury was definitely pointed out, testimony as to the condition of the walk in front of the lot at other places than where the testimony tended to show the accident happened, is admissible for the purpose of charging the city with notice of the condition of the walk.—Boyle v. City of Saginaw, 124 Mich. 348.

¶ 1164. In an action for personal injuries alleged to have been caused by falling into a hole in a cross-walk, it is not error to exclude evidence of the condition of the walk more than two years before the accident since its condition for two years prior to the accident is sufficient time to establish implied notice which is the sole object of such testimony.—Scheel v. City of Detroit, 130 Mich. 51.

¶ 1165. Evidence that an entire piece of sidewalk in front of a particular lot was generally out of repair, that the stringers were rotten so that the nails would not hold, that many of the boards, which were laid crosswise, would fly up when stepped upon, and that this condition existed for more than a year, is admissible to show notice to, and negligence by, defendant.—Campbell v. City of Kalamazoo, 80 Mich. 655.

¶ 1166. Where plaintiff sues a city for injuries sustained by her foot being caught in a hole in a sidewalk, evidence of the long-continued existence of the defect is admissible to show notice thereof to defendant, although it shows that the defect existed before the statute upon which the city's liability is based went into effect (Laws 1887, Act No. 264).—Tice v. Bay City, 84 Mich. 461.

¶ 1167. Evidence as to the generally defective condition of the walk for a distance of four or five rods in either direction from the place of the accident and tending to show age and decay is competent to charge a village with notice, even though the particular defect, loosening and tipping of a plank, which caused the injury may not have been then existent or apparent to ordinary observation.—Will v. Village of Mendon, 108 Mich. 251.

¶ 1168. Where the declaration in an action against a village for injuries sustained by reason of a defective sidewalk avers that the entire walk in front of a specified block had been allowed to become and remain in a dangerous and unsafe condition, evidence of the generally defective condition of such walk is admissible for the purpose of showing notice to the municipal authorities.—Strudgeon v. Village of Sand Beach, 107 Mich. 496.

¶ 1169. In an action against a city for injuries from a defective sidewalk, evidence that the walk was for its full length in front of certain premises in a generally rotten and loose condition six or eight months before the accident, is admissible in order to show notice to and negligence by defendant, even though it appears that some repairs were made upon the walk two months prior to the injury, where there is testimony tending to show that such repairs did not improve the walk's general condition.—Butts v. City of Eaton Rapids, 116 Mich. 589.

¶ 1170. In an action for injury alleged to have been caused by a defective sidewalk, testimony that the walk was repaired shortly before the accident, does not preclude evidence of its condition prior to such repair where it is claimed that the repairs made did not render it reasonably safe and fit for travel.—Styles v. Village of Decatur, 131 Mich. 443.

¶ 1171. In an action for injuries caused by being thrown from a cart owing to a defective street, evidence of the general bad condition of the street in the vicinity of the accident is admissible as bearing upon the question of notice.—Corcoran v. City of Detroit, 95 Mich. 84.

§ 293. ——Previous accidents as bearing on notice.

¶ 1172. In an action against a city for injuries received by falling upon a defective sidewalk, evidence that three or four days later another was injured on the same walk, but with nothing to show under what circumstances, is inadmissible to show that the city had constructive notice of such defect.—McGrail v. City of Kalamazoo, 94 Mich. 52.

¶ 1173. In an action for injuries received from stepping into a hole in a sidewalk, testimony that others had stepped into the same hole, is admissible as bearing upon the question of notice; but it is unimportant whether or not injury resulted.—Moore v. City of Kalamazoo, 109 Mich. 176.

¶ 1174. Where a city is sued for injuries which plaintiff received from stepping into a hole in a sidewalk, testimony that others had stepped into holes in that vicinity is admissible as bearing upon the question of

notice.—Moore v. City of Kalamazoo, 109 Mich. 176.

¶ 1175. Testimony that others had fallen off the walk, prior to his injury, at the place where plaintiff was injured, was not admissible in an action for injury from defective sidewalk, where it appeared that a barrier had been erected after they fell, and was there when the plaintiff was hurt.—Vander Velde v. Village of Leroy, 140 Mich. 359.

¶ 1176. In an action for death due to defects in a highway, evidence of previous accidents at such place, as showing constructive notice to defendant, is competent. —Lamb v. Township of Clam Lake, 175 Mich. 77.

§ 294. ——As to construction, strength and condition of bridges and culverts.

¶ 1177. In an action for injury resulting from the breaking of a bridge, evidence of new methods in building bridges is immaterial unless it appears that there was fault in not knowing and using them.—Fulton Iron & Engine Works v. Township of Kimball, 52 Mich. 146.

¶ 1178. In an action against a township for an injury done to heavy machinery from the giving way of a bridge over which it was being moved, there was no error in admitting testimony that the approaches to the bridge were so deep that it had not seemed likely that very heavy loads could be placed on it without using extra teams; and that for several years and up to the day of the accident it had been safely crossed by unusually heavy loads.—Fulton Iron & Engine Works v. Township of Kimball, 52 Mich. 146.

¶ 1179. It may be shown that a bridge was defectively constructed, not according to the plan, and was allowed to remain so until it became dangerous by neglecting the necessary repairs.—Woodbury v. City of Owosso, 64 Mich. 239.

¶ 1180. On issue of the strength of defendant's bridge evidence of the strength of the bridge to sustain heavy loads at the time of the trial and after the structure has been changed, is inadmissible.—Woodbury v. City of Owosso, 64 Mich. 239.

¶ 1181. The general condition of a bridge at the time of an accident from its nonrepair being in issue, it is proper to ask, after evidence had been offered showing the condition of the lugs which carried the floor joists where the accident occurred, about the condition of the lugs on the other part of the bridge.—Woodbury v. City of Owosso, 64 Mich. 239.

¶ 1182. Where the condition of a bridge at the time of an accident is in issue, evidence that some of its planks were loose and that its stringers were rotten less than a month before is admissible.—Lay v. City of Adrian, 75 Mich. 438.

¶ 1183. As bearing on negligence in failing to repair a bridge it is not competent to show in what manner the city repaired the bridge after the accident.—Woodbury v. City of Owosso, 64 Mich. 239.

¶ 1184. In an action against a city under the Highway Damage Act, § 3441 et seq., for the death of the occupant of an automobile who met his death as the result of the car plunging into the river while a drawbridge was open at night, and alleged to be due to the failure of the bridge tender to lower the gates, which were operated by an electric button, and where defendant contended that the accident was due to a defective mechanism which had not been discovered at the time of the accident, held that evidence that the morning after the accident a defect was discovered in the mechanism of the gate which prevented its lowering when the button was turned the first time the defendant attempted to lower it after the accident, that neither the defendant nor its agents knew of any such defect before the injury, nor had any notice, and that one of defendant's officers, when the gate refused to work on a subsequent trial, ordered the draw closed, and fixed the defect so that it then worked, was erroneously excluded.—Beach v. City of St. Joseph, 192 Mich. 296.

¶ 1185. To rebut testimony that the stringers of a bridge were not decayed, as alleged by plaintiff, the latter may in rebuttal interrogate as to the condition of the bridge a witness who had walked over the bridge the day of the accident and before plaintiff left it.—Lay v. City of Adrian, 75 Mich. 438.

¶ 1186. In an action for an injury caused by the falling, through decay, of a sidewalk that formed part of a bridge, testimony of the decayed condition of the timbers in other parts of the bridge is admissible to show constructive notice.—Snyder v. City of Albion, 113 Mich. 275.

¶ 1187. The exclusion of evidence that a threshing machine outfit consisting of a ten-horse engine and a tank full of water is an extraordinary load for a bridge is error where the other party to an action has been allowed to prove that such engines or larger ones frequented the highways of the township.—Moore v. Township of Hazelton, 118 Mich. 425.

¶ 1188. In an action for the wrongful death of a boy while driving along a highway, in the absence of witnesses to the accident, testimony by witnesses acquainted with the highway as to a condition, which would tend to show that the boy was thrown

on account of a defective culvert, is admissible.—Miller v. Township of Meade, 128 Mich. 98.

¶ 1189. In an action for injuries caused by the breaking of a bridge while an engine was crossing it, testimony is admissible to show that it was negligent and unusual to take a tank full of water upon the bridge with the engine, such evidence being competent on the question of defendant's negligence and on plaintiff's contributory negligence.—Comstock v. Township of Georgetown, 137 Mich. 541.

§ 295. ——In actions against abutters and third persons.

¶ 1190. In an action for injuries received by plaintiff in falling into a ditch dug by defendant across a sidewalk in front of his premises and left open, unguarded and unlighted at night, an ordinance forbidding the digging of ditches in any public place without permission of public authorities and requiring if dug that a fence or barrier with colored lights at night shall be placed around the excavation, is admissible in evidence as tending to show, not the breach of a public duty, but the degree of negligence, where the action is not based upon the ordinance but upon the common-law right to compensation.—Flater v. Fey, 70 Mich. 644.

¶ 1191. In a suit for personal injuries arising from the falling of materials from a building in the course of construction by defendant, on the question whether plaintiff heard a warning given by one of defendant's employees stationed on the fifth floor, it is error to exclude the evidence of said employee to the effect that he was in the habit of calling down to people, to the engineer, and to the man tending line at the hoist, and that they heard and understood him.—Brown v. Bryant, 166 Mich. 180.

¶ 1192. In an action for a personal injury by stepping into an unguarded excavation in a street while watching defendant's servants, it is competent to show the entire surroundings of the place where the accident occurred.—Le Beau v. Telephone & T. Const. Co., 109 Mich. 302.

¶ 1193. In a suit for personal injuries caused by falling glass from defendant's windows, it is improper to receive testimony on behalf of plaintiff to show the dilapidated condition, after the accident, of the window in question and other windows in the building.—Bannigan v. Woodbury, 166 Mich. 491.

§ 296. ——As to care or negligence by plaintiff.

See also ante ¶¶ 1111, 1112.

Contributory negligence of injured person, see ante § 247 et seq.

Proof of contributory negligence in general, see Negligence, V.

¶ 1194. Testimony that plaintiff's wife was sick, and that he was consequently anxious to reach home, he having left home to perform duties as a constable, cannot be shown to excuse his incurring a risk that he might not otherwise have taken in driving along a dangerous highway.—Harris v. Township of Clinton, 64 Mich. 447.

¶ 1195. In action for negligence in leaving a drawbridge unguarded by reason of a broken guard chain, where a defense of contributory negligence was made, it was proper to receive proof that on a prior occasion deceased rode his bicycle against the chain, since it tended to show knowledge of the situation; but it was inadmissible to show that he was habitually a careless rider and so inferentially was negligent on the occasion when he met his death.—Benedict v. City of Port Huron, 124 Mich. 600.

¶ 1196. Where one sues for injury sustained from an obstruction while driving in a highway, his general method of driving horses cannot be shown, being inadmissible to establish his negligence at the time of the accident.—Langworthy v. Township of Green, 88 Mich. 207.

§ 297. ——Evidence as to making claim and notice thereof.

Sufficiency of evidence as to notice or presentment of claim, see post § 302 et seq.

¶ 1197. Since plaintiff, in an action against a village for personal injuries sustained by reason of a defective sidewalk, must, under section 2775, 1 Comp. Laws 1897, as amended by Act No. 223, Pub. Acts 1899, present his claim as a condition precedent to maintaining an action thereon, testimony of a member of the council detailing an informal conversation among the members of the council present when plaintiff's claim was discussed, and stating that no action was taken, is admissible for the purpose of showing that the claim was presented to the council, and that the council so understood it.—Haney v. Village of Pinckney, 155 Mich. 656.

¶ 1198. Where suit against a township was begun within fifteen months after an injury caused by an obstruction in a highway, there being no dispute as to the fact or extent of plaintiff's injury, and none as to the existence of the obstruction, a highway commissioner's testimony that plaintiff had made no claim against the township does not tend to show that the suit was an "after-thought," and is properly excluded.—Langworthy v. Township of Green, 88 Mich. 207.

§ 298. Weight and sufficiency of evidence.

What facts constitute actionable neglect, see also ante XII, A-XII, E.

Proper and admissible evidence, see ante §§ 283-297.

Burden of proof and presumptions, see ante § 280.
General rules as to weight and sufficiency, see Evidence, X.
Direction of verdict on testimony of doubtful credibility, see also Directing Verdict ¶ 58.

¶ 1199. Testimony that a flag stone in a walk was broken and sunken from two to six inches and that in the evening when it was raining the plaintiff stepped into the depression and was thrown down, is sufficient to support a verdict for the plaintiff in an action for damages against the city.—Williams v. City of West Bay City, 126 Mich. 156.

¶ 1200. In an action for personal injuries sustained from the defective condition of a sidewalk evidence that a private citizen had made some repairs in the walk about two weeks before the accident is not evidence of such repairs as the statute contemplates on the part of the city, and does not require the plaintiff to prove that the sidewalk had become out of repair after such repairs had been made.—Weitzel v. Village of Fowler, 143 Mich. 700.

¶ 1201. In a suit for injury on a defective sidewalk, it is proper for an expert witness to testify that he examined the sidewalk six months after the accident, and found the timbers so rotted that they would not for a year or more past have held a nail, so as to support the inference that the sidewalk was defective at the time of the accident.—Williams v. City of Lansing, 152 Mich. 169.

¶ 1202. In a suit for personal injuries due to plaintiff's coming in contact with the end of defendant's electric wire, which was hanging in the public street near the ground, the jury in answer to a special question found that the wires which passed through the branches of trees did not come in contact with each other so as to burn off the wire in question. The theory of plaintiff was that the wire was burnt off by reason of a "short circuit" formed by contact of the wire with a branch of a tree. Held, that the jury's verdict for plaintiff should not be disturbed in the absence of overwhelming scientific evidence that such a "short circuit" was impossible.—Johnson v. City of Bay City, 164 Mich. 251.

¶ 1203. Plaintiff was injured February 24, 1906, on a sidewalk in front of the house of one Fields. Fields testified for the defendant city that he repaired the walk in question in November, 1905. On cross-examination, court permitted him to testify that the sidewalk was in bad condition when he repaired it. Held, that the latter testimony was admissible, but the jury was not bound to find therefrom that Fields had properly repaired the walk in question.—Williams v. City of Lansing, 152 Mich. 169.

§ 299. ——To show negligence of defendant.

¶ 1204. In an action to recover damages for injuries received because of a defective sidewalk, knowledge of the plaintiff of the existence of the defect is not conclusive evidence of his negligence.—Argus v. Village of Sturgis, 86 Mich. 344.

¶ 1205. A city cannot be held liable for injuries to one who at night fell into an unguarded excavation adjacent to a sidewalk, if the evidence by which the negligence of the city is sought to be established is not inconsistent with positive evidence offered by it to the effect that upon the night in question the place was left by the workmen guarded with proper barriers, thereby permitting the inference that they were subsequently removed in some manner for which the city was not responsible.—Welsh v. City of Lansing, 111 Mich. 589.

¶ 1206. A cement sidewalk of the defendant city connected with a tar sidewalk, the latter being about six inches lower. The fall between the two was bridged by a cement apron, fourteen inches long. The evidence showed that plaintiff's injury was due to stepping into space while passing from the higher to the lower sidewalk, and was not caused by any defect in the sidewalks or the apron, aside from the difference in level. Held, the evidence revealed no liability on the part of the city for negligent injury.—McIntyre v. City of Kalamazoo, 154 Mich. 301.

¶ 1207. Defendant city strung and maintained its electric wires over the grassplot between the sidewalk and the public street. The wires ran through the branches of trees growing on the plot. During a storm a wire broke and one end hung down near the ground. Plaintiff was injured by contact with it. There was evidence that the wires were allowed to remain in contact with a branch of the tree at the place of the accident, and some of defendant's experts who repaired the wire testified that it was burnt off through a "short circuit" formed by the contact of the wire with the limbs of the tree. Held, the finding of the jury that defendant was negligent was based upon sufficient evidence, and should not be disturbed.—Johnson v. City of Bay City, 164 Mich. 251.

§ 300. ——To show notice or knowledge of defect.

Burden of proof and presumptions as to notice of defect, see ante § 281.
Questions of law and fact as to notice, see post § 323.

¶ 1208. A woman was injured by stumbling in a gap in the crosswalk while running

for a neighbor, by night, in case of sudden illness; and she brought suit against the municipality for damages. The walk had been out of order before, and planks had occasionally been missing as if torn up in contempt of its dilapidated condition. The place was within sight of the street commissioner's residence. Held, that there were facts to go the jury on the question whether the municipal government did not have notice of the condition of the walk in time to repair it before the accident.—Datton v. Albion Common Council, 50 Mich. 129.

¶ 1209. It is only necessary for a party injured by a defective bridge in an action for damages, to show upon the subject, by testimony, knowledge on the part of the township officers of such a state of facts as reasonably and necessarily make it their duty to examine and act, in order to protect the traveling public, and their neglect to do so.—Stebbins v. Township of Keene, 55 Mich. 552.

¶ 1210. In an action for an injury caused by a defective sidewalk constructive notice to the city of the walk's condition is established by evidence that it was defective for two months in the exact locality of the accident.—Rodda v. City of Detroit, 117 Mich. 412.

¶ 1211. In an action for personal injuries against a city sustained by reason of a defective sidewalk, evidence that the walk in the immediate vicinity of the plank where the accident occurred was in bad condition for two or three years before the injury, and that the plank had been rotted off for some months is sufficient on the question of notice of the defect although there was no direct notice to any officer of the city given by word or writing.—Epelett v. City of Sault Ste. Marie, 144 Mich. 392.

¶ 1212. Where a walk was repaired only three days before the accident there can be no presumption of knowledge by the city of the defective condition of such walk; but where, during the three days, numerous witnesses casually passing observed the defective walk, and where the city street commissioner admitted that he passed over the walk during each of the three days, held, that the jury might find that the city either had actual notice of the condition of the walk or was in fault for not knowing of such condition.—Moon v. City of Ionia, 81 Mich. 635.

¶ 1213. In an action against a village for personal injuries alleged to have been caused by a defective sidewalk, evidence that the hole in the walk had been in existence for two or three months and that it was obvious to passersby, justifies the jury in finding that its existence was generally known and that the village was negligent.—Hunter v. Village of Durant, 137 Mich. 53.

§ 301. ——To show contributory negligence.

What constitutes contributory neglect, see ante XII, F; and see also Negligence, IV.

Instructions as to contributory negligence, see post § 359.

¶ 1214. Where it appears that a plaintiff suing for an injury caused by an obstruction of a highway was using the highway on a proper errand at a place where it was habitually used and where an obstruction making it impracticable or reckless to pass would have been unlawful, and where plaintiff's testimony shows ordinary care, there is no such proof of contributory negligence as authorizes the court to take the case from the jury.—Laughlin v. Grand Rapids St. R. Co., 62 Mich. 220.

¶ 1215. Where a man walking along a country road upon a dark night stepped into a hole, for which he was, however, on the lookout, held, that his knowledge of the defect did not necessarily establish his negligence, but was only a fact for the jury to consider in deciding whether he was negligent or not.—Lowell v. Township of Watertown, 58 Mich. 568.

¶ 1216. Plaintiff's previous knowledge of defects in a sidewalk from which he received injury may be considered by the jury in determining whether he used due care, but is not conclusive against his right to recover.—Grattan v. Village of Williamston, 116 Mich. 462.

¶ 1217. The fact that a pedestrian has knowledge of a defect in a sidewalk does not necessarily establish contributory negligence, but is a fact to be considered by the jury along with other facts in determining the question.—Wadkins v. City of Albion, 201 Mich. 130.

¶ 1218. A claim that plaintiff temporarily forgot the presence of holes in a road at a culvert when he was driving over it in the nighttime cannot be predicated on statements that he was not sure he thought about the chance of an accident where he testified that he was familiar with the highway and kept a good lookout and knew he was in the vicinity of the culvert which he considered dangerous but did not know his exact position until his horses stepped on the planking and that he then tried to pull his horses to one side to keep on the narrow roadway and avoid the holes.—Rohlfs v. Township of Fairgrove, 174 Mich. 555.

¶ 1219. The fact that many teams are driven safely over a road is not conclusive that it is in a reasonably safe condition for travel, nor of the negligence of a traveler who claims to have been injured because of its defective condition.—Hunt v. Township of Lincoln, 131 Mich. 637.

¶ 1220. The concession in the case in question, that if the sidewalk upon which plaintiff sustained injury had not been slippery, plaintiff would have passed in safety the hole into which her foot slipped, disposed of the question of contributory negligence, where the plank upon which she slipped was strong enough to support her and it was therefore not negligent to step there.—Burrell v. City of Greenville, 133 Mich. 235.

§ 302. ——Of notice or presentment of claim.

Admissibility of evidence as to making claim or notice, see ante § 297.

¶ 1221. Service of notice of claim against the city for personal injuries, upon the corporation counsel is sufficiently shown where it appears that such notice properly addressed was handed to the office boy of plaintiff's counsel for delivery, and that he knew the location of the office of the corporation counsel and delivered it there, that the claim was presented to the common council and considered by a committee which made an adverse report without any claim that notice had not been given.—Beattie v. City of Detroit, 137 Mich. 319.

§ 303. ——In actions for injuries from bridges and culverts.

Instructions as to construction and maintenance of bridges and culverts, see post § 355.

¶ 1222. A stringer of a township bridge had been in use three years and had been examined with reference to its soundness only two months before the accident for which suit was brought. There was nothing in the general appearance of the timber or of the bridge to indicate weakness, and several teams were engaged in drawing stone over the bridge only the day before and on the day of the accident, no one discovering or suspecting any infirmity; held, that the town had neither constructive notice nor knowledge that the stringer was defective.—O'Neil v. Township of Deerfield, 86 Mich. 610.

¶ 1223. In an action against a township for damages alleged to have been sustained by reason of its negligence in permitting the supports of a bridge to become rotten, so that one side was lower than the other, the testimony of the highway commissioner that an actual measurement showed an incline of one inch, if unimpeached, must prevail as against the testimony of witnesses who confessedly rely upon estimates in placing the incline at several inches.—Perkins v. Township of Delaware, 113 Mich. 377.

¶ 1224. Evidence that in rebuilding a bridge the township left the mudsills some 12 to 16 inches above the bottom of the drain, is insufficient to s
properly constructed wh
the mudsills were more
from the edge of the d
and that the bridge st
after rebuilding thoug
peated severe tests, and
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—Pearl v. Township of
275.

**§ 304. ——In actions ag
vate parties.**

What constitutes action
ante XII, G.

Judgment against a ci
an abutting owner
appear and defend,
cation § 60.

¶ 1225. Where a hor
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by defendant in the hi
fence and eight or ten
traveled road, but with
traveled way defendant
for having wrongfully
the jury having found
v. Hazen, 66 Mich. 657,
by equal division.

¶ 1226. The fact alc
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driving along a street
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Michigan Telephone Co.

4. Questions of

Necessity and sufficienc
post XII, H, 5.

§ 305. In general.

Condition and safety c
§§ 306-311.

Condition and safety
ings, see post §§ 31

In actions against abut
ties, see post §§ 31

Condition and safety of
see post §§ 321,

Notice of defects and
safe, see post §§ 3

Proximate cause, see
Contributory negligenc
seq.

Directing verdict, see
Weight and sufficiency
§ 298 et seq.

¶ 1227. Whether, in
way, one's horse brok
where before there w
is for the jury.—Wak
St. Clair, 91 Mich. 15.

¶ 1228. In an actio
jury in which the pla

been injured while walking at a certain place on the sidewalk, an issue is raised for the jury by evidence that the plaintiff had his bicycle with him at the time and that the peculiar marks of his bicycle tire were found in the ditch near the sidewalk on the second day after the accident.—Callahan v. City of Port Huron, 128 Mich. 673.

¶ 1229. Whether a particular vehicle is suitable for ordinary road travel as being unwieldy and unmanageable, is for the jury. —Malloy v. Township of Walker, 77 Mich. 448.

§ 306. Condition and safety of roadway.

Particular objects, defects and conditions, see post §§ 306-311.

Condition and safety of walks and crosswalks, see post § 312 et seq.

In actions against abutters for dangerous conditions, see post § 317 et seq.

Condition of bridges and culverts, see post §§ 321, 322.

¶ 1230. A township is not obliged to keep its highways absolutely safe for travel, but only reasonably fit and safe, and such question is for the jury.—Lamb v. Township of Clam Lake, 175 Mich. 77.

¶ 1231. It is a question for the jury to determine whether, under the circumstances of a given case, a highway is reasonably safe and fit for public travel.—Malloy v. Township of Walker, 77 Mich. 448.

¶ 1232. In a suit against a city for injuries arising from a hole in a street pavement, it is not error for the trial court to rule as a matter of law that the hole in the pavement was only three inches deep, where the city photographer has actually measured the depth, and plaintiff's witnesses, who testify as to a different depth, base their conflicting statements only upon estimates.—Jones v. City of Detroit, 171 Mich. 608.

§ 307. ——Objects or impediments in street or road.

Holes and depressions impending use, see post § 308.

Contributory negligence in failing to avoid objects in street, see post § 320.

¶ 1233. It is negligence as a matter of law for a city to permit the rails of an abandoned side track in an unpaved street to remain, for two and one-half years, slightly covered so as not to be visible, but so near the surface as to be dangerous in wet weather.—Cutcher v. City of Detroit, 139 Mich. 186.

§ 308. ——Holes, depressions and excavations.

In actions by foot travelers, see post § 313.

Contributory negligence in failing to avoid holes and excavations, see post § 335.

¶ 1234. A wagon in which plaintiff was riding was turning out of the street car track and one of the wheels went into a depression in the pavement three inches deep, plaintiff being thrown from the wagon thereby and injured. Held, the trial court properly ruled that as a matter of law the city was not negligent in leaving a depression of this depth in the pavement.—Jones v. City of Detroit, 171 Mich. 608.

¶ 1235. In an action by a widow against a city for the death of her husband who was killed as a result of being struck by an automobile fire truck which ran off the street because of a hole in the pavement, where the hole was repaired a few days after the accident, and plaintiff's evidence as to the width and depth of the hole was based on estimates, and defendant's evidence was based on actual measurements, held that it was a question for the jury as to whether the hole was of depth sufficient to make the city liable because of the defective condition of a public street.—Cone v. City of Detroit, 191 Mich. 198.

§ 309. ——Warning signals, barriers and railings.

Questions as to handrails and barriers on walks and cross walks, see post § 315.

Questions as to protective lights, signals and barriers in actions against abutters and private parties, see post § 320.

Questions as to absence of guard railings from bridges and culverts, see post § 322.

Questions as to contributory negligence in disregarding signals, see post § 331.

Instructions as to duty to protect openings, excavations, etc., see post § 348.

¶ 1236. It was a question for the jury to determine, in an action for the death of plaintiff's intestate, resulting from a defective highway, whether the defendant township was liable under How. St. § 1445, which provides that it is the duty of townships to keep in good repair, so that they shall be safe and convenient for public travel, at all times, all public highways under their care and control, which are open to the public, for failure to erect guards and barriers along that portion of the highway where the accident occurred, and which ran along a high embankment, 12 to 16 feet wide at the top.—Malloy v. Township of Walker, 77 Mich. 448.

¶ 1237. The question whether barriers should have been erected along a highway is ordinarily a question for the jury, except when there is no dispute as to the material facts, which, as a matter of law, show that there was no such obvious danger as to require their erection.—Irwin v. Township of Byron, 183 Mich. 345.

¶ 1238. A highway having a clear space thirty feet in width beyond the wrought por-

tion on which one might drive with reasonable safety before reaching a place of danger, is, as a matter of law, reasonably safe for travel without the erection of barriers.—Irwin v. Township of Byron, 183 Mich. 345.

¶ 1239. Where a highway between hills is built at such a height and is so narrow as to require barriers or railings to make it reasonably safe and convenient for public travel, it becomes the duty of the township to erect them, but such question is for the jury, and it is error to charge the jury that such is the absolute duty of the township.—Lamb v. Township of Clam Lake, 175 Mich. 77.

§ 310. ——Temporary conditions, guards and warnings.

¶ 1240. Whether the duty to light an excavation in a public street was discharged by the act of the excavators in leaving at the place a lighted lantern is a question for the jury, where there is evidence that the lantern did not contain sufficient oil to keep it lighted during the time the light was required.—Baker v. City of Grand Rapids, 111 Mich. 447.

¶ 1241. Where a city granted a permit to plumbers to make an excavation in the streets, and the night of the day following the granting of the permit a person driving on the street drove his horse into an excavation which extended nearly across the street, and which was left open and unguarded by barriers, or by lights except on the curbs on each side, and which was impassable except on the south side of the street, held that the question whether the city was negligent in failing to properly guard the excavation was for the jury.—Reppard v. Chapin, 190 Mich. 19.

§ 311. ——Fright of horses.

¶ 1242. The question whether it was negligence for the defendant township to store building materials which frightened the plaintiff's horse, beside a highway for use in a nearby bridge, held properly submitted to the jury.—Boos v. Township of Northfield, 186 Mich. 386, 12 N. C. C. A. 145.

§ 312. Condition and safety of walks and crossings.

Particular conditions and defects as presenting jury questions, see post §§ 313-316.

Conditions of roadways as jury question, see ante §§ 306-311.

Questions in actions against abutters, see post §§ 317-320.

Questions as to bridges, see post §§ 321, 322.

Questions as to notice or knowledge of defects and dangers, see post §§ 323-326.

As to contributory negligence of foot travelers, see post § 333.

Instructions as to duty and negligence respecting walks, see post § 351.

¶ 1243. The question whether a village which was constructing a sidewalk at the time, was negligent in disposing of the material of the old sidewalk, is for the jury.—Finch v. Village of Bangor, 133 Mich. 149.

¶ 1244. Whether the highway at a crossing on the side of the street where there was no walk but a pathway was in a reasonably safe condition for public travel was a question for the jury, where it appeared that a tile drain, which received the water from an open ditch on the opposite side of the street, was allowed to discharge it into a continuation of the ditch at a point within the lines of the sidewalk if extended.—Comiskie v. City of Ypsilanti, 116 Mich. 321.

¶ 1245. Where a municipality leaves a pile of sheet steel 30 inches high and weighing 600 pounds on a sidewalk against a building but in so nearly an upright position as to be easily toppled over it is a question for the jury as to whether the sidewalk is in a condition reasonably safe and fit for public travel.—Brown v. City of St. Johns, 187 Mich. 641, 14 N. C. C. A. 440.

§ 313. ——Inequalities of surface, holes and breaks.

Questions as to holes, depressions and excavations in roadway, see ante § 309.

Questions as to contributory negligence in failing to avoid holes and excavations, see post § 335.

¶ 1246. In an action for personal injuries the question as to whether it was negligence for a city to leave for a long time upon a sidewalk traveled by many persons a flagstone 3½ inches thick, over which plaintiff stumbled, is one for the jury to decide.—Wedderburn v. City of Detroit, 144 Mich. 684.

¶ 1247. A crosswalk was constructed on a level with the curb, and to within 7 to 12 inches thereof, leaving a gutter from 5 to 7 inches deep, with abrupt, vertical sides between the curb and the walk. Plank covers were provided for this gutter and for like openings throughout the city, of which there were a number; but these covers were frequently removed for the purpose of cleaning the gutters, and in some instances were not replaced. Held, in an action for personal injuries sustained by stepping into the open gutter while attempting to cross the street, that it was for the jury to determine whether the crosswalk was reasonably safe for travel.—Schrader v. City of Port Huron, 106 Mich. 173.

¶ 1248. In a suit for personal injuries, a city which left an iron grating used to cover a hole in a public sidewalk projecting one and three-quarters inches above the sur-

rounding level, is held as a matter of law to be not guilty of negligence.—Northrup v. City of Pontiac, 159 Mich. 250.

¶ 1249. The question whether or not a sidewalk in which there was a broken plank which caused a depression of from two to three inches, and which when stepped on would sink down several inches more, was reasonably safe and fit for travel, is for the jury.—Urtel v. City of Flint, 122 Mich. 65.

¶ 1250. In an action for a sidewalk injury, testimony that the planks in a walk had been removed for some distance leaving a drop of 4 to 6 inches is sufficient to go to the jury on the question of whether it was reasonably safe.—Wilkins v. City of Flint, 128 Mich. 262.

¶ 1251. In an action for a sidewalk injury, testimony for plaintiff that she stepped into a hole in a rotten plank in the sidewalk of which the city had notice, controverted by testimony for the defendant, raises a question of fact for the jury as to whether the walk was kept in a reasonably safe condition for travel.—Newman v. City of Ann Arbor, 134 Mich. 29.

§ 314. ——Accumulations of ice and snow.

Directing verdict, see post § 340.

¶ 1252. Where snow is piled up on the highway at a railroad crossing, so as to leave a sharp descent to the track, it is for the jury to say whether, in an injury resulting therefrom, the defect is one for which the city is liable.—Johnson v. City of Marquette, 154 Mich. 50.

§ 315. ——Handrails and barricades, lights and warnings.

Questions as to protective signals, barriers and railings in roadway, see ante §§ 309, 310.

¶ 1253. The sufficiency of a barricade at a defective temporary walk is for the jury, where it appears that the planks in the walk gave way as the traveler, a child, was approaching the barricade.—Brydon v. City of Detroit, 117 Mich. 296.

¶ 1254. In an action against a city for injuries sustained by plaintiff stepping off a sidewalk on a dark night at a point where the sidewalk was about 21 inches above the ground, and where the only negligence alleged was the failure to erect a railing along the sides of the walk, such question of negligence was properly left to the jury.—Hannon v. City of Gladstone, 136 Mich. 621.

§ 316. ——Temporary walks.

See also post ¶ 1283.

¶ 1255. In an action against a city for a sidewalk injury due to a defective plank bridge placed across a ditch in a street being repaired, it is erroneous to hold as a matter of law that the city is not liable on the ground that the independent contractor had no authority to build a temporary bridge under his contract where the contract provides that the roadways should not be wholly obstructed without authority and all the work was done under the supervision of the city authorities and similar bridges had been used at other streets.—Beattie v. City of Detroit, 129 Mich. 20.

§ 317. In actions against abutters and private parties.

Questions as to conditions of roadway and walks, see ante §§ 306-316.

Questions as to contributory negligence, see post § 337.

Directing verdict, see post § 341.

¶ 1256. The question of the negligence of defendant railway company in discharging a volume of hot water into the street in such a way that a thirteen-year-old boy fell therein and was injured, held properly submitted to the jury.—Curtis v. Grand Trunk Ry. Co. of Canada, 178 Mich. 382.

¶ 1257. Where the icy condition of a walk upon which plaintiff fell and sustained injuries for which she sues was not the result of neglect to remove naturally-accruing ice and snow, but was caused by defendant's action in throwing water on the place where it froze, the case is a proper one for the jury.—Canfield v. Chicago & W. M. R. Co., 78 Mich. 356.

§ 318. ——Signs, wires and other objects liable to fall.

¶ 1258. Testimony in an action for personal injuries showing that the defendant telephone company placed a brace wire over the street, that an unusual storm broke down many wires throughout the territory, that the brace wires sagged down and that the plaintiff was injured by driving into it, is sufficient to go to the jury on the questions of negligence and contributory negligence.—Friesenhan v. Michigan Tel. Co., 134 Mich. 292.

¶ 1259. That a sign suspended above a sidewalk had not been inspected for seven months is sufficient to take to the jury the question of the owner's negligence, in an action by a pedestrian who was injured by the fall of the sign.—Hass v. Booth, 182 Mich. 173.

¶ 1260. Whether it was negligence for a workman to leave a ladder unattended leaning against a building in a city street, and which blew over and injured a pedestrian, is a question for the jury.—Bacon v. Candler, 181 Mich. 372.

¶ 1261. The question whether an electric light company could have known, by the

exercise of reasonable skill, that attaching a bracket and wire to a brick cornice would subject it to a strain which, by reason of its frail construction, would render it liable to fall and injure pedestrians, was for the jury, upon evidence that the building was brick-veneered, that it had been built twenty-two years, that the front was cracked, and that it was otherwise in bad condition when defendant's employees attached the bracket.—Swanson v. Menominee Elec. L., R. & P. Co., 113 Mich. 603.

¶ 1262. Plaintiff, employed by a carpenter contractor, was on a scaffold working on a bay window. One Bishop, employed by defendant contractors, was painting on a ladder resting at the top against the edge of the roof of the bay window. One of the defendants told Bishop that since it was getting windy he should finish a certain portion and then take the ladder down. Bishop left the ladder resting against the freshly painted surface of the house in order to change his paints. The ladder fell and plaintiff was injured. Held, the court erred in directing a verdict for defendants on the question of negligence, such question being for the jury.—Haxer v. Griessel, 162 Mich. 810.

§ 319. ——Dangers caused by excavations or construction work.

Questions as to holes and excavations in actions against municipality, see ante §§ 309, 313.

¶ 1263. The question as to the depth of a trench left in a street by a power company and into which plaintiff drove, is for the jury.—Sherman v. Consumers' Power Co., 199 Mich. 543.

¶ 1264. In an action against a street railroad company to recover damages for personal injuries due to falling into an excavation made by the defendant in the course of construction of its track, held that it was a question for the jury whether the defendant was negligent.—Norris v. Detroit United Ry., 193 Mich. 578.

¶ 1265. In an action against a lighting company for personal injuries sustained by plaintiff when a front axle of his loaded dray broke as he drove across a trench in a city street, which trench was the result of the power company's laying of a cable in the street, held that the questions as to the depth of the trench and whether the street was reasonably safe for travel were for the jury.—Sherman v. Consumers' Power Co., 199 Mich. 543.

§ 320. ——Protective measures, lights, signals and barriers.

Questions in actions against municipality, see ante §§ 309, 315.

¶ 1266. In an action against a paving contractor for injuries sustained by plaintiff's coming in contact with a board protruding on a street, while he was riding on the running board of a car, where defendant claimed that his work commenced and was being carried on over a block away from the place of the accident, and that no barriers were erected when the work was suspended on the night preceding the day of the accident, testimony tending to show that defendant's operations had extended to the place of the injury and that defendant's contract required the erection of protection around excavations, was sufficient to carry the case to the jury to determine whether defendant's witnesses were mistaken in testifying as to the state of the work at the time in question.—Pomaski v. Grant, 119 Mich. 675.

¶ 1267. In an action for injuries to a horse running into a sagging telephone wire, the question whether the defendant had the right to hang a wire across the street for such a reasonable time as might be necessary for its purposes without taking measures to protect travelers against accident, would depend upon circumstances and is for the jury.—Hovey v. Michigan Tel. Co., 124 Mich. 607.

¶ 1268. Whether a summer storm which extinguished warning lights placed about an excavation in a public street, was such as should have been anticipated and provided against by a street railway company making the excavation, is a question for the jury.—Norris v. Detroit United Ry., 185 Mich. 264.

¶ 1269. Whether a storm which extinguished warning lights about an excavation made by a street railway company in a public street, was an unusual and extraordinary one, held, under the evidence, to be a question for the jury.—Norris v. Detroit United Ry., 185 Mich. 264.

¶ 1270. In a suit for personal injuries against defendant, a paving contractor, for leaving a public street unguarded at night, the court properly leaves the question of negligence to the jury where there is evidence that no danger signal was displayed.—Williams v. Sager, 165 Mich. 635.

¶ 1271. Where a gang of telephone employees was stringing a cable through a snatch block operated intermittently by a team of horses a block away, and the noise attracted a seven-year-old child who approached, placed its hand upon the block and had it crushed by the sudden starting of the team, the question as to whether it was negligence for the employees to leave the snatch block unguarded in the street was one properly submitted to the jury.—O'Leary v. Michigan State Tel. Co., 146 Mich. 243.

§ 321. Condition and safety of bridges and culverts.

Questions as to notice of condition of bridges and culverts, see post § 325.

Questions as to contributory negligence, see post § 332.

Instructions as to construction and maintenance of bridges and culverts, see post § 355.

¶ 1272. Where, in a suit for damages sustained by reason of the breaking of a bridge stringer, the jury finds that to all outward appearance the stringer was sound, but was rotten internally, in the absence of personal knowledge on the part of the proper officers of the hidden defect, the question for the jury is whether said officers used due diligence in discovering such defect, and neglected to do that which common prudence and caution required them to do to ascertain the true condition of the stringer.—McKeller v. Township of Monitor, 78 Mich. 485.

¶ 1273. In an action against a township for injuries to the plaintiff from the falling of a bridge, caused by the breaking of a stringer on one end of the structure, it is proper to submit to the jury whether from the evidence the defendant's officers, in examining the bridge, used the necessary diligence to ascertain its condition.—Blank v. Township of Livonia, 95 Mich. 229.

¶ 1274. The question whether a township is required to provide a bridge sustaining a load such as a threshing machine outfit consisting of a ten-horse engine and a tank full of water, is a question of fact upon which it is proper to receive evidence.—Moore v. Township of Hazelton, 118 Mich. 425.

¶ 1275. In an action for wrongful death, evidence that a culvert was defective and a turn in the road made it probable that the wagon would lurch violently at that place, that the deceased, an eleven-year-old boy was seen driving the team steadily just before he reached the culvert, that the team stopped just beyond and the boy was found crushed by the wheels, is sufficient to go to the jury on the questions of negligence and contributory negligence, notwithstanding the lack of direct testimony as to how the accident occurred.—Miller v. Township of Meade, 128 Mich. 98.

¶ 1276. In an action against a city for injuries sustained by a traveler who after crossing a bridge over a small stream, turned to cross the street and in passing between one of the bridge braces and an upright for electric wires, tripped over a chain which swung parallel to the curb between the brace and the upright according to custom while the draw was closed, the questions of negligence of the city and of contributory negligence on the part of the plaintiff, were for the jury, although the city was required by law to maintain a chain or guard, and plaintiff knew of a practice to suspend the chain at the point in question while a former bridge stood there, but claimed to have had no knowledge of the practice as to the new bridge.—Milliken v. City of St. Clair, 136 Mich. 250.

§ 322. ——Absence of guard railings.

Questions as to guards and railings on roadways and walks, see ante §§ 309, 310, 315, 320.

¶ 1277. Whether a railing along the banked approach to a bridge is necessary for the safety of travelers is a jury question.—Shaw v. Township of Saline, 113 Mich. 342.

¶ 1278. Whether the failure to maintain side railings on a bridge twenty feet long and sixteen feet wide, one end of which was one foot lower and one side one inch lower than the other, constituted negligence, is a question for the jury.—Perkins v. Township of Delaware, 113 Mich. 377.

¶ 1279. Where the evidence is conflicting, the question as to whether or not it is the duty of a township to maintain a rail upon the side of a bridge is for the jury.—Lauder v. Township of St. Clair, 125 Mich. 479.

¶ 1280. Plaintiff's horse while crossing a bridge took fright at the noise of the water flowing over the wasteweir at the end of a dam, the top of which formed the approach to the bridge, backed off the bridge and off the approach, and plaintiff was injured. The bridge was supplied with railings, but the approach was not, nor was there anything provided to hide the water from the sight of horses at any point upon the bridge or the approach. Held, that the question whether or not defendant was guilty of negligence in failing to erect barriers at the sides of the approach should have been submitted to the jury.—Ross v. Township of Ionia, 104 Mich. 320.

¶ 1281. Plaintiff was injured while driving her vehicle upon the approach leading to a highway bridge. The highway and said bridge were being repaired by defendant township, but were not closed by the township authorities, and were being used for travel at the time by the public. Held, the trial court properly left to the jury the question whether it was the duty of the township to erect railings or barriers along said approach.—Speck v. Township of Bruce, 166 Mich. 550.

§ 323. Notice of defects and opportunity to make safe.

Questions of notice as to particular defects, see post §§ 324-326.

Questions as to nature and character of the defects and conditions, see ante §§ 306-322.

Sufficiency of evidence to show notice, see ante § 300.

¶ 1282. It was for the jury to say whether the existence of a chuckhole in a newly filled road had existed long enough to impute notice of the defect, where it had been caused by a heavy rain a few days before plaintiff drove along the road at that place.—Cavanagh v. Township of Riverside, 136 Mich. 660.

¶ 1283. In a suit against defendant city for personal injuries, there was evidence that a contractor paving a street had placed boards from the curb at the crossing to the excavation in the street, for people to walk on; that work had been suspended for ten days, and the boards had been so used for that period; that no barricade or lights were placed at the crossing; and that the work was under the supervision of the department of public works. Held, there was sufficient evidence of notice to defendant and of defendant's liability, to submit the case to the jury.—Hughes v. City of Detroit, 161 Mich. 283.

¶ 1284. Evidence that plaintiff's horse shied at a washout on a high embankment in the road which had existed the whole spring at a point in the road where washouts had occurred during rainfalls in the spring and fall for at least two years, warrants the inference that the washout must have been known to the township officers, and negligence based thereon was properly submitted to the jury.—Tracey v. Township of South Haven, 132 Mich. 492.

§ 324. ——Sidewalks.

Questions as to condition of walks and crosswalks, see ante § 312 et seq.

¶ 1285. In an action against a city for injuries sustained by stepping upon a loose board in a sidewalk where no notice of defect was shown, evidence that the walk was badly out of repair for several months made the question of constructive notice one for the jury.—Ness v. City of Escanaba, 142 Mich. 404.

¶ 1286. A defect in a sidewalk which has existed for a number of months and which could be discovered at a distance of two rods, cannot as a matter of law, be said to be latent.—Urtel v. City of Flint, 122 Mich. 65.

¶ 1287. In an action for a sidewalk injury, the question of notice is for the jury where an inspection of the walk was made ten days before the accident but there is testimony that the walk was out of repair for 3 weeks and that the inspector was informed of it.—Wilkins v. City of Flint, 128 Mich. 262.

¶ 1288. Question of notice to the city is for the jury in an action for injuries alleged to have been caused by falling over a loose plank in the sidewalk, there being evidence that the walk was old, and the stringers rotten so they would not hold nails, that the walk was repaired shortly before the accident but the stringers were not replaced, and that upon taking up the walk shortly after the accident the stringers were found to be badly decayed.—Brown v. City of Owosso, 130 Mich. 107.

¶ 1289. Whether a particular defect in the sidewalk existed a sufficient length of time prior to the accident to constitute constructive notice to the city, was a question for the jury to decide, in an action for personal injuries from such defective sidewalk; where there was an abundance of testimony that such sidewalk, being a plank walk, had been down 15 or 16 years, and was in bad repair, that the stringers were gone, and the boards were rotted; even though the street commissioner testified he had repaired such walk the day before the accident.—Allen v. City of West Bay City, 140 Mich. 111.

¶ 1290. The general bad condition of a sidewalk near the dividing line between two lots about where the injury occurred was properly allowed to send the question of notice to the jury, though in the particular city it was the duty of each abutter to build the walk in front of his own premises, and though an inspector reported a few months before the accident that one of such walks was sound and the other bad whereupon the city ordered the bad walk relaid which had not been done at the time of the accident, the objection urged being that the evidence of bad condition should under the circumstances be limited to that portion of the walk fronting the lot where the injury occurred.—Nestle v. City of Flint, 141 Mich. 153.

¶ 1291. Where it appeared, in an action against a city for injuries sustained by reason of a defective sidewalk, that one of the city councilmen, at noon of the day of the accident, discovered a sound plank out of the walk at the place where the accident subsequently occurred, and replaced it without nailing it, and upon the evening of the same day notified the street commissioner, it was as matter of law not an unreasonable delay and was error to permit the jury to base a finding of negligence upon the failure of such official sooner to notify the commissioner.—McKormick v. City of West Bay City, 110 Mich. 265.

§ 325. ——Of defective bridges and culverts.

Questions as to conditions of bridges and culverts, see ante §§ 321, 322.

¶ 1292. Plaintiff, while riding upon a traction engine, sustained injuries by reason

of the collapse of a bridge, due to the decay of the stringers, which had been in use for fifteen years. In an action against the township, persons who lived near the bridge testified that it had been in bad condition for some time; that it would shake when teams passed over it; and that they were afraid to drive across it with heavy loads. One witness testified that he had gone upon the bridge with the overseer of highways, and that it shook when they jumped upon it. This witness was contradicted by the overseer. The commissioner of highways testified that he went under the bridge two months before the accident, and made a careful examination, without finding any evidence of decay. Held, that there was evidence to go to the jury on the question of notice.—Aben v. Township of Ecorse, 113 Mich. 9.

¶ 1293. Where, in an action to recover for injuries to a traction engine by reason of a defective bridge, witnesses testify that before the accident they noticed appearances of decay in the stringers of the bridge, the question whether the facts testified to are sufficient, if true, in connection with the other facts in the case, to constitute constructive notice to the township of the particular defect that caused the accident is one of fact for the jury and not of law for the court.—Randall v. Township of Southfield, 116 Mich. 501.

¶ 1294. In an action for injuries to a threshing machine outfit caused by the fall of a bridge, it is proper to submit to the jury the question of the plaintiff's knowledge and opportunities of knowing if the bridge has been repaired.—Moore v. Township of Hazelton, 118 Mich. 425.

¶ 1295. A question as to whether a township had notice, prior to the date of an injury, that snow would create an appearance upon single-floor bridges at night to the effect that seams or cracks would appear wider than they really were, is properly given to the jury in an action for injuries sustained because of a horse's shying and backing up, causing a vehicle to fall off the bridge, and a driver to become injured.—White v. Township of Riley, 121 Mich. 413.

¶ 1296. The question of notice, in an action against a township for injuries caused by the fall of a bent under a bridge, should be submitted to the jury where there is testimony that the imperfect condition of the bridge was visible and generally known for a long period.—Pearl v. Township of Benton, 131 Mich. 275.

§ 326. ——Notice to persons or corporations responsible for conditions.

Questions as to dangers and defective conditions, see ante §§ 317-320.

¶ 1297. Whether a street railway company had a reasonable time to restore warning lights at a point where it had torn up the street, after they were extinguishd by an unusual and extraordinary storm, is a question for the jury.—Norris v. Detroit United Ry., 185 Mich. 264.

§ 327. Proximate cause.

Direction of verdict for want of proof, see post § 342.

Instructions as to proximate cause, see post § 358.

¶ 1298. It was a question for the jury to decide whether an accident to travelers in a "long carry-all," a long wagon with front wheels turning under it, upon a highway at a place where it ran along an unguarded embankment, would have occurred if such highway had been in proper condition; where it appeared that such highway was worn into ruts from two to four inches deep, and was icy and slippery and the rear wheels did not follow in the track of the front ones.—Malloy v. Township of Walker, 77 Mich. 448.

¶ 1299. Where, in an action against a township for negligent injuries, it appears that as plaintiff's horse shied at some object by the roadside, one of the wheels of the wagon struck a log near the center of the highway, it cannot be said as matter of law that the mere shying of the horse, rather than the obstruction in the highway, was the proximate cause of the injury.—Langworthy v. Township of Green, 95 Mich. 93.

¶ 1300. In an action for negligent injury it appeared that a highway in defendant township crossed a ravine by a culvert some six feet high; that the highway was built up across the ravine for quite a distance, and at the top was some thirty feet wide, until, arriving within forty feet of the culvert, it narrowed to thirteen or fourteen feet on top; that the culvert was six feet high, made of planks sixteen feet long, and extended about a foot beyond the embankment, and was of the width of about five feet; that at the southwesterly corner of the culvert, and extending across to the middle of the traveled track, there was a hole, or washout, about two feet wide, and from four to seven feet long, and from one to two feet deep; that there was no railing or barrier along the embankment; that, just as plaintiff got nearly to the culvert, his horse shied at the hole, and jumped over the embankment on the other side, carrying plaintiff and the buggy with him. One count of the declaration alleged all of the defects as producing the injury complained of. Held, that the court properly submitted the question to the jury whether the proximate cause of the injury was one or all of the defects combined.—Simons v. Township of Casco, 105 Mich. 588.

¶ 1301. Whether the plaintiff in an action for injury from a defective sidewalk

was injured because he slipped and fell on the walk, or because of stepping on the edge of the walk and falling off because of the lack of a proper railing, was properly submitted to the jury, where the testimony was not so conclusive as to enable the judge to dispose of it as a matter of law.—Vander Velde v. Village of Leroy, 140 Mich. 359.

¶ 1302. Where a team has already become frightened by some object, and is then further frightened, until beyond the control of the driver, by a defect in defendant city's highway, it is a question for the jury to say whether, but for the defect, the driver would have regained control, and whether therefore the defect was the proximate cause of the accident.—Johnson v. City of Marquette, 154 Mich. 50.

¶ 1303. A horse is not to be considered as matter of law beyond control that merely shies or starts, and for a moment has his own way.—Johnson v. City of Marquette, 154 Mich. 50.

¶ 1304. The questions whether the fright of the plaintiff's horse was attributable to the negligence of the defendant township in storing building material near a highway for use in a bridge, and whether it was likely to frighten a horse of ordinary gentleness, held properly submitted to the jury. —Boos v. Township of Northfield, 186 Mich. 386, 12 N. C. C. A. 145.

§ 328. Contributory negligence of vehicle users or drivers.

Questions as to contributory negligence of foot travelers, see post §§ 333-336.

In actions against private party or abutter, see post §§ 337, 338.

¶ 1305. A person is not guilty of contributory negligence as a matter of law in riding on the top of a load of bolts loaded on a rack and piled about three and a half feet high, where the forward wheels of the wagon dropped into a mud hole with such force as to throw him off and seriously injure him.—Hunt v. Township of Lincoln, 131 Mich. 637.

¶ 1306. Whether there was contributory negligence in riding on a wagon loaded with wood piled crosswise as it was drawn over a former corduroy road lately covered with soil and gravel which recent rains had washed out, is for the jury.—Cavanagh v. Township of Riverside, 136 Mich. 660.

¶ 1307. In an action against a township for damages for personal injuries sustained by a person being kicked by a horse when he fell from a load of lumber on which he was riding, upon the wagon dropping into a rut in the approach to the bridge, causing the team to become frightened and to kick and run away, where it appeared that the lower part of the load of lumber consisted of stuff piled between the upright standards of the bolsters, that several bunches of shingles were placed on the top and that plaintiff and the driver were each seated upon a bunch of shingles about three feet from the front end of the load, held that it was a question for the jury whether plaintiff was guilty of contributory negligence.—Pool v. Township of Montague, 194 Mich. 476.

¶ 1308. It cannot be said to have been negligent as matter of law to drive a horse loose in a country highway from a farm to a watering place 160 rods distant; but the question is for the jury on evidence as to the age and disposition of the horse and the circumstances.—Bennett v. Hazen, 66 Mich. 657, per Morse and Champlin, JJ., Campbell, C. J., and Sherwood, J., dissenting on the ground that such negligence was shown by the fact that the horse strayed and was brought back into the road and started on a run putting it out of control.

¶ 1309. It is for the jury whether there was contributory negligence, where plaintiff's intestate was found dead in a stream 75 feet distant and 25 feet below the level of the traveled part of a plank road at a point where a railroad bordered one side and there was no barrier on the river side, and where there were marks in the soil indicative of excited movements of the horse, which with the buggy was found next morning on the opposite bank uninjured, and where decedent was a healthy, strong man, skilful with horses, sober at the time, was traveling at a reasonable hour, and no witness saw the accident.—Carver v. Detroit & S. Plank Road Co., 69 Mich. 616.

§ 329. ——Avoidance of objects and obstructions.

Questions of contributory negligence respecting particular things or conditions, see also post §§ 329-332.

Questions of negligence contributory to that of abutter or other private party, see post §§ 337, 338.

Questions of contributory negligence by foot travelers, see post §§ 333-336.

¶ 1310. Where the driver of a cutter which collided with stones in a street and caused plaintiff in an action against a city, to be thrown out and injured, had known for months of the presence of such stones and had ceased driving there on that account, and after ceasing driving there had passed the place daily without observing the stones, and had at the time of the accident supposed that the stones had been removed, he could not be said as a matter of law to have been guilty of contributory negligence. —McEvoy v. City of Sault Ste. Marie, 136 Mich. 172.

¶ 1311. Where a township left certain bags of cement covered with white canvas on the side of the road, and thereby caused plaintiff's horse to become frightened so that plaintiff, in urging her beyond said bags, lost control of her, with the result that horse, buggy, and occupants were precipitated into a culvert, negligently left open by said township, plaintiff's contributory negligence in attempting to drive past the cement is a question of fact for the jury.—Judd v. Township of Caledonia, 150 Mich. 480.

¶ 1312. Whether a plaintiff injured by driving his automobile into a sand pile left in a city street by a private contractor is guilty of contributory negligence in failing to observe the pile while driving at a high rate of speed, is a question for the jury.—Walls v. City of Detroit, 171 Mich. 612.

§ 330. ——Avoidance of known defects in road.

Questions as to contributory negligence of foot travelers in failing to avoid defects, see post § 335.

¶ 1313. A person who, in the lawful use of a highway, comes to a defective place such as a flooded reach in a road which had been narrowed by encroachment of a bordering stream, may yet proceed if it is consistent with reasonable care so to do; and that is generally a question of fact for the jury, depending on the nature of the obstruction or defect, and all the surrounding circumstances.—Harris v. Township of Clinton, 64 Mich. 447.

¶ 1314. A person is not guilty of contributory negligence as a matter of law in driving over a corduroy road which he knows to be in general in a dangerous condition but which others are using daily, where he does not know of any particular defect and there is no other accessible way to drive around this piece of road.—McTiver v. Township of Grant, 131 Mich. 456.

¶ 1315. In an action for personal injuries received from being thrown out of a cart wherein plaintiff was driving, "hurrying along," at night at a rate of speed not clearly shown to be rapid or improper over a street known to plaintiff to be defective, the question of contributory negligence was for the jury.—Corcoran v. City of Detroit, 95 Mich. 84.

¶ 1316. Whether one who was injured while driving along the highway at night was guilty of contributory negligence in forgetting a defect which he had noticed the morning before is a question for the jury under the proven circumstances, and the case should not be permitted to turn solely upon the question whether he in fact did or did not remember the defect at night.—Bouga v. Township of Weare, 109 Mich. 520.

¶ 1317. Whether one was guilty of contributory negligence in riding along the traveled portion of a highway without taking precautions to avoid a defect therein which he knew to have existed some months before, but which he supposed had been remedied, is a question for the jury.—Whoram v. Township of Argentine, 112 Mich. 20.

¶ 1318. In an action for personal injuries alleged to have been caused by a defective highway, the question of contributory negligence is for the jury under evidence that plaintiff had driven over the place the day before, and the fall before, and that others had driven over it safely, and no evidence to show that plaintiff could have avoided driving over the place in question.—Hunt v. Township of Lincoln, 131 Mich. 637.

¶ 1319. The questions of negligence of defendant city and of contributory negligence of a traveler, in an action against such city for injuries to such traveler from a defective street, were for the jury, where it was the claim of plaintiff, supported by evidence, that the city had allowed such street, which descended a hill, to remain gullied or washed out so that the traveled portion was dangerously narrow, that there were no barriers; and where defendant claimed and introduced evidence tending to support the same that such traveler was familiar with that part of the city, that he might have gone a safe way by another street, that his horse was smooth shod, although the streets were covered with ice.—Warn v. City of Flint, 140 Mich. 573.

¶ 1320. The question as to whether the driver of an automobile who sees an elevation in the highway 15 or 20 rods away which is not guarded or lighted and slows down his car to 6 or 7 miles per hour, and does not see a sluiceway on the other side of the elevation until too late, in proceeding after observing such elevation exercises the care and caution that an ordinarily careful and prudent man would have exercised under similar circumstances, is for the jury to determine.—Loose v. Township of Deerfield, 187 Mich. 206.

§ 331. ——Disregard of or mistake as to warning signals.

¶ 1321. In an action for personal injuries sustained by running one's automobile into an excavation in the street, on the theory that red lights were at the curb line only, and that the barricade was so far back to the north as not to be visible from the south, there being some testimony to that effect, the question was properly left to the jury as to whether plaintiff exercised common prudence, after seeing the light to act on the assumption that it marked danger only near

the west curb, and that it would be safe to travel on the east side.—Karrer v. City of Detroit, 142 Mich. 331.

¶ 1322. Contributory negligence as a matter of law cannot be imputed to one who, while driving down a dark street in which he knew a sewer was being constructed, relied upon the red lights as locating the place of danger, and was injured by running his buggy wheel over a pile of dirt fifty feet from the nearest light.—Taylor v. City of Jackson, 151 Mich. 639.

¶ 1323. In an action against a city for damages for the loss of a horse which at night fell into an open and unbarricaded excavation extending nearly across a street, where the only passageway was on the south side of the street, and the evidence was conflicting as to the exact location of the signal lights, and as to the effect which the electric light, together with the shade produced at the point of the excavation had, held that the question of the contributory negligence of the driver was for the jury. —Repperd v. Chapin, 190 Mich. 19.

§ 332. ——In use of bridges, culverts and approaches thereto.

Questions as to condition of bridges and culverts, see ante § 321.

¶ 1324. To drive along an embankment forming part of a highway, and built across low land as an approach to a bridge across a river, at the time of an overflow, and at a place where the river had previously narrowed the roadway, is not negligence per se; whether it would be negligence in a particular case depends on the circumstances, and is for the jury.—Harris v. Township of Clinton, 64 Mich. 447.

¶ 1325. Whether the owner of a horse, in permitting it to be driven unshod when the roads were slippery because of rains, was guilty of contributory negligence, precluding a recovery for damages resulting from its inability to keep its footing upon an inclined highway and bridge, which was unprotected by barriers, was a question for the jury, as was also the question of the negligence of the driver in not alighting before attempting to drive up the incline.—Perkins v. Township of Delaware, 113 Mich. 377.

¶ 1326. In an action for personal injuries caused by an engine's breaking through a bridge, where it appears that plaintiff had been warned that the bridge was not very strong, the question of contributory negligence in attempting to cross with a tank full of water attached to the engine, is for the jury.—Comstock v. Township of Georgetown, 137 Mich. 541.

¶ 1327. A drawbridge was opened with no signal of danger except a bell placed upon it. The night was dark, and a bicyclist approaching at a moderate speed ran into the open bridge and was drowned. There was evidence that he looked both up and down the river and directly ahead while approaching. Held, he was not, as a matter of law, guilty of contributory negligence.—Scharman v. Bay County Bridge Commission, 158 Mich. 77. (Brooke and Grant, JJ., dissenting.)

¶ 1328. Plaintiff on dismounting from his bicycle upon a bridge over a mill race on account of an accumulation of dirt washed upon the bridge either struck, pushed against or rested upon a temporary railing of the bridge, which being insecure gave way, causing him to fall some twenty feet into the stream below. In an action against the township and the owner of the mill his contributory negligence was held to be for the jury.—McRae v. Township of Hart, 179 Mich. 325.

¶ 1329. Plaintiff was guilty of contributory negligence as a matter of law where it appears that when he was driving his team in the nighttime at a walk over a culvert, at each end of which large holes had been washed in the roadway, one of the horses stepped in a hole and pulled the rig into it and injured him, that the road had been defective for several months, that plaintiff had used it hundreds of times and knew of its extremely dangerous condition and how to avoid the danger, that at the time of the accident he knew he was at the culvert when his horses stepped on the planking, that he could not see the road but attempted to drive on the narrow roadway between the holes, that he had his team under full control and that by alighting and using his lantern he could have passed safely.—Rohlfs v. Township of Fairgrove, 174 Mich. 555.

¶ 1330. Whether a plaintiff in riding in a vehicle driven by her mother upon the approach to a bridge, is guilty of contributory negligence, where the defendant township has permitted a pile of sand and a layer of boards to be placed on said approach with the result that the vehicle is overturned and plaintiff injured, is a question of fact for the jury.—Speck v. Township of Bruce, 166 Mich. 550.

¶ 1331. In an action against a city for the death of an occupant of an automobile, who was riding with the owner, resulting from the automobile plunging into a river at night after a drawbridge had been raised, and alleged to be due to the failure of the bridge tender to lower the gates when the drawbridge was open, where it appeared that the owner of the automobile had passed over the bridge a number of times and knew that the drawbridge was provided with gates which were lowered when the drawbridge was opened, and other safeguards were provided in the way of lights and stop signals, held

that it was a question for the jury whether the driver of the automobile acted as a reasonable and prudent man would act.—Beach v. City of St. Joseph, 192 Mich. 296.

§ 333. Contributory negligence of foot travelers.

Particular questions, see also post §§ 334-336.

Questions as to contributory negligence of vehicle users, see ante §§ 328-332.

Questions in actions against private party or abutter, see post § 337.

Direct verdict on ground of contributory negligence, see post § 344.

¶ 1332. A person is not guilty, as matter of law, of contributory negligence, who is walking along a street in the night without exercising any unusual precaution or thinking of danger, when he has no knowledge of the bad condition of a sidewalk.—Pearll v. City of Bay City, 174 Mich. 643.

¶ 1333. It cannot be said as a matter of law that the plaintiff in an action for sidewalk injury was guilty of contributory negligence in running along a snow covered and wet sidewalk with both hands in his overcoat pockets.—Wilton v. City of Flint, 128 Mich. 156.

¶ 1334. The question whether a woman was negligent in stepping in the darkness from a sidewalk bed over the curb and into the gutter about 15 or 19 feet from the crosswalk, is for the jury.—Finch v. Village of Bangor, 133 Mich. 149.

¶ 1335. Contributory negligence is properly for the jury in an action against a city for personal injuries caused by stepping into a gutter, where the evidence showed that the existence of the gutter was well known to plaintiff, that it was broad daylight, that she was carrying packages which had gotten disarranged and she was arranging them, that her attention was diverted by the packages, and that she did not know that she was so near the place.—Herring v. City of St. Joseph, 137 Mich. 480.

§ 334. ——Use of defective walk or way.

Question as to voluntary use of defective or dangerous roadway by driver, see ante §§ 329-331.

¶ 1336. Previous knowledge or means of knowledge on the plaintiff's part of the defect in a street or walk which caused the injury out of which the action arose is not conclusive evidence of negligence; and where the question is in doubt it should go to the jury.—Dundas v. City of Lansing, 75 Mich. 499; Argus v. Village of Sturgis, 86 Mich. 344; Graves v. City of Battle Creek, 95 Mich. 266.

¶ 1337. It is not negligence per se for one knowing of defects in a sidewalk to attempt to pass over it.—Sias v. Reed City, 103 Mich. 312; Oesterreich v. City of Detroit, 137 Mich. 415; Hodge v. City of St. Louis, 146 Mich. 173.

¶ 1338. In an action against a city for personal injury due to a defective sidewalk the fact that the plaintiff although she knew of the defect did not have it in mind at the time of the injury raises a question of fact for the jury as to contributory negligence.—Vergin v. City of Saginaw, 125 Mich. 499.

¶ 1339. Because the plaintiff did not have her eyes upon the board at the time it cannot be said as a matter of law that she was guilty of contributory negligence where she was crossing a temporary crosswalk constructed while street improvements were being made, when she had not seen the crossing before, and walking thereon just behind her husband, she was injured by her husband stepping on a short board which sprang up and tripped her, the board which tripped her not being the one she was walking on.—Barker v. City of Kalamazoo, 146 Mich. 257.

¶ 1340. A woman, carrying her child in arms along a sidewalk whereon paving stones are scattered, and who stepping over them trips on one and stumbles and is hurt is guilty of contributory negligence as matter of law.—Grandorf v. Detroit Citizens' St. R. Co., 113 Mich. 496.

¶ 1341. In an action for injuries alleged to have been caused by a defective sidewalk, the question of contributory negligence in walking upon the walk after dark, is for the jury though plaintiff knew that the boards were accustomed to rattle when walked upon.—Styles v. Village of Decatur, 131 Mich. 443.

¶ 1342. Contributory negligence was for the jury in an action for injuries from a defective sidewalk, where the plaintiff's own testimony shows he was familiar with the walk and had used it almost daily, and that there was another street over which he could have traveled in going to his home.—Vander Velde v. Village of Leroy, 140 Mich. 359.

¶ 1343. In an action for personal injuries sustained by falling on a defective sidewalk, under the instruction given the court did not err in submitting the question of contributory negligence to the jury upon the theory that plaintiff had knowledge of the defective condition of the sidewalk, whereas the defendant's whole case, on the question of contributory negligence, was based upon the theory that on the night of the accident she could, by the exercise of ordinary care, have avoided the accident.—Proulx v. Bay City, 143 Mich. 550.

¶ 1344. Plaintiff approached a certain crosswalk of defendant city. She noticed that some of the boards were broken and that there were holes in it. She told her

little girl to wait behind as there was not room for both of them to cross without falling into a hole. Plaintiff stepped upon an apparently sound board in order to step across the hole. The board gave way, and she was injured. Held, she was not as a matter of law guilty of contributory negligence.—O'Connor v. City of Detroit, 160 Mich. 193.

¶ 1345. Plaintiff was injured while walking on certain boards placed by a contractor of the defendant city on the curb at a crossing, and running down into the street, which was excavated preparatory to being paved. Under the evidence the manner of the plaintiff's injury was in dispute. Held, the question of her contributory negligence was for the jury.—Hughes v. City of Detroit, 161 Mich. 283.

§ 335. ——Avoidance of holes, breaks and defects.

By drivers in roadway, see also ante §§ 329-331.

¶ 1346. Plaintiff's contributory negligence in using a sidewalk in which there were holes is a question for the jury.—Wolverton v. Village of Saranac, 171 Mich. 419.

¶ 1347. Where, in an action for injuries received by stepping into a hole in a sidewalk, it appears that the accident occurred in broad daylight, that the defect was plainly visible, and that plaintiff had been accustomed to pass the place at least once a week, and had never noticed the defect, which according to her theory was of long standing, the question of her contributory negligence should be submitted to the jury, although she further testifies that she was exercising ordinary care and caution, and walking quietly along the street.—Mackie v. City of West Bay City, 106 Mich. 242.

¶ 1348. A pedestrian, perfectly familiar with the existing conditions, is, as a matter of law, guilty of contributory negligence, precluding a recovery for injuries sustained by falling from the side of a walk unguarded by a rail into an excavation, during the night time, where, instead of guiding himself by the rail on the other side, he directed his course by a light, which proved not to be the one he supposed it to be.—Church v. Village of Howard City, 111 Mich. 298.

¶ 1349. One is not necessarily precluded from recovering for injury caused by a defect in a highway simply because he was aware of such defect, but this fact, with all others, is proper to be taken into consideration by the jury in determining whether, under all of the facts and circumstances, he was guilty of carelessness or negligence without which he would not have been injured. So held, where plaintiff, who on a dark and stormy night had been injured by stepping into a hole in a defective sidewalk, testified that she knew of the bad place in the walk; that on passing over it earlier in the evening, she spoke of it to two girls who were with her; that on her return she said to the girls, "We will have to look out for that bad place in the walk"; that she was walking on the outside of the walk, and her companions on the inside; that they all walked somewhat rapidly in that way until she stepped into the hole; and that she was paying attention to the defect in the walk, and was watching for it, but reached it sooner than she expected.—Sias v. City of Reed City, 103 Mich. 312.

¶ 1350. A boy ten years of age, who is injured, while running upon a sidewalk, by stepping into a hole therein, of the existence of which he has knowledge, is not guilty of contributory negligence, as a matter of law, but it is for the jury to say whether he used such care and discretion as boys of his age usually exercise under like circumstances.—Strudgeon v. Village of Sand Beach, 107 Mich. 496.

¶ 1351. In an action for personal injury caused by a defective sidewalk testimony that the plaintiff stepped into a small hole in the sidewalk, that he and others were accustomed to walk over this sidewalk daily, that the hole was filled with leaves and dirt, and that the nearest electric light, if it was burning, was 300 ft. distant is sufficient to justify leaving the question of contributory negligence to the jury.—Kopelka v. City of Bay City, 125 Mich. 625.

¶ 1352. In an action against a city for a sidewalk injury, the question of contributory negligence of the plaintiff is properly left to the jury on evidence that the plaintiff on returning from work slipped in the hole in the sidewalk and was injured, that having passed over the sidewalk many times, and knowing its dilapidated condition she was walking slowly "picking her way along" to avoid the dangerous places, that there were other sidewalks not quite so convenient and she could have avoided the danger by walking on the ground alongside the walk, and that the evening was dark and the electric light half a block away.—Barnes v. City of West Bay City, 138 Mich. 93.

¶ 1353. Want of care as a matter of law is not shown, in an action for personal injury caused by a defective walk, by testimony that plaintiff might have seen the hole in the walk had she looked for it and if she had not been carrying anything, and that a plank tipped up and then she fell into the hole, since though she might have seen the holes and avoided them, it does not follow that she was in fault in not discovering that the plank would tip up and cause her to fall.—Oesterreich v. City of Detroit, 137 Mich. 415.

§ 336. ——Deviation from traveled part of walk or way.

¶ 1354. The mere fact that plaintiff made use of a customary path crossing a street instead of the crosswalk, at night, did not, as a matter of law, render him guilty of contributory negligence respecting a manhole into which he fell.—Baker v. City of Grand Rapids, 111 Mich. 447.

¶ 1355. Contributory negligence of a pedestrian is for the jury on evidence that the plaintiff instead of following the crosswalks went upon a man-hole at the intersection of and just outside the walks in attempting to cross the street diagonally and was injured by the tipping of the cover, and where there was testimony that he was intoxicated, which he denied on cross-examination.—Lincoln v. City of Detroit, 101 Mich. 245.

§ 337. Contribution to negligence of private party or abutter.

As to overhanging or falling objects, see post § 338.

Questions of law and fact generally in actions against abutters and private persons for highway injuries, see ante § 317 et seq.

Questions as to contributory negligence in actions against the public, see ante §§ 328-336.

¶ 1356. In a suit for personal injuries against a paving contractor for leaving a public street unguarded at night, resulting in injuries to plaintiff, the question of contributory negligence is for the jury.—Williams v. Sager, 165 Mich. 635.

¶ 1357. Where, in an action for a personal injury, the evidence shows that defendant took up a sidewalk and dug a ditch across and left it exposed at night, and that plaintiff stepped off the walk upon the ground and then fell into the ditch, it being very dark, the case should not be taken from the jury on the ground of contributory negligence.—Flater v. Fey, 70 Mich. 644.

¶ 1358. Whether one who, in passing along a sidewalk, and while absorbed in watching the workmen in an excavation being made from the street into an area under the sidewalk, walks into a manhole left open for the purpose of hoisting through it the material excavated from the area, not seeing a barrel which had been placed beside the manhole as a means of guarding it, is guilty of contributory negligence, is a question for the jury.—Le Beau v. Telephone & T. Const. Co., 109 Mich. 302.

¶ 1359. Where the danger is not clearly obvious, a person will not be guilty of contributory negligence as a matter of law in attempting to drive across a known depression in a city street even though such depression could be avoided.—Sherman v. Consumers' Power Co., 199 Mich. 543.

¶ 1360. Whether, in attempting to drive across a known depression in a city street, plaintiff, suing the lighting company responsible for the defect for personal injuries sustained, was guilty of contributory negligence held, in view of the evidence, to have been a question of fact.—Sherman v. Consumers' Power Co., 199 Mich. 543.

¶ 1361. Contributory negligence is for the jury in an action for injury to a paving foreman caused by the fall of a telephone pole which was being removed from the street, 35 feet from where he was working, it appearing that no warning was given him by the company and the evidence being conflicting as to whether he was aware of the danger.—Kyes v. Valley Tel. Co., 132 Mich. 281.

¶ 1362. Where a gang of telephone employees was stringing a cable through a snatch block operated intermittently by a team of horses a block away the question as to whether a seven-year-old child is guilty of contributory negligence in approaching and putting his hand on the block while it is not being operated is one for the jury.—O'Leary v. Michigan State Tel. Co., 146 Mich. 243.

¶ 1363. Where a thirteen-year-old boy was struggling in the street with another boy for the possession of swimming trunks, and fell into a pool of hot water discharged into the street by defendant railway company, the question of whether plaintiff was guilty of contributory negligence was for the jury.—Curtis v. Grand Trunk Ry. Co. of Canada, 178 Mich. 382.

§ 338. ——Overhanging and falling objects.

¶ 1364. In an action for injuries to a horse through striking a sagging telephone wire in a street, while being driven at a pace of 12 miles an hour, the question whether such a pace was unusual or dangerous is one for the jury in the absence of proof that the pace was dangerous.—Hovey v. Michigan Telephone Co., 124 Mich. 607.

¶ 1365. In an action for injuries to a horse going at about twelve miles an hour, running into a telephone wire which in being carried across a street sagged near the ground, it is a question for the jury to say whether plaintiff had reason to expect and should have seen the obstruction, knowing that defendant was then stringing wires.—Hovey v. Michigan Telephone Co., 124 Mich. 607.

¶ 1366. In a personal injury case it appeared that the defendant company was stringing wires along the road in front of the plaintiff's premises, that trees had been felled on the plaintiff's premises for the purpose of clearing the way, that while the

plaintiff was engaged in removing the trees he drove his horses over slack wires which a short time later were drawn up by the lineman farther up the road and that the plaintiff in attempting to hold the wires down to get the team out of danger was thrown down and injured. Held, error to instruct the jury, that as a matter of law, the plaintiff was guilty of contributory negligence.—Balderson v. Portland Tel. Co., 173 Mich. 412.

¶ 1367. Plaintiff, employed by a carpenter contractor, was on a scaffold working on a bay window. One Bishop, employed by defendant painting contractors, was painting on a ladder resting at the top against the edge of the roof of the bay window. The wind was blowing. Bishop left the ladder to change his paints and the ladder blew down and injured plaintiff. Plaintiff testified that while he knew Bishop was engaged about his painting job, he was busy with his own duties and paid little attention to him. Held, plaintiff was not as a matter of law guilty of contributory negligence.—Haxer v. Griessel, 162 Mich. 310.

§ 339. Directing verdict.

See also ante ¶ 1262.
On particular questions and grounds, see post §§ 340-344.
What constitutes material variance between allegations and proof, see ante § 277.
Weight and sufficiency of evidence, see ante § 298.
General law of directing verdict, see Directing Verdict.

¶ 1368. Plaintiff, while passing over a sidewalk in the defendant city, was tripped by a loose section of the planking, and sustained injuries for which she brought suit. Upon the trial she produced witnesses who testified that, at the place where the accident occurred, a board in the walk was split diagonally from one end, so as to leave a pointed piece of the plank, too short to reach both stringers, fastened only at one end, and liable to fly up when stepped on at the outer end, which projected nearly a foot over the edge of the stringer. One witness testified that he knew that the split had existed for a month before the accident, because he had tripped there one night himself. On cross-examination this witness stated that no one, who did not know that the board was loose, would notice it; but there were other witnesses who testified that the defect was plainly visible. The circuit judge directed a verdict for defendant, on the ground that the defect was not such a one as would attract attention, and that the city was not negligent in not discovering it. Held, that the question of notice should have gone to the jury.—Menard v. City of Bay City, 114 Mich. 450.

¶ 1369. Where, in an action to recover for injuries caused by a defective sidewalk defendant claims the defect was caused by driving a heavily loaded wagon over the walk two days before the accident, and that it did not have notice of the defect, and where there is testimony that the accident occurred at a point east of where the wagon passed, it is not error to refuse to direct a verdict for defendant based on the assumption that the "undisputed" evidence showed a recent defect made by the wagon.—Butts v. City of Eaton Rapids, 116 Mich. 539.

¶ 1370. One Maynard, a licensed plumber, opened a street with the commissioner's permission to connect a private sewer. He left the ditch open at night without danger signals. One Collins discovered the ditch and warned the police. Before the arrival of the police, who acted promptly, to place the signals, plaintiff was injured in the ditch. Held, a directed verdict for defendant city should be reversed.—Bonneville v. City of Alpena, 158 Mich. 279. (Brooke, J., dissenting.)

¶ 1371. Three wooden steps were a part of the defendant village's sidewalk. The risers were decayed, as were also the two inch steps, and the city had nailed upon the steps some one-inch boards over the rotted places. Plaintiff was injured while stepping on the space between a one-inch board and the riser by the giving way of the step board. The city had condemned the walk prior to the accident, and knew of the defects. Held, it was error to direct a verdict for the defendant, as the question of negligence was for the jury.—Seeger v. Village of Hart, 160 Mich. 134.

¶ 1372. The refusal of the trial court to direct a verdict for defendant in an action against a city for injuries due to a defective sidewalk on the ground that the walk was reasonably safe was not reversible error where there was evidence that the depression in the walk causing the accident was three or four inches, and the court instructed the jury that defendant was not liable unless plaintiff was injured as the result of a depression of at least two inches.—Wadkins v. City of Albion, 201 Mich. 130.

¶ 1373. In an action for damages against a township based on the fact that while plaintiff was moving his threshing outfit and in passing over a fill in the highway, the separator slid into a ditch and was overturned, there being no evidence that the fill at the point where the accident occurred was not in a condition reasonably safe and convenient for public travel, it is error to deny defendant's motion to direct a verdict.—Canfield v. Township of Gun Plains, 175 Mich. 379.

§ 340. ——Snow and ice conditions.

Conditions as questions of law or fact, see ante § 314.

¶ 1374. In an action against a city for injuries sustained by falling on the ice on a sidewalk, evidence of the existence of a depression in the walk which caused water to collect, and that the liquid from a garbage can had flowed across the walk in this place for several years, is sufficient to reverse a directed verdict and judgment for the defendant.—Navarre v. City of Benton Harbor, 126 Mich. 618.

¶ 1375. Testimony of a road foreman to the effect that six hours before the accident there was no ridge of ice in the street, is not sufficient to justify a verdict directed in favor of defendant, a city, especially where witnesses for plaintiff testify that there was such a ridge, and that plaintiff slipped upon it.—Bowen v. City of Detroit, 150 Mich. 546.

¶ 1376. The defendant city built a cinder foundation for a cement walk, and left it incomplete during the winter. During snowy and icy weather, plaintiff slipped on the ice collected on the cinder walk, which had become roughened, fell, and injured herself. Held, that the trial court properly directed a verdict for the city.—Pringle v. City of Detroit, 152 Mich. 445.

¶ 1377. Defendant township's public road crossed a ravine. Defendant constructed an embankment across the ravine from dirt thrown up from the land lying near the highway. The embankment was rolling in shape, with only about two feet to spare at either side of each wagon track. No railing was provided and the embankment was some five feet high at the culvert. The hind runners of plaintiff's sled slipped on the snow and ice covering the embankment while crossing same, slid off into the ravine, and plaintiff was injured by the overturning of the sled caused by the striking of the runners against the culvert. Held, the trial court erred in directing a verdict for defendant, since the questions as to whether the roadway was reasonably safe for travel, whether the driver of the horses was negligent, and whether the proximate cause of the injury was the icy and slippery condition of the road, should have been submitted to the jury.—Stanton v. Township of Webster, 170 Mich. 428.

§ 341. ——In actions against private parties.

Questions of law and fact, see ante § 317 et seq.

¶ 1378. The action of the trial court in directing a verdict for defendant in a suit for injuries sustained by falling upon an icy sidewalk was held to have been erroneous, in that the evidence offered by plaintiff as to defendant's negligence in failing to keep his eave troughs in repair, thereby permitting an accumulation of ice, raised a question of fact for the jury.—Howey v. Fisher, 111 Mich. 422.

¶ 1379. In a suit for personal injuries caused by falling glass, the trial court properly refuses to instruct for a verdict for defendant on the ground that there is no evidence of negligence, where a witness testifies that defendant as agent of the premises in question permitted the glass in the window of a building to remain for a long time in such a broken condition as to be likely to fall down upon passers-by.—Bannigan v. Woodbury, 166 Mich. 491.

§ 342. ——On want of proof of cause of injury.

¶ 1380. In an action against water commissioners for damages, brought by a person injured through being thrown out of his wagon, as the result, according to his claim, of a jolt, when the wheels struck a ridge of earth left after the laying of water pipes along a street near a railroad, if it is shown that the ridge was eighteen feet from the railroad and that the plaintiff was about to cross the track when his team became frightened and started, and it is not shown what caused the jolt or frightened the team it is proper to direct a verdict for the defendant. —Westfall v. Board of Water Commissioners of Detroit, 93 Mich. 211.

¶ 1381. In an action to recover from a township damages for injuries sustained by plaintiff in falling from his bicycle and over the edge of a culvert on a highway, which it is alleged defendant failed to keep in repair, a verdict was properly directed for defendant where it appeared that the accident was caused, not by a hole in the road, nor the narrowness of the culvert or approaches, but by reason of the bicycle slewing in the sand, or striking a stone, or in some manner undisclosed getting out of plaintiff's control, and throwing him over the bridge.—Briggs v. Township of Pine River, 150 Mich. 381.

§ 343. ——On contributory negligence of vehicle user.

Questions of law and fact as to contributory negligence, see ante § 328 et seq.

¶ 1382. A horse that was driven on a trot was permanently injured by stepping on a cobblestone of which there were several scattered about the street, and there was evidence that they could be seen by the driver. An action against the city for the injury was taken from the jury. Upon review the supreme court was equally divided and the result was not disturbed.—McCool v. City of Grand Rapids, 58 Mich. 41.

¶ 1383. In an action against a municipal corporation to recover damages for personal injuries sustained by plaintiff while driving in a buggy which collided with a wagon having no light thereon standing on a public street of defendant, where there was evidence tending to support defendant's claim that certain conditions were such that due

care on plaintiff's part would have discovered such wagon and also evidence tending to sustain plaintiff's claim that certain other conditions were such as to charge defendant with a duty to hang out a danger signal, held the testimony presented issues of fact and motion to direct a verdict for defendant was properly denied.—Hall v. City of Flint, 195 Mich. 688.

§ 344. ——On contributory negligence of pedestrian.

Questions of law and fact as to contributory negligence of pedestrian, see also ante § 333.

¶ 1384. In an action against a city for injuries caused by a defective crosswalk, verdict for defendant should be directed on the ground of contributory negligence where plaintiff's testimony shows that she knew of the bad condition of the walk, that it was light enough to see it, that she knew she must exercise a great deal of care, and that she took the chance of going over safely there being a safe way within a few feet of the walk in question.—Irion v. City of Saginaw, 120 Mich. 295.

¶ 1385. Where the plaintiff who knew a street was being paved, walked at a crossing in the nighttime and while looking at a team instead of where he was going fell into an excavation, contributory negligence appeared on plaintiff's own testimony and a verdict should have been directed for the city.—Cloney v. City of Kalamazoo, 124 Mich. 655.

¶ 1386. Verdict for defendant should not be directed, in an action against a village for personal injuries alleged to have been caused by a defective sidewalk, on the ground of contributory negligence though it appeared by plaintiff's testimony that he knew of the defect several weeks before the injury, where it also appeared that he knew that repairs had recently been made in the vicinity and that he believed that the defect had been remedied.—Hunter v. Village of Durand, 137 Mich. 53.

¶ 1387. In an action for personal injuries sustained through the alleged defective condition of a walk, the defense being contributory negligence, where the want of care is not established as a matter of law the matter should be placed before the jury and it is error to direct a verdict.—Lewis v. City of Marshall, 146 Mich. 389.

¶ 1388. In a suit against a township for personal injuries sustained through its negligence in leaving a ditch open in a public road, the plaintiff testified that in approaching the road by a path she lost her direction and while in a confused state of mind stumbled along in the darkness. In another part of her testimony she stated that though confused at the time, she thought she knew where she was just before falling into the ditch. Held, the court properly refused to direct a verdict in favor of the defendant on the ground that plaintiff was guilty of contributory negligence in continuing the walk when she was confused as to her whereabouts, such question being for the jury. —Hunt v. Township of Douglass, 165 Mich. 187.

¶ 1389. The fact that the plaintiff knew that there were holes in the gravel walk which she was traversing, and that she had this defect in mind at the time of her injury, caused by stepping into one of the holes, does not change the question of her negligence from one of fact to one of law, and justify the trial court in directing a verdict.—Wolverton v. Village of Saranac, 171 Mich. 419.

¶ 1390. Plaintiff was crossing a bridge running north and south. There was evidence that just as he was stepping off the north end of the bridge, his attention was distracted by a whistle, and he stepped into a depression fifteen inches deep, and sustained an injury; that he did not notice the depression until he was just stepping into it; and that the depression was caused by the rotting out of a crosswalk which had partially been replaced by cinders. Held, the court was in error in directing a verdict for defendant on the ground of the contributory negligence of plaintiff.—Willard v. City of Detroit, 164 Mich. 241.

5. Instructions.

Questions for the court and jury respectively, see ante XII, H, 4.

§ 345. Necessity and sufficiency in general.

As to duty and negligence respecting roadways, see post §§ 346-350.

As to duty and negligence in respect to walks and crosswalks, see post §§ 351-354.

As to construction and maintenance of bridges and culverts, see post §§ 355, 356.

In actions against abutters and private persons, see post § 357.

As to proximate cause, see post § 358.

As to contributory negligence, see post §§ 359-362.

Directing verdict, see ante § 339 et seq.

General law of instructions and necessity and sufficiency of cautionary and general instructions not peculiar to highway injury cases, see Instructions.

Erroneous comments by judge in course of trial, see Trial, II.

Instructions in bridge cases, see also Bridges § 21.

¶ 1391. In an action for damages for personal injuries to an equestrian resulting from being thrown from his horse, stum-

bling on the highway, where the testimony conflicts as to whether the horse stepped into a visible hole in the surface or whether a river had so disintegrated the bed of the road as to leave a crust of earth which the horse broke through, it is error to refuse to charge that if the hole did not exist before the accident, but was made at the time of the accident by plaintiff's horse, and there was nothing on the road's surface to give notice that the water underneath was eating away a hole, then plaintiff could not recover.—Wakeham v. Township of St. Clair, 91 Mich. 15.

¶ 1392. Where the declaration and the plaintiff's evidence in an action for a sidewalk injury are based upon his having been injured while walking at a certain place on a sidewalk, the defendant is entitled to an instruction that if he was injured while riding his bicycle on the sidewalk he could not recover, upon evidence to support that theory.—Callahan v. City of Port Huron, 128 Mich. 673.

¶ 1393. In the case of injury by plaintiff's wagon overturning at a washed out place in the road while trying to pass around it on the side, the question to be submitted to the jury was whether the defect which caused the accident was such that it rendered the highway not reasonably safe and fit for travel, and an instruction to the effect that people sometimes get hurt when nobody is to blame, in which case there is no redress, was erroneous, as tending to obscure the issue.—Handy v. Township of Meridian, 114 Mich. 454.

¶ 1394. In an action for personal injuries sustained by running an automobile into an excavation in the street an instruction which assumes that certain lights were back of the curb, where there was convincing testimony that they were not, is prejudicial because the jury would naturally infer that the trial judge believed the lights were at the curb, or at least remote from the center of the street.—Karrer v. City of Detroit, 142 Mich. 331.

§ 346. As to duty and negligence respecting safety of roadways.

As to fright of horses, see post § 347.
As to protection of openings, holes, draw bridges, etc., see post § 348.
As to dangerous wires, see post § 349.
As to notice or knowledge, see post § 350.
As to walks and crosswalks, see post §§ 351-354.
As to bridges and culverts, see post §§ 355, 356.

¶ 1395. An instruction that the law imposing on townships the duty of keeping public highways in a reasonably safe condition for public travel must be "construed reasonably, taking into consideration that townships must perform their duties by means of public officers," is improper, as justifying the inference that, because the township is obliged to act through officers, its negligence in the performance of a duty imposed by statute in plain and unambiguous terms may be excused under circumstances that would not excuse such negligence in an individual.—Handy v. Township of Meridian, 114 Mich. 454.

¶ 1396. In an action against a township for death resulting from a defective highway, it is error to instruct the jury that defendant was obliged to make an approach to a fill "straight and level," or a particular embankment "of a safe width and level," or to construct barriers on its sides.—Lamb v. Township of Clam Lake, 175 Mich. 77.

§ 347. ——As to fright of horses.

¶ 1397. The instructions in an action against a township for injuries sustained by a traveler's horse becoming frightened at building materials left by the township beside a highway for use in a nearby bridge, held as favorable as the plaintiff could require.—Boos v. Township of Northfield, 186 Mich. 386, 12 N. C. C. A. 145.

§ 348. ——As to protecting openings, excavations, draw bridges, etc.

¶ 1398. In an action for personal injury against a city a request to charge that a city ordinance as a matter of law obligated the city to guard an excavation is properly refused as the ordinance at most affords only evidence of negligence.—Sterling v. City of Detroit, 134 Mich. 22.

¶ 1399. In an action against a city for the death of a bicyclist while riding through an open draw at night and drowning, refusal to instruct that if the deceased rode over the draw because of the absence of the chain which he was looking for, plaintiff was entitled to recover, is not error where the request for such charge left out other circumstances.—Benedict v. City of Port Huron, 124 Mich. 600.

¶ 1400. In an action against a city for the death of a bicyclist by his riding on a moonlight night into an open draw and drowning, where the proof showed that the deceased knew he was approaching a place that might be dangerous, the refusal of a request to instruct the jury that the deceased had a right to assume that the city would do its duty in the premises, was not error when coupled with the implication that the deceased was under no obligation to look for danger if he could not reasonably be expected to see or expect that the draw was open.—Benedict v. City of Port Huron, 124 Mich. 600.

¶ 1401. In an action against a city for the death of a bicyclist by riding at night

through an open drawbridge and drowning, it was not error for the court to fail to call the attention of the jury to differences in the condition of the bridge and surroundings at the time of the accident from those existing at the time of the trial, where the request and the jury could not have failed to understand, if possessed of ordinary intelligence, that it was the condition upon the former and not the latter occasion that they were considering.—Benedict v. City of Port Huron, 124 Mich. 600.

§ 349. ——Danger from electric wires.

Instructions in cases of personal injury from electricity, see also Electricity § 11.

¶ 1402. Plaintiff's intestate was killed while grasping a "hanger" wire used to raise and lower the electric street light. Plaintiff requested an instruction that the intestate was entitled to presume the wire safe to handle, and, in the absence of knowledge of danger on his part, was not obliged, in order to escape contributory negligence, to look out for any danger. Held, this instruction was properly refused as casting a duty on the defendant to warn the intestate of danger likely to arise from the latter's interference with the former's plant, and also because there was evidence that plaintiff's intestate had been warned of the danger.—Charette v. Village of L'Anse, 154 Mich. 304.

¶ 1403. Plaintiff's intestate was killed by grasping a "hanger" wire used to raise and lower an electric street light. The court instructed that the defendant village owed no duty to station an officer at each pole, or to inclose the pole so that the wire could not be reached by anybody, but that the question was whether, having placed the wire out of ordinary reach, a reasonably careful man would have thought it necessary to take further precautions. Held, this instruction, taken with others, was proper.—Charette v. Village of L'Anse, 154 Mich. 304.

¶ 1404. Plaintiff's intestate, a boy of fourteen, was killed by an electric shock while taking hold of a "hanger" wire used to raise and lower the electric street light. There was evidence that certain other boys and young men were known occasionally to have operated this wire. Held, that an instruction that under the evidence, as a matter of law, a custom did not exist among the inhabitants of the defendant village giving a right to operate the wire, was proper.—Charette v. Village of L'Anse, 154 Mich. 304.

§ 350. ——Knowledge or notice of defect or condition.

Instructions as to notice of defective walks, see post § 353.

Instructions as to notice of defective bridges and culverts, see post § 356.

¶ 1405. In an action for injuries caused by a defect in a highway which had existed for a sufficient length of time to charge the township officers with notice, it was error to instruct the jury that there was a question for their consideration as to whether the defect was such that the township officers, "by reason of investigation," should have seen it.—Handy v. Township of Meridian, 114 Mich. 454.

§ 351. As to duty and negligence respecting safety of walks.

As to plan and construction, see post § 352.

As to inspection and notice of defect, see post § 353.

As to opportunity to make safe, see post § 354.

Instructions as to duty and negligence respecting roads, see ante §§ 346-350.

Questions of law and fact as to condition and safety of walks, see ante § 312.

¶ 1406. Under Comp. L. 1897, § 3443, requiring municipalities to keep their sidewalks in reasonable repair and in addition reasonably safe and fit for travel, it is error to instruct the jury that the municipality is required to keep its sidewalks in good repair and safe and convenient for public travel.—Phalen v. City of Detroit, 126 Mich. 683.

¶ 1407. In an action against a city for personal injuries alleged to have been caused by stepping into a hole in the sidewalk, an instruction that "the law requires the city to keep its sidewalks in suitable repair, so that persons traveling over them, exercising ordinary care, may do so with safety," is error since it fixes a higher standard than is required by Comp. L. 1897, § 3441, which requires reasonable repair and a condition reasonably safe and fit for public travel.—Caldwell v. City of Detroit, 137 Mich. 667.

¶ 1408. The statement in the charge to the jury in a personal injury case against a city, that a city is bound to make safe all of its sidewalks, standing alone, applies too stringent a rule.—Renaud v. City of Bay City, 124 Mich. 29.

¶ 1409. An instruction in an action against a city for injuries alleged to have been caused by a defective sidewalk, which imposes a higher degree of care upon the city than is required by statute, is error though the testimony given by plaintiff is undisputed, since the question of reasonable repair and reasonable safety is for the jury, except in cases altogether free from doubt.—Caldwell v. City of Detroit, 137 Mich. 667.

¶ 1410. In an action for personal injuries alleged to have been caused by a defective sidewalk upon which plaintiff was walking after dark, it is not error to instruct that it is the duty of a village to keep its side-

walks in a condition reasonably safe and fit for travel by night as well as by day.—Styles v. Village of Decatur, 131 Mich. 443.

¶ 1411. Where the injury to a pedestrian took place on a man-hole cover at the intersection of sidewalks but just outside them, a charge was misleading which told the jury that it was "the duty of the city to keep that manhole in just as safe condition as the sidewalk itself"; for it may have induced the jury to believe that a man-hole cover and its supports must be as smooth and even as the walk designed for pedestrians.—Lincoln v. City of Detroit, 101 Mich. 245.

¶ 1412. In an action against a village for personal injuries alleged to have been caused by a defective sidewalk, it is not error to refuse an instruction which implied an obligation on the part of plaintiff to exercise more than ordinary care, where the court properly instructed as to contributory negligence and reasonable and ordinary care.—Hunter v. Village of Durand, 137 Mich. 53.

¶ 1413. Incorrect statements of the rule of liability of the city for defective sidewalks, taken without their context in the charge, are not error, where the remainder of the charge repeatedly states that the city is not an insurer of travelers and requires only that it keep its walks reasonably safe for ordinary travel.—Hendershott v. City of Grand Rapids, 142 Mich. 140.

¶ 1414. It is not error for the court to refuse to instruct the jury, in a suit for injuries received by reason of a defective sidewalk, to the effect that defendant city, with 300 miles of sidewalk, would not be held to as great diligence in caring for them as a small village would be.—Moore v. City of Kalamazoo, 109 Mich. 176.

¶ 1415. In an action for personal injuries against the city, an instruction that "if under the circumstances as they appeared and as detailed to you the plaintiff may not have deemed it to be unsafe and dangerous to walk on and he thought it was proper and suitable for him to walk over and you find he was justified in using it as he did, then that place having remained there so long it was the duty of the city to have put it in repair; and the city so far as that is concerned, not having put it in repair, in case a person is injured without fault on their part, the city is liable," when taken in connection with other instructions is not open for objection that the jury would infer that the plaintiff was the one to decide whether the sidewalk was safe.—Kopelka v. City of Bay City, 125 Mich. 625.

§ 352. ——Plan and construction.

¶ 1416. Municipal liability for injury cannot be predicated upon the manner of the connection of a crosswalk and sidewalk, and instructions leaving the proper manner of construction of a crosswalk to the jury, and holding that any walk not safe for children is unlawful, are erroneous.—Shippy v. Village of Au Sable, 65 Mich. 494.

¶ 1417. A jury is properly instructed as a matter of law that an inequality of two inches or less in a sidewalk does not render it not reasonably safe for public travel. (Ostrander, C. J., Bird and Moore, JJ., dissenting.)—Baker v. City of Detroit, 166 Mich. 597.

§ 353. ——Inspection or notice of defect.

Instructions as to notice of defective roadways, see ante § 350.

Questions of law and fact as to notice of defective walks, see ante § 324.

¶ 1418. In an action for an injury from a defective sidewalk it is error to assume, in instructing the jury, that it is the municipality's duty to make such an inspection of sidewalks as would disclose latent defects if any existed. In the absence of actual notice the liability is only for such defects in sidewalks as are apparent, or are suggested by appearances, or as are disclosed by a test in the ordinary use of such walks.—Hembling v. City of Grand Rapids, 99 Mich. 292.

¶ 1419. Where, in an action for injuries caused by a defective sidewalk, defendant requests a charge that if its street commissioner, shortly before the accident, went over the walk and examined it carefully and did not see the defect, then he used due care and diligence and defendant is not liable, it is proper to add the instruction that the jury may consider all the testimony as to the previous existence of the defect in determining whether such officer used due care.—Tice v. Bay City, 84 Mich. 461.

¶ 1420. In an action for an injury from a defective sidewalk, the court, after stating to the jury the rule of presumptive notice, said that it appeared that defendant had men whose duty it was to inspect the walks, and to use reasonable diligence and care to find out whether they were in a reasonably safe condition; and that if they used such care and diligence, and were unable to find the defect, or did not find it, defendant did not then have knowledge, and the plaintiff could not recover, but that if they neglected to perform these duties, defendant would be liable for the defect. Held, that the instruction meant no more than that the failure to inspect the walk, or to inspect it properly, did not prevent the application of the rule of presumptive notice.—Germaine v. City of Muskegon, 105 Mich. 213.

¶ 1421. In an action against a municipality for injuries sustained by stepping into a hole in a sidewalk, an instruction that de-

fendant would be presumed to have had notice of the hole in the walk, if it rendered it out of reasonable repair, and had existed for from one to six months before the injury, and was of such a character as would naturally arrest the attention of persons passing by, if objectionable as determining, as a matter of law, what would be reasonable notice, is cured by a subsequent charge that, before plaintiff can recover, the jury must find that defendant, after constructive notice of such hole, had sufficient time to put it in repair, and neglected to do so.—Mulliken v. City of Corunna, 110 Mich. 212.

¶ 1422. In an action for an injury from a defective sidewalk an instruction to the jury that if the sidewalk generally was in bad condition so that an accident might happen, that was notice to the authorities, was sustained.—Grattan v. Village of Williamston, 116 Mich. 462.

¶ 1423. An instruction that defendant "had notice of the condition of the walk, whatever it was" is not erroneous under uncontradicted evidence that a witness, who lived within a few yards of the alleged defective place in the sidwalk, called the attention of the street commissioner to the condition of the walk all along the place where the hole was alleged to be, since the qualification "whatever it was" made it notice of the condition which actually existed.—Hart v. Village of New Haven, 130 Mich. 181.

¶ 1424. A charge that if a defect in a walk has existed "for quite a length of time—a month or more we will say—that would be constructive notice to the city," is error; since it is a question of fact whether it has existed long enough for that.—Hendershott v. City of Grand Rapids, 142 Mich. 140.

¶ 1425. In a suit against a city for personal injuries received in a fall alleged to have been caused by the defective condition of a crosswalk, an instruction that before the jury can find for plaintiff, it must determine that the defect was a patent one, and of such a character as to put the sidewalk in a condition not reasonably safe and fit for travel, that it had existed for so long that want of knowledge of it by the proper city officials was improbable, that the accident happened to plaintiff at that point, and that injuries resulted therefrom, is proper, and is all that defendant is entitled to on the question of constructive notice and latent defects.—Abbott v. City of Detroit, 150 Mich. 245.

§ 354. ——Opportunity to make safe.

Instructions as to opportunity to repair bridges and culverts, see post § 356.

¶ 1426. Where a city is sued for injuries caused by a defective sidewalk, it is proper to charge that in order to return a verdict for plaintiff the jury must find that defendant had reasonable time to make repairs after notice of the defect and had not used reasonable diligence.—Fuller v. City of Jackson, 82 Mich. 480.

¶ 1427. In an action against a village for injuries occasioned by a defective sidewalk it appeared that defendant had been incorporated for about fifteen months, and had collected a tax for village purposes, and that the failure to repair was caused by the street commissioner's neglect to notify the abutting owner. Held not error to refuse to charge that defendant lacked the time and means or had used due diligence to make repairs.—Lombar v. Village of East Tawas, 86 Mich. 14.

¶ 1428. Where a horse which had been fastened to a plank in a sidewalk jerked it out of place just as plaintiff came along, so that the latter was hurt, it was misleading for the court to instruct the jury that the city's obligation was to repair "speedily"; there being no showing of actual notice to the city, and no pretense that a reasonable time to repair had elapsed, while the time required to operate as constructive notice was insufficient.—Hembling v. City of Grand Rapids, 99 Mich. 292.

§ 355. Construction and maintenance of bridges and culverts.

On opportunity to make safe, see post § 354.
Questions of law and fact as to condition and safety of bridges and culverts, see ante § 321.

¶ 1429. In an action for personal injuries alleged to have been caused by the defective condition of a bridge, the fact that the court in the charge to the jury recognized the failure to erect railings for the bridge, which was only 3½ feet high and from 12 to 14 feet wide and 8 feet long, as negligence, is not reversible error where such instruction was immediately followed by one which limited the right to recover upon a finding relative to a hole in the bridge.—Bratfisch v. Township of Mason, 120 Mich. 323.

¶ 1430. In an action for injuries to a threshing engine through the collapse of a bridge, an instruction concluding with the words "There is something left at least that you can remember; that the engine went down and was injured; that the bridge gave way; that they were starting to use considerable caution by putting planks across, making it double plank floor; how the engine went off; how the bridge gave way; and all about it. That is something that we must leave to the judgment of eleven men" is erroneous as liable to create a wrong impression as to what would establish the defendant's negligence.—Coan v. Township of Brownstown, 126 Mich. 626.

§ 356. ——Notice and opportunity to repair.

¶ 1431. Where the testimony was conflicting as to whether, for a long time prior to an accident, a bridge had been out of repair at the place where the accident occurred, and some recent repairs had been made, it was proper for the court to direct the jury's attention to the precise place in controversy, and to the disputed question whether it had been repaired there as bearing on notice of the defect.—Merkle v. Township of Bennington, 68 Mich. 133.

¶ 1432. A charge of the court that proximity of a highway commissioner's residence to a bridge claimed to be defective is evidence tending to show notice on the township's part of the dangerous condition is not objectionable.—La Duke v. Township of Exeter, 97 Mich. 450.

¶ 1433. A statement, in a charge to the jury, of the law governing actual notice, of which there was no evidence, in an action for personal injuries alleged to have been caused by a defective bridge, is not reversible error where it was immediately followed by instructions regarding constructive notice upon which the jury alone could base their verdict.—Bratfisch v. Township of Mason, 120 Mich. 323.

¶ 1434. In an action against a township for personal injuries caused by an engine which broke through a bridge, requests to charge as to latent defects not being notice to the township are properly refused where it appeared that the township officers had notice and claim to have given the information to plaintiff.—Comstock v. Township of Georgetown, 137 Mich. 541.

¶ 1435. An instruction in an action for injuries sustained from a defect in a bridge, which implies that township officers when crossing the bridge, should have observed defects which an ordinary traveler would not have noticed, held erroneous.—Whitford v. Township of Washington, 184 Mich. 422.

§ 357. In actions against private persons and abutters.

¶ 1436. In a suit for personal injuries caused by falling glass, where the negligence alleged by the declaration is that defendant permitted the windows to get out of repair, and with knowledge of their condition permitted them to remain out of repair, it is improper for the court to give an instruction setting out the defendant's duty to inspect the premises.—Bannigan v. Woodbury, 166 Mich. 491.

¶ 1437. In a suit for personal injuries arising from the falling of materials from a building in process of construction by defendants, plaintiff testified that he was passing by the building at the time of the injury along the sidewalk in the public streets, and when he came to the alley running back of the building he did not enter said alley, but turned out towards the middle of the street. His declaration alleged that he was injured while entering said alley, and was orally amended at the trial to conform to his testimony. Held, the trial court erred in submitting to the jury a theory that plaintiff might recover even though he was entering into said alley at the time of the accident.—Brown v. Bryant, 166 Mich. 180.

¶ 1438. In a suit for personal injuries arising from the falling of materials from a building in the course of construction, plaintiff's evidence and the circumstances of the case tended to show that certain false work was in position; that the hoisting of material from the ground to the places where it was needed was a method used by the defendant in the process of construction; that the tearing loose of portions of the false work was not an accompaniment of the hoisting of material and was not intended to take place; that such tearing loose was due to some fault or mismanagement either in the manner in which the false work was constructed, or in which the hoisting was carried on; that it was the duty of certain employees of the defendant to keep materials which were being hoisted away from the openings in the building and away from the walls, and when the material reached a proper elevation to pull or swing it into the building; that the particular material which was being hoisted was improperly handled in this respect by said employees; and that while it was ascending under power from the steam engine it caught and tore loose some of the false work which, with the material being hoisted, fell to the ground. No evidence was introduced by defendant tending to prove that the hoisting upon this occasion was properly done. Held, the court properly instructed the jury that the defendant was negligent.—Brown v. Bryant, 166 Mich. 180.

¶ 1439. In an action against a street railroad company for damages for personal injuries due to falling into an excavation made by the defendant in the course of the construction of its track, an instruction on the liability of the defendant for negligence, where the street was rendered dangerous because of storms, held proper.—Norris v. Detroit United Ry., 193 Mich. 578.

§ 358. Proximate cause.

Questions of law and fact as to proximate cause, see ante § 327.

¶ 1440. Plaintiff sought to recover of a township for damages sustained by the slipping of his wagon and team over an embankment in a public highway and contended defendant was negligent in failing to place barriers on the side of the slop-

ing road. Defendant properly requested instructions to the effect that plaintiff could not recover if the proximate cause of the accident was the icy condition of the road and not the failure of the defendant to furnish said barriers. Held, the failure of the court to give these requested instructions did not constitute error where the trial judge in his general charge accurately covered the point of proximate cause raised by defendant in its requests.—West Michigan Park Ass'n v. Pere Marquette R. Co., 172 Mich. 179.

¶ 1441. Plaintiff sued a township for injury to his horses and sleigh arising from the slipping of the same over an embankment in a sloping public road cut into a hillside. The court instructed that if the injury was the combined result of an accident, namely, the slipping on the ice, and the insufficiency of the road for lack of proper barriers, plaintiff might recover; that if the cause of the accident was the slipping on the ice either by the horses or of the sleigh, and there was no other cause for the accident, the defendant would not be liable; but that if the road required a barrier in order to make it reasonably safe and the accident would not have happened, even though the horses or sleigh had slipped, if the highway had been in a reasonably safe condition for public travel, plaintiff should recover. Held, the question of proximate cause was presented in a manner sufficiently favorable to defendant. —Lubbers v. Township of Manlius, 172 Mich. 387.

§ 359. Duty of traveler and contributory negligence.

As to foot travelers, see post § 360.
As to travel on bridges, see post § 361.
As to contribution to abutter's negligence, see post § 362.
Questions of law and fact as to contributory negligence, see ante § 328 et seq.

¶ 1442. In an action for personal injuries sustained by an automobile running into an excavation in the street the defendant city is not entitled to have a request given which applies the rule that those attempting to cross street-car tracks whereon electric cars are operated must before crossing, "stop, look, and listen" when there is no track on the street where the accident occurred.—Karrer v. City of Detroit, 142 Mich. 331.

¶ 1443. Plaintiff's sleigh and team while being driven by his son were injured by slipping over an embankment in a sloping public road. Up to three years prior to the accident, the plaintiff had been for many years township supervisor. Defendant township requested the court to charge that if plaintiff had known for a number of years that the road was defective and did not notify the highway commissioner or the overseer of highways of the fact, to have the same put he was guilty of contrib could not recover. Hel properly rejected and th structed that plaintiff c less the son exercised view of the condition of bers v. Township of Ma

¶ 1444. In an action sustained by driving an excavation, where the that he was not negli ward as he did, an insti denly put in danger is tively to do that whic ended, it is seen might the peril escaped, is per to defendant's claim of aging the car after dis tion.—Karrer v. City o 331.

§ 360. ——Pedestrians a

¶ 1445. An instructio which treats previous fect in a sidewalk as covery, without regard had it in mind at the taken to avoid injury Flint, 122 Mich. 65.

¶ 1446. In an actio jury, a request to cha at the time she stepped sidewalk upon which s afflicted with any dise for her to use more c holes in the walk than narily healthy persons, —Edwards v. Common Three Rivers, 102 Mi

¶ 1447. Having cha the municipality is onl fects in sidewalks as suggested by appearan closed by a "test in th nary use of such walk his own motion for th "ordinary use" of the w as a person walking o regard for the walk as a person going ov way "and having par duty of ascertaining walk with reference to and fit for public tra that if such an inspe though they failed t that caused the accid not be liable.—Hunter 141 Mich. 539.

¶ 1448. In an actio injuries received by sidewalk, it is proper that there is no eviden

ligence on plaintiff's part, that being a question of fact for the jury, in determining which, the condition and situation of the walk, plaintiff's knowledge of it, the time of day when the accident occurred, and other circumstances connected therewith, should be considered.—McGrail v. City of Kalamazoo, 94 Mich. 52.

¶ 1449. In a suit against a township for personal injuries sustained through its negligence in leaving a ditch open in a public road, defendant's counsel by a lengthy cross-examination of plaintiff sought to show that she fell into the ditch through continuing to wander about after she knew she had lost her sense of direction, and requested the court to charge specially that if this were true plaintiff could not recover. Held, it was error to refuse the requested instruction.—Hunt v. Township of Douglass, 165 Mich. 187.

§ 361. ——Of persons using bridges and culverts.

¶ 1450. A man was driving a traction engine across a bridge. The bridge gave way and the driver's foot slipped and caught in the chain so that he was seriously hurt. Held, that in an action for the injury the court should have charged, if there was evidence to support the instruction, that the driver was negligent in having no guard for his foot if he knew of the danger, or in removing it if there had been one.—Stebbins v. Township of Keene, 55 Mich. 552.

§ 362. ——Towards conditions caused by private parties.

¶ 1451. Where, in a suit to recover damages for injuries sustained by being hit by a bale of hay, thrown from a barn loft upon a public sidewalk, there is no proof that plaintiff saw other bales fall, or that she was where she could not well avoid seeing them, there can be no inference that she saw them, and the court's failure to instruct the jury that if plaintiff had seen other bales fall she should have been wary of the one causing the injury is not error.—Dehring v. Comstock, 78 Mich. 153.

¶ 1452. In an action against a contractor for injuries sustained by a passenger on a car by coming in contact with a protruding board used in connection with work on a street, an instruction stating that it was not negligence for plaintiff to ride on the running board of the car, was not error in view of the undisputed testimony that the car was full and that he could not get inside.—Pomaski v. Grant, 119 Mich. 675.

6. Verdict, findings and judgment.

§ 363. In general.

Directing verdict, see ante § 339 et seq.
General law as to verdict and findings, see Verdict.
General law of judgments and enforcement thereof, see Judgments.
Judgments against municipalities and means of enforcing same, see also Municipal Corporations, XVI, A; Townships, VIII; Mandamus.

¶ 1453. In an action for injuries because of the dangerous condition of a highway a finding that the highway was dangerous for the reason stated is to be treated as including a finding that there was an unwarranted obstruction to travel at that point, and it is unnecessary to show the width that the highway had been opened for public use and that certain logs were within the limits of the highway as opened for public travel.—Schelske v. Township of Orange, 147 Mich. 135.

¶ 1454. In an action for personal injuries by reason of dangerous condition of a highway where the court found that the highway was in a dangerous condition, that plaintiff, while using ordinary care to avoid injury, sustained an injury through no fault of his but by reason of the dangerous condition of the highway, and that defendant had notice of this dangerous condition a sufficient time to have placed the highway in a proper condition, if a statement or finding that the highway was dangerous is equivalent to a finding that it was not reasonably safe the necessary facts to support the judgment appeared.—Schelske v. Township of Orange, 147 Mich. 135.

XIII. RIGHT TO USE WAY AND LAW OF THE ROAD.

A. IN GENERAL.

§ 364. Common right of use.

Proper kinds of use, see post § 365.
Use by automotive vehicles, see post § 366.
Reciprocal rights and duties, see post § 367.
Rules for driving, see post §§ 368-371.
Law of the road to turn to the right, see post § 368.
Public easement in the highways, see ante X.
Common rights other than travel, see ante § 159.
Private easements in ways and passages, see Easements.
Rights of street railway in using street with respect to other users, see Street Railways, IV.

¶ 1455. A highway is for the general public to use for passage and traffic, without distinction; and the restrictions upon its use are only such as to secure to the public the largest practicable benefit from the easement.—Macomber v. Nichols, 34 Mich. 212.

¶ 1456. Those who use highways for the customary purposes of travel and passage have the first right, and their use must not

be obstructed unless under exceptional circumstances.—Burford v. City of Grand Rapids, 53 Mich. 98.

§ 365. Manner, kinds and purposes of use.

Use by motor vehicles and bicycles, see post § 366.
Uses and servitudes proper to highways, see ante § 157 et seq.
Maximum weight of vehicle permitted to operate in highway, see Pub. Acts 1917, No. 132, § 1.
Maximum wheel loads, see Pub. Acts 1917, No. 132, §§ 2, 3.
Regulation as to brakes on vehicles, see Pub. Acts 1917, No. 132, § 4.
Regulations and restrictions of use of sidewalks on rural highways, see Comp. L. 1915, § 4578 et seq.

¶ 1457. By the common law every person may use the public highway for passage, but not for pasturage, except opposite his own premises.—Robinson v. Flint & P. M. R. Co., 79 Mich. 323.

Injury by or while driving ambulance, see note, 3 N. C. C. A. 444-455.

§ 366. Use by automotive vehicles and bicycles.

Use of steam engines or other unusual vehicles as nuisances, see ante § 176.
Duty and care in driving and handling motor vehicles, see post § 369.
Duties of bicyclists, see post § 371.
Contributory negligence of persons using automotive vehicles and bicycles, see post §§ 401, 402.
Questions of law and fact as to negligence or misuse of automotive vehicles, see post § 396.
Statutory liabilities respecting automobiles, see post § 374.
Motor vehicle regulations, rights and duties, see post XIV.
Regulations respecting vehicles propelled by steam, see Pub. Acts 1917, No. 181, amending Comp. L. 1915, § 4793 et seq.

¶ 1458. Persons using horses for travel or traffic have no greater rights in the highway than those who use other permissible means of locomotion upon it, e. g., steam-engines; improved methods of transit cannot be excluded from existing public roads if not inconsistent with present methods.—Macomber v. Nichols, 34 Mich. 212.

¶ 1459. Users of automobiles enjoy the same rights in streets and highways as do drivers of horses.—Wright v. Crane, 142 Mich. 508.

¶ 1460. Under a charter expressly conferring the entire control and the power to regulate the use of streets and sidewalks upon the common council, it is competent to pass an ordinance allowing the use of certain sidewalks for bicyclists.—Lee v. City of Port Huron, 128 Mich. 533.

What are vehicles within meaning of statute declaring "rule of the road," see note, 12 N. C. C. A. 278-287.
Use on street or highway of automobile without license, see note, 1 N. C. C. A. 88-100.
Absence of vehicular license as affecting right of driver, owner or occupant, to recover for injuries, and as affecting their liability for injuries inflicted upon others, see note, 9 N. C. C. A. 828-838.

§ 367. Reciprocal rights and duties.

Actionable wrongs or neglect, see post § 372 et seq.
Passing on wrong side, see post § 377.
Questions of law and fact as to observance of duty, see post § 394 et seq.
Instructions as to duty in using streets, see post §§ 408, 409.

¶ 1461. Persons exercising their right to use highways must do so with due care and regard for the like rights of others.—Burford v. City of Grand Rapids, 53 Mich. 98; Wright v. Crane, 142 Mich. 508.

¶ 1462. Highways, whether by land or water, must be used with due regard to their lawful and proper use by others.—People's Ice Co. v. The Excelsior, 44 Mich. 229.

¶ 1463. The rights of travelers upon a highway are mutual and co-ordinate; each should so use his right of passage as to avoid causing injury or detriment to another having a like right.—Pigott v. Engle, 60 Mich. 221.

¶ 1464. The rights of a pedestrian and of the driver of an automobile on a street are equal, and their duty to exercise the degree of care that the ordinarily careful and prudent person would when moving along the street for the purpose of determining whether any danger is apt to come to either at a street crossing is reciprocal.—Wilson v. Johnson, 195 Mich. 94.

Right of way at street intersection as between drivers of vehicles, see note, 15 N. C. C. A. 463-480.

§ 368. Driving and handling horses; law of the road and speed.

Rules for driving of motor vehicles and bicycles, see post §§ 369-371.
Actionable negligence, see post § 372 et seq.
Racing and immoderate driving, see post § 378.
Improper hitching, see post § 379.
Evidence to show notice of horse's vicious character, see post § 389.
Questions of law and fact, see post §§ 395, 400.

Instructions as to duty and negligence in driving horses, see post § 408.
Statutory law of the road, see Comp. L. 1915, § 4592.
Penalty for nonobservance of law of the road, see Comp. L. 1915, § 4592 et seq.
Regulations and penalties concerning drunken drivers, driving at running gait, leaving horses unfastened or unattended, see Comp. L. 1915, § 4594 et seq.
Prohibition against intoxicated person using highway, see Pub. Acts 1917, No. 164.
Regulation as to fast driving over bridges, see Comp. L. 1915, § 4438 et seq.

¶ 1465. The "traveled part of the road" (Comp. L. 1871, § 2002, How. St., § 1456) means that part which is wrought for traveling, and is not confined simply to the most traveled wheel track.—Daniels v. Clegg, 28 Mich. 32.

¶ 1466. In the use of a public highway one has a right to exact from others ordinary prudence and to rely upon it in determining his own means of using the road; he may travel upon any portion of it except when he is about to meet and pass another's vehicle, when he must seasonably turn to the right of the middle of the traveled part of the road.—Daniels v. Clegg, 28 Mich. 32.

¶ 1467. Driving a horse along the crowded streets of a city at the rate of six miles an hour may, under certain circumstances, be negligence.—Stroub v. Meyer, 132 Mich. 75.

§ 369. Driving and handling motor vehicles.

Right of automotive vehicle to use road, see ante § 366.
Actionable negligence, see post § 372 et seq.
Statutory liabilities respecting automobiles, see post § 374.
Racing and immoderate driving, see post § 379.
Burden of showing negligence, see post § 387.
Admissibility of evidence as to negligence in handling motor vehicles, see post § 390.
Weight and sufficiency of evidence as to negligent operation of motor vehicles, see § 392.
Questions of law and fact as to negligence or misuse of automobiles, see post §§ 395, 401.
Instructions as to duty or negligence with automotive vehicles, see post § 409.
Motor vehicle regulations, rights and duties, see post XIV.

¶ 1468. Users of automobiles, like drivers of horses, must, in the use of their means of locomotion, observe due care towards others having occasion to travel the highway.—Wright v. Crane, 142 Mich. 508.

¶ 1469. It is the duty of the driver of an automobile to operate it on a public highway at a proper and reasonable rate of speed with regard to the traffic and use thereof under existing conditions, and to avoid, so far as possible, endangering the life or limb of other persons, as well as the safety of property.—Winckowski v. Dodge, 183 Mich. 303.

¶ 1470. Irrespective of which side of a street an automobile passes another vehicle coming from the opposite direction, it is settled law that the driver of each must look out for pedestrians suddenly appearing from behind the other vehicle.—Winckowski v. Dodge, 183 Mich. 303.

¶ 1471. Where the driver of an automobile is justified in taking the left side of a street in passing another vehicle, it is his duty to observe that degree of caution and to proceed with care at such reduced speed as is commensurate with such unusual conditions.—Winckowski v. Dodge, 183 Mich. 303.

Liability for various automobile accidents, see note, 2 N. C. C. A. 806-810.

§ 370. ——Statutory regulations; speed, passing, stops, etc.

Municipal power to regulate motor vehicles, see post § 411.
Equipment regulations and regulations as to signals and lamps, see post § 412.
Statutory liabilities of owners of motor vehicles, see post § 413.
Statutory regulations as to tire gauge and speed of motor trucks and trailers, see Pub. Acts 1917, No. 132.

¶ 1472. An automobile upon the highway in the hands of an incompetent or a reckless driver may result in great injury to persons and property, and because of this fact, the state, in the exercise of its police power, may pass statutes in relation to the ownership of automobiles and the running thereof.—Johnson v. Sergeant, 168 Mich. 444.

¶ 1473. Section 1 and subdivision 3 of section 10 of Public Acts of 1909, pages 772 and 780, making the owners of motor vehicles liable for any injury occasioned by the negligent operation by any person of such motor vehicles, whether such negligence consists in violation of the provisions of a statute or in failure to use ordinary care and making the act applicable to any person, firm, association or corporation renting a motor vehicle or having the exclusive use thereof, is not invalid as exceeding the police power of the state.—Johnson v. Sergeant, 168 Mich. 444.

¶ 1474. It constitutes actionable negligence to drive an automobile, in violation of Act No. 318 of Pub. Acts 1909, How. Ann. St., 2nd Ed., ch. 31, in a city at a speed greater than ten miles an hour, and, while running on the wrong side of a street, to

turn into an intersecting street at the left of the center line thereof.—Holden v. Hadley, 180 Mich. 568.

¶ 1475. To operate an automobile at a speed in excess of that prescribed by Act No. 318, Public Acts 1909, How. St., 2nd Ed., ch. 31, is negligence per se.—Levyn v. Koppin, 183 Mich. 232.

¶ 1476. Under section 7 of Act No. 318, Public Acts of 1909, How. St., 2nd Ed., § 2493, it is the duty of the driver of an automobile on meeting a pedestrian in a street, either in the business or residence portion of a town, to give reasonable warning of his approach, to reduce the speed of his automobile to ten miles an hour, and to use every precaution to insure the former's safety.—Levyn v. Koppin, 183 Mich. 232.

¶ 1477. Under Pub. Acts 1909, No. 318, § 6, subd. 5, How. 2nd Ed., § 2492, subd. 5, relating to the duty of a driver of an automobile desiring to pass another vehicle going in the same direction, it is the duty of the driver of an automobile who observes a wagon standing on the right side of a street near the center to express his desire to pass so that the other vehicle may turn to the right and allow him to pass to the left of it on the right-hand side of the street, where there is room to do so.—Wilson v. Johnson, 195 Mich. 94.

¶ 1478. By construing section 12, Act No. 196, Pub. Acts 1905, to mean that motor vehicles shall not be driven in any portion of a city devoted wholly or partly to business at a higher rate of speed than eight miles an hour, the court does not render the provisions so uncertain or indefinite as to make it void, nor does such a construction make an unreasonable requirement in compelling a driver to determine the character of the portion of the city through which he is passing.—People v. Dow, 155 Mich. 115.

¶ 1479. Under Pub. Acts 1905, No. 196, § 12, limiting the rate of speed of motor vehicles "in the business portion" of cities and villages to eight miles an hour, such vehicles cannot be driven more than eight miles an hour in any portion of a city devoted to business; the requirement is not restricted to a single central business area of any city.—People v. Dow, 155 Mich. 115.

Duty of driver of automobile to signal following cars before stopping or changing course, see note, 10 N. C. C. A. 562-569.
Horses frightened by automobiles; duty of operator of automobile, see note, 2 N. C. C. A. 806-808.
Sufficiency of signal given to automobile operator to stop machine to avoid frightening horse, see note, 8 N. C. C. A. 1079-1088.

§ 371. Duties of bicyclists.
Rights of use of highway by bicyclists, see ante § 366.
Proximate cause of injury from collision with bicycle, see post § 381.
Variance in action for injuries from collision between automobile and bicycle, see post ¶ 1522.
Burden of disproving negligence, see post § 387.
Questions of law and fact as to contributory negligence of bicyclists, see post § 402.

¶ 1480. A bicycle is a vehicle, and is to be so regarded in determining the degree of care to which the rider should be held in the use of the public highways.—Myers v. Hinds, 110 Mich. 300.

B. INJURIES TO OTHER USERS.

1. Duties and negligence.

§ 372. Actionable wrongs or neglect.
Particular acts of neglect and negligence of or by particular classes of users of way, see post §§ 373-380.
Proximate cause and contributory negligence, see post §§ 381-383.
Actions for injuries, see post § 384 et seq.
Burden of proof and evidence as to negligence, see post § 387 et seq.
Actionable injuries caused by negligent condition of roadway or walk, see ante XII.
Duties and liabilities of persons driving on or otherwise using private ways open to the public, see post § 420.
Negligence by driver towards other occupant of vehicle, see Negligence.
Street railway collisions and injuries to others on highway by street railway cars, tracks and appliances, see Street Railways, IV.
Actionable injury to travelers (including those by automobile) at railroad crossings, see Railroads, VIII, D.
Liability of railroad to persons injured by stalled automobile on track, see Railroads, VIII, D.
Liability of manufacturers or dealers for defects in thing sold (automobile), see Negligence.
Liability of garage keeper as bailee for damage to vehicle by collision, see Bailments § 13.
Municipal liability for tort by employer or department in use of motor vehicle, see Municipal Corporations, XII.
Actionable death of person, see Death by Wrongful Act.
Liability of traction engine operator for fires spread from engine, see Fires § 3.
General law of respondeat superior as applied to injuries by servant's careless driving, see Master and Servant, IV.
Master's liability to chauffeur, see Master and Servant, III; Workmen's Compensation Law.

Imputation of agent's knowledge to corporation for purpose of predicating negligence thereon, see also Corporations § 148, ¶ 557.
Criminal liability for killing or injuring person, see Crimes; Homicide; Indictment.
Statutory liability of masters of servants driving vehicles for hire, see Comp. L. 1915, § 4598.

¶ 1481. The owner of a truck, driven by his servant, is answerable for injuries to another caused by the truck, when the horses drawing the same were running away; provided the driver lost control of the horses through his want of due care.—Silsby v. Michigan Car Co., 95 Mich. 204.

¶ 1482. The employer of decedent, a milk wagon driver, is not a joint tort feasor with the owner of a truck whose servant drove it into the milk wagon, killing decedent.—Dettloff v. Hammond, Standish & Co., 195 Mich. 117, 14 N. C. C. A. 901.

¶ 1483. Drivers of automobiles on highways are not insurers against accidents arising from negligence of children or their parents.—Barger v. Bissell, 188 Mich. 366.

What are vehicles within meaning of statute declaring "rule of the road," see note, 12 N. C. C. A. 278-287.
Liability for injuries or damage caused by horse running away without negligence of driver, see note, 3 N. C. C. A. 532-547.
Liability for injury or loss caused by collision occasioned by vehicle turning into or emerging from alley or like way, see note, 12 N. C. C. A. 909-924.
Liability of owner or operator of vehicle on street or highway by overtaking pedestrian thereon, see note, 12 N. C. C. A. 436-445.
Liability for injuries to persons on sidewalk or street caused by fall of objects from vehicles, see note, 11 N. C. C. A. 255-262.
Signal from traffic officer as affecting question of negligence of driver of vehicle, see note, 13 N. C. C. A. 1117-1126.
Liability of overtaking or overtaken vehicle on street or highway for injury or damage caused by collision, see note, 12 N. C. C. A. 625-650.
Recent cases on injuries due to the negligent operation of automobiles and the duty and liability of owners and operators thereof, see note, 4 N. C. C. A. 1-39.
Liability of automobile owner or driver for injury to pedestrian at street crossing in absence of ordinance regulating precedence, see note, 15 N. C. C. A. 978-1012.
Liability of owner of automobile for injury to pedestrian at street crossing where ordinance gives pedestrian precedence, see note, 14 N. C. C. A. 1089-1101.
Injury by automobile to person going to or from street car, see note, 2 N. C. C. A. 410-420.
Automobiles injuring persons boarding or alighting from street cars, see note, 8 N. C. C. A. 580-587.
Liability for injury to pedestrian struck by automobile while making emergency turn to avoid collision with another vehicle or pedestrian, see note, 15 N. C. C. A. 776-779.
Injury to pedestrian by skidding of automobile, see note, 2 N. C. C. A. 305-308.
Injuries received in collision between automobile and coasting sled, see note, 4 N. C. C. A. 14, 15.
Collision of bicycles with automobiles, see note, 4 N. C. C. A. 13, 14.
Liability of automobile owner or driver for injury to person employed on street, see note, 15 N. C. C. A. 848-868.

§ 373. Duty and negligence towards children and incapables.

Presumption of negligence from accident to child, see post ¶ 1530.
Variance as to presumptive negligence, see post ¶ 1523.
Liability of municipality for injuries to children from defective highways, see ante § 240.

¶ 1484. The owner of a wagon is not answerable for the death of a child seven years of age who, without the knowledge of the driver of the wagon, suddenly ran out from the side of the road and while attempting to climb on the side of the wagon fell under the wheels and was killed.—Eichkern v. Park Brewing Co., 181 Mich. 1.

Liability of owner of automobile for injury to children in streets, see note, 8 N. C. C. A. 369-385.
Liability of automobile owner or driver for injury to child pedestrian in streets, see note, 15 N. C. C. A. 781-800.

§ 374. Statutory liabilities respecting automobiles.

Common law liability, see ante §§ 372, 373, post § 375 et seq.
Statutory liability of owner of motor car for injuries done with it, see post § 413.
Regulations as to signals and lights, see post § 412.
Driving regulations, see ante § 370.
Municipal power to regulate motor vehicles, see post § 411.
Rights of use of highways by automotive vehicles and bicycles, see ante § 366.
Rules for driving and handling motor vehicles, see ante § 369.
Evidence as to negligent driving and handling of motor vehicles, see post § 390.

General regulations of Motor Vehicle Law, see Comp. L. 1915, chap. 89, especially section 4825.

¶ 1485. Pub. Acts 1909, No. 83, How. 2nd Ed., § 2506, prohibiting the unauthorized using or taking of automobiles, does not of itself give a right of action to pedestrians injured upon the street, since they do not belong to the class for the protection of which the law was passed.—Johnston v. Cornelius, 200 Mich. 209.

¶ 1486. Where one driving an automobile on a highway, has ample space to pass a pedestrian and guides the machine so as to strike the pedestrian in passing, he is guilty of negligence.—Schock v. Cooling, 175 Mich. 313.

¶ 1487. Under Public Acts of 1909, page 772, relating to the regulation of motor vehicles, the securing of judgment against the driver of an automobile is not prerequisite to bringing action against the owner thereof for violation of said statute. Johnson v. Sergeant, 168 Mich. 444.

§ 375. Negligence by servant or borrower of automobile.

Liability of owner under statute for injury done with car, see post § 413.
Burden of proof as to negligence, see post ¶ 1528.
Master's liability for injury to third persons, see Master and Servant, IV.

¶ 1488. Where the owner of an automobile lends it to a third person and at the invitation of the borrower accompanies him on a ride, and the borrower operates the machine and is in entire control thereof, the owner is not liable in the absence of statute, for injuries sustained by a plaintiff on account of the borrower's negligent driving of the machine.—Hartley v. Miller, 165 Mich. 115.

¶ 1489. The owner of an automobile is not liable for injuries inflicted as the result of its negligent operation in his absence by a third person.—Levyn v. Koppin, 183 Mich. 232.

¶ 1490. In an action for damage caused by defendant's chauffeur to the front of plaintiff's store when such chauffeur ran defendant's automobile against the store front, in the absence of any statute enlarging the responsibility of the car owner, defendant's liability depends upon whether the chauffeur, when the accident occurred, was acting as his servant and within the scope of his employment.—Brinkman v. Zuckerman, 192 Mich. 624.

¶ 1491. An automobile not being a "dangerous instrumentality" in the legal sense, the relation between the owner of the car and his chauffeur is determined, in so far as torts to third parties are concerned and in the absence of a statute, by the general rules relative to master and servant.—Brinkman v. Zuckerman, 192 Mich. 624.

¶ 1492. In so far as the liability of a father owning an automobile is concerned with regard to injuries inflicted by his son, the fact that the son is driving the car without the father's knowledge distinguishes his liability from that in cases where the son was driving the car for members of the family.—Johnston v. Cornelius, 193 Mich. 115.

Liability of owner of automobile for negligence of borrower, see note, 1 N. C. C. A. 126-132.
Liability of employer for injury by chauffeur when using automobile on own account without former's consent, see note, 2 N. C. C. A. 422-429.
Liability of employer for injury by chauffeur using automobile on his own account without employer's consent, see note, 2 N. C. C. A. 806-808.
Liability of master for negligence of his servant temporarily in the service of another, see note, 6 N. C. C. A. 357-371.

§ 376. Causing fright of horses.

Negligence of public in suffering conditions to frighten horses, see ante § 228.
Regulations concerning use of traction engines and motor vehicles, see Comp. L. 1915, chap. 89.

¶ 1493. Inconvenience incident to the reasonable use of highways under impartial regulations; e. g., the frightening of horses by non-negligent use of steam-engine as means of locomotion on the highway is damnum absque injuria.—Macomber v. Nichols, 34 Mich. 212.

¶ 1494. Hallooing on the public highway to the driver of a team for the purpose of warning him that another driver wishes to pass him cannot be treated as an act of negligence that will make one jointly liable with the driver if the latter's team takes fright and does the passing team an injury, —especially if the warning was meant to prevent a collision.—Pigott v. Lilly, 55 Mich. 150.

¶ 1495. Driving along a highway a team with a rope dragging behind, and turning, in passing another team, so that the rope is dragged under the feet of plaintiff's horses, making them unmanageable, constitutes negligence.—Barnes v. Brown, 95 Mich. 576.

Liability for personal injuries caused by horse taking fright at noise of automobile, see note, 1 N. C. C. A. 107-118.
Liability for injuries caused by frightening horses on streets or highways, see note, 12 N. C. C. A. 145-173.

Horses frightened by automobiles; duty of operator of automobile, see note, 2 N. C. C. A. 806-808.
Sufficiency of signal given to automobile operator to stop machine to avoid frightening horse, see note, 8 N. C. C. A. 1079-1088.

§ 377. Passing on wrong side.

Reciprocal rights and duties, see ante § 367.
Duty to turn to the right, see also ante § 368.

¶ 1496. A driver on the wrong side of the road who fails to exercise due care while attempting to pass another driver coming from the opposite direction also on the wrong side is not precluded thereby from recovering for injuries to his property resulting from a collision, where the conduct of the other party is wanton and wilful.—Tyler v. Nelson, 109 Mich. 37.

Turning vehicle to wrong side of road in emergency, while meeting or overtaking another vehicle, as actionable, see note, 12 N. C. C. A. 844-858.
Liability of overtaking or overtaken vehicle on street or highway for injury or damage caused by collision, see note, 12 N. C. C. A. 625.

§ 378. Racing and immoderate driving.

See also ante ¶ 1467.
Liability of municipality for injuries to pedestrians from speeding or racing in roadway, see ante § 238.

¶ 1497. Two persons racing in sleighs on a public street make a plain and serious danger to every other person driving along the street, and it is itself an act of such negligence as to make the racing parties responsible for a collision caused by it.—Potter v. Moran, 61 Mich. 60.

§ 379. Improper hitching, standing or parking.

Duty in driving and handling horses, see ante § 368.
Driving animals on highway or turning them loose into way, see post § 380.
Questions of law and fact as to negligent driving or handling of horses, see post §§ 395, 400.
Instructions as to duty or negligence in driving horses, see post § 408.
Liability for personal injury sustained from runaway of horse caused by improper hitching, see note, 6 N. C. C. A. 1043-1048.

¶ 1498. Leaving a buggy standing at an angle to the beaten track, and so near that by backing one foot it would be in the way of passing vehicles, is negligence.—Joslin v. Le Baron, 44 Mich. 160.

§ 380. Animals driven upon or turned into highway.

Questions of law and fact as to negligence in driving animals, see post § 398.
General liabilities for injuries by or to animals, see Animals.

¶ 1499. One who turns his cattle into the highway and allows them to run at large therein contrary to the statute is liable, though the cattle are not vicious, for damage done by them while so at large in overturning plaintiff's sulky.—Shipley v. Colclough, 81 Mich. 624.

¶ 1500. A wild bull, two and one-half years old, is a dangerous animal to be driven in the street.—Barnum v. Terpening, 75 Mich. 557.

¶ 1501. In an action for damages for personal injuries inflicted by the defendant's bull, driven in the street, the fact that the bull had never attacked any one prior to the injury sued for will not bar a recovery. —Barnum v. Terpening, 75 Mich. 557.

¶ 1502. In an action for damages for personal injuries inflicted by the defendant's bull driven in the street, facts that the bull was never actually vicious up to the time of his attack upon the plaintiff, and that the person then driving him had no knowledge of such viciousness, will not bar a recovery if the manner of driving and managing the animal was negligent.—Barnum v. Terpening, 75 Mich. 557.

§ 381. Proximate cause.

Instructions as to proximate cause, see post § 407.
Proximate cause of injury from defective highways and bridges, see ante § 241.
Concurrent liability of negligent user of highway with carrier of passenger in street car, see also Carriers § 149.
General law as to proximate cause, see Negligence, III.

¶ 1503. One who rides a bicycle down a narrow path beside the roadway at the rate of five or six miles an hour, giving no warning of his approach, at a time when the path is occupied by many other persons going in the same direction, is not relieved from liability for running into a pedestrian by the fact that the accident was caused by his striking an obstacle—at least if it does not appear that he was unable to see and avoid such obstacle by the exercise of due care.—Myers v. Hinds, 110 Mich. 300.

¶ 1504. Where defendant left his team standing over a foot path, and plaintiff's intestate, a girl 5 years of age, in coasting down the path, was carried against the heels of the horses and killed, her own act and not that of defendant, even conceding the latter to have been negligent, was

the proximate cause.—Stoll v. Laubengayer, 174 Mich. 701.

§ 382. Contributory negligence of pedestrians.
Proximate cause of accident, see ante § 381.
Weight and sufficiency of evidence as to contributory negligence, see post § 393.
Questions of law and fact as to contributory negligence, see post § 399.
Instructions as to contributory negligence, see post § 410.
Contributory negligence of persons injured from defective highways and bridges, see ante § 247 et seq.
General law of contributory negligence, see Negligence, IV.
Negligence towards person in position of discovered peril due to his own negligence (last clear chance rule), see Negligence, IV.
Doctrine of imputed negligence of driver to occupant of vehicle, see Negligence, IV.
Doctrine of contributory negligence as affected by childhood of the person, see Negligence, IV.

¶ 1505. It is not necessarily negligence to walk in the traveled part of a city street if it is not shown that it is usually so occupied with teams as to make foot travel imprudent.—Cleveland v. Newsom, 45 Mich. 62.

¶ 1506. There is no imperative rule of law requiring pedestrians lawfully using the public ways to be continuously looking or listening to ascertain if automobiles are approaching.—Gerhard v. Ford Motor Co., 155 Mich. 618.

¶ 1507. Usually, a country highway is not, as a railroad crossing is, a place of danger to be approached and traversed only after looking and listening for coming vehicles.—Hill v. Lappley, 199 Mich. 369.

¶ 1508. One, who starts to cross a bridge when a vicious bull is being driven across and is tossed by the bull, is not contributively negligent if ignorant of the bull's vicious disposition.—Barnum v. Terpening, 75 Mich. 557.

¶ 1509. A woman 77 years of age, who is in full possession of her faculties, except that her eyesight is impaired so that she cannot see a great distance, and who, after looking in both directions before alighting from the rear of an automobile truck and seeing no vehicles coming, alights backwards and starts to cross the street without seeing any vehicle and steps directly in front of an automobile headed in the same direction as the truck, and is struck thereby, is guilty of contributory negligence.—Hill v. Lappley, 199 Mich. 369.

¶ 1510. A pedestrian is guilty of contributory negligence where, in the middle of a block of a narrow street 30 feet in width, he suddenly and unexpectedly steps from behind a standing automobile where he cannot be seen by the driver of an approaching automobile truck, with his back turned toward it as he proceeds in a diagonal direction across the street, with his coat collar turned up and his head down, and he not only fails to look, but is apparently so engrossed with other thoughts that he fails to hear either the noise of the truck or the shout of warning from the companion of the driver.—Fulton v. Mohr, 200 Mich. 538.

Duty of pedestrian to watch for automobiles in crossing street, see note, 2 N. C. C. A. 289-297.
Liability of owner or driver of automobile for injury to person walking upon a city street elsewhere than at street intersections, see note, 15 N. C. C. A. 880-917.
Attempting to stop runaway horse as negligence, see note, 16 N. C. C. A. 167-173.
Right to recover for injuries sustained while attempting to stop runaway horses, see note, 9 N. C. C. A. 890-893.

§ 383. ——Of vehicle users.
Last clear chance rule, see Negligence, IV.
Doctrine of imputed negligence of driver to occupant of vehicle, see Negligence, IV.
Breach of rules of the road or of automobile laws as contributory negligence defeating recovery from street railway of railroad company, see Street Railways, IV, C; Railroads, VIII, D.

¶ 1511. One cannot recover for injury to his horse and vehicle resulting from defendant's negligence in driving on the wrong side of a highway, if by using ordinary care himself he might have avoided the collision which caused it.—Daniels v. Clegg, 28 Mich. 32.

¶ 1512. One driving a carriage on a dark night is not guilty of contributory negligence, if, hearing a buggy coming at full speed behind him, he takes the side of the road that belongs to him, though it turns out that if he had remained where he was he would have escaped injury.—Flower v. Witkovsky, 69 Mich. 371.

¶ 1513. On approaching a street intersection a person is not bound to stop his automobile on observing another automobile coming at a high rate of speed, where the driver of the latter vehicle has ample room to avoid a collision.—Brown v. Mitts, 187 Mich. 469.

¶ 1514. One cannot recover for an injury done his wagon by collision if his driver's want of ordinary care contributed to produce the collision.—Mabley v. Kittleberger, 37 Mich. 360.

2. Actions for injuries.

Actions for injuries on private ways by reason of negligence of defendant, see post § 421.

General law of actions for negligence, see Negligence, V.

§ 384. Form of action.

Form of action for injuries from defective highways, see ante § 271.

¶ 1515. For injuries resulting from a collision of vehicles caused by defendant's negligence, case is proper.—Bradford v. Ball, 38 Mich. 673.

§ 385. Pleading; declaration.

Issues and variance of proofs from allegations, see post § 386.

Pleading in actions for injuries from defective highways, see ante § 275.

General law of pleading, see Pleading.

Pleading assault in maliciously driving against plaintiff on road, see Assault § 21, ¶ 80.

¶ 1516. In an action against the owner of an automobile truck for negligent death of a pedestrian a declaration alleging that defendant did not use proper and reasonable caution and judgment in operating its automobile truck when coming out of the dark passageway of its building and across the public sidewalk approach and highway and when approaching intestate, and that, although it was known that deceased was not aware of the approach of the truck, defendant failed to sound a warning signal and ran over him, held to sufficiently charge negligent management and operation of the truck.—Tuttle v. Briscoe Mfg. Co., 190 Mich. 22, 12 N. C. C. A. 909.

¶ 1517. The declaration in an action against an express company for its servant's negligence in driving over plaintiff alleged that defendant by its agent so carelessly drove its horse and wagon that by and through said agent's carelessness and improper conduct the said horse and wagon were driven over plaintiff while he was lawfully and with all due care walking along the highway there. Held, a sufficient averment that defendant's agent was negligent in driving at all, under the circumstances, in the place and time where the accident occurred.—Post v. United States Express Co., 76 Mich. 574.

¶ 1518. Where a declaration in a personal injury case alleged four particulars of negligence: (1) that defendant knowingly employed an incompetent driver; (2) that the team was so afraid of street cars, fractious and unmanageable that it was negligent to permit them to be driven on streets where cars were operated; (3) that the driver was careless in his manner of driving on this occasion; (4) the use of an insufficient and unsafe drawbolt, only the second and fourth can be considered as concurrent acts of negligence, the others being separate and distinct allegations of negligence.—Warren v. Porter, 144 Mich. 699.

¶ 1519. Declaration held to state a cause of action for negligent operation of automobile.—Holden v. Hadley, 180 Mich. 568.

¶ 1520. A cause of action is stated by a declaration alleging that the plaintiff, while riding a bicycle with due care on a city street, was struck and injured by an automobile driven by the defendant, in violation of Act No. 318 of the Pub. Acts 1909, How. Ann. St., 2nd Ed., ch. 31, at a greater rate of speed than ten miles an hour, on the wrong side of the street, while he attempted to turn into an intersecting street at the left of the center line thereof.—Holden v. Hadley, 180 Mich. 568.

¶ 1521. In the absence of a demurrer a declaration in an action for injuries caused by an automobile running into a standing vehicle, which did not allege the defendant's duty and any breach thereof, held sufficient, where the facts pleaded clearly implied the defendant's duty to operate his car in a careful manner, and its breach.—Jolman v. Alberts, 186 Mich. 643.

§ 386. ——Issues and variance.

In actions for injuries from defective highways, see ante § 277.

Issues and variance generally, see Pleading, IX, X.

¶ 1522. In a suit to recover for the death of plaintiff's decedent, caused by a collision between defendant's automobile and the decedent's bicycle, the proofs do not support the declaration which alleges a head-on collision while decedent was proceeding in a northerly direction along the east side of the street, when they show that he was in fact attempting to cross the street in a southwesterly direction.—Gibbs v. Dayton, 166 Mich. 263.

¶ 1523. The question of presumptive negligence of an unlicensed chauffeur in running over a child will not be considered when the declaration fails to aver negligence in such particular.—Barger v. Bissell, 188 Mich. 366.

§ 387. Burden of proof and presumptions.

Weight and sufficiency of evidence, see post § 391.

Instructions as to burden of proof and presumptions, see post § 406.

In actions for injuries from defective highways, see ante § 280.

Burden and presumptions as to negligence in general, including res ipsa loquitur rule, see Negligence, V.

General law as to burden of proof and presumptions, see Evidence, II.

¶ 1524. In an action to recover damages arising from a collision on a highway, the burden of proof is on the plaintiff to prove negligence and misconduct on the other's part, and to show ordinary care and diligence on his own.—Daniels v. Clegg, 28 Mich. 32.

¶ 1525. A bicyclist has the burden of disproving his negligence when he rides up behind another, who is walking where he has a right to walk, without giving any warning, strikes him with his vehicle.—Myers v. Hinds, 110 Mich. 300.

¶ 1526. The burden of proof rests on the plaintiff in an action for personal injuries, to show the negligence of the defendant in driving an automobile into the rear of the vehicle in which the former was riding.—Grogitzki v. Detroit Ambulance Co., 186 Mich. 374.

¶ 1527. The burden does not rest on the defendant in an action for personal injuries caused by an automobile, to show that he exercised ordinary care and prudence in operating the car, since it was incumbent on the plaintiff to establish the negligence of the defendant.—Grogitzki v. Detroit Ambulance Co., 186 Mich. 374.

¶ 1528. The burden of proof in an action against the owner of an automobile to recover for the death of a pedestrian who was killed while attempting to cross a street by such automobile, which was driven by an agent of defendant, to show that the defendant, through its agent, was guilty of negligence that was the proximate cause of the injuries to the deceased, and that the deceased was not guilty of carelessness or negligence that caused, or contributed to cause, the injuries that he received, is on the plaintiff.—Amley v. Saginaw Milling Co., 195 Mich. 189.

¶ 1529. There is no presumption of negligence in not turning out of the traveled track to avoid colliding with a team hitched by the roadside, but negligence must be proved.—Joslin v. Le Baron, 44 Mich. 160.

¶ 1530. The fact that an accident occurred to a child does not raise a presumption that the driver of an automobile was negligent.—Barger v. Bissell, 188 Mich. 366.

¶ 1531. No presumption of negligence arises from the fact that an automobile in charge of the defendant's servant, ran into the rear of the plaintiff's vehicle and injured him.—Grogitzki v. Detroit Ambulance Co., 186 Mich. 374.

¶ 1532. Where the undisputed testimony shows that at the time a pedestrian was struck by an automobile it was being operated on the wrong side of the street in attempting to pass around another vehicle, a presumption of negligence on the part of the driver of the automobile arises.—Winckowski v. Dodge, 183 Mich. 303.

¶ 1533. Father's ownership of automobile which son was shown to have been driving at time of accident, to plaintiff's intestate, held under the evidence, to give rise to no presumption of liability on the part of the father.—Johnston v. Cornelius, 193 Mich. 115.

Application of doctrine of res ipsa loquitur in action by trespasser for injuries by, see note, 5 N. C. C. A. 33-35.

§ 388. Admissibility of evidence.

As to particular evidence or issues, see post §§ 389, 390.

Weight and sufficiency of evidence, see post § 391 et seq.

Judicial notice as to speeds, see Evidence, I.

Judicial notice as to automobile speeds, see Evidence ¶ 114.

General law of evidence, see Evidence.

Evidence of ill will to show intentional collision, see also Evidence ¶ 542.

Admissions and declarations by agents as evidence against principal, see Evidence, VII, C, D.

Proper scope of cross-examination, see Examination of Witnesses § 51.

Cross-examination of party as to circumstances of injury, see Examination of Witnesses § 52.

¶ 1534. In an action for an injury caused by a street collision it is proper to show the position of plaintiff's vehicle and how it came there; to prove that he was not in fault in occupying that position, and what the result would have been if he had done differently; to show how the other driver handled his team and his whip, and to testify that, knowing plaintiff's position, he was careless.—Joslin v. Grand Rapids Ice & Coal Co., 53 Mich. 322.

¶ 1535. In an action for damages sustained by a collision on the highway, it appeared that defendant, who was approaching plaintiff in a buggy on the opposite side of the road, drove across, and ran into and injured plaintiff's horse. Held, that evidence of defendant's ill-will towards plaintiff, before and up to the time of the collision, was properly admitted, as bearing upon his intent or motive in so crossing the road.—Tyler v. Nelson, 109 Mich. 37.

Evidence as to noise made by automobile in action for personal injuries caused by horse taking fright, see note, 1 N. C. C. A. 117.

§ 389. ——To show notice of horse's vicious character.

See also post ¶ 1545, and see Animals § 16.

¶ 1536. In an action by one, who while on her front lawn, was injured by a run-

away horse, evidence that the driver of the horse had heard of its running away before, is admissible as tending to show notice of its vicious character.—Dyer v. Peoples Ice Co., 188 Mich. 203.

¶ 1537. In a personal injury case where the plaintiff was injured by a runaway team of horses, evidence of the man who sold the horses to the agent who had purchased them for defendant that he had been informed by the former owner that they had run away once was admissible against the objection that it was too remote, it bearing upon the character of the team and tending to show notice to defendant of the necessity of care and caution.—Warren v. Porter, 144 Mich. 699.

§ 390. ——Negligent driving or handling of motor vehicles.

¶ 1538. Where plaintiff was struck by defendant's automobile and it is claimed that defendant was running without lights contrary to statute, evidence showing that other automobiles were lighted at the time is admissible as bearing on the question whether it was sufficiently dark to warrant the carrying of lights.—Schock v. Cooling, 175 Mich. 313.

¶ 1539. The testimony of a locomotive engineer as to the speed of an automobile which is passing should be received in an action for damages for personal injuries against the owner unless it is clearly apparent that it could be of no value to the jury.—Harnau v. Haight, 189 Mich. 600, 13 N. C. C. A. 566.

¶ 1540. A city ordinance requiring slowly moving vehicles to keep as closely as possible to the curb on the right so as to permit more swiftly moving vehicles free passage on their left is immaterial as evidence to show contributory negligence in an action by a bicycle rider against the owner of an automobile for damages for personal injuries received as a result of an apparent collision while going in the same direction, and while plaintiff was near the center of the street, where the plaintiff's theory was that the defendant while driving his unlighted automobile overtook plaintiff and ran plaintiff down, and defendant's theory was that his car was well lighted, and that plaintiff was not riding in front of his car, but at one side, and turned as defendant came by and ran into the automobile.—Harnau v. Haight, 189 Mich. 600, 13 N. C. C. A. 566.

¶ 1541. In an action for damages for personal injuries alleged to be due to the negligent driving of an automobile which frightened plaintiff's horse so that it tipped over the buggy in which plaintiff was riding, held that the evidence of plaintiff and her daughter, who were accustomed to driving horses, to meeting automobiles and to riding on trains, as to the speed of the automobile, was admissible, especially as the accident occurred in the day time, and an unobstructed view of the automobile could be had for 15 to 20 rods.—Faulkner v. Payne, 191 Mich. 263.

¶ 1542. In an action for damages for personal injuries sustained as the result of a buggy in which plaintiff was riding at night on the right side of an unlighted street being struck in the rear by an automobile having small kerosene lights, but no headlight burning, the exclusion of evidence on behalf of defendant as to why defendant did not have his headlight on, held to be correct, where the count alleging negligence in failure to light the car was withdrawn.—Jolman v. Alberts, 192 Mich. 25.

¶ 1543. In an action for a collision between automobiles at a street intersection the attorney for the defendant held not to have been unduly restricted in cross-examining the plaintiff as to whether he could have stopped his car in time to avoid the accident after observing the danger.—Brown v. Mitts, 187 Mich. 469.

What evidence admissible as to speed of motor vehicles, see note, 13 N. C. C. A. 566-586.

§ 391. Weight and sufficiency of evidence.

See also ante ¶ 1522.

As to operation of motor vehicles, see post § 392.

As to contributory negligence, see post § 393.

Admissibility of evidence, see ante § 388 et seq.

¶ 1544. The failure of a driver to exercise due care and caution in attempting to pass another upon the highway is not conclusively established by evidence that he did not observe the law of the road.—Tyler v. Nelson, 109 Mich. 37.

¶ 1545. Testimony of previous conduct of a horse in breaking its tie strap and running away, and that the defendant knew of this and thereafter had frequently taken the precaution of unhitching the horse from the buggy when tying him for any length of time, is sufficient to support a verdict and judgment for the plaintiff for injuries received through the horse breaking away and colliding with the plaintiff's vehicle.—Sinsabaugh v. Brown, 126 Mich. 538.

¶ 1546. Where, in an action for an injury from a collision caused by the negligence, or design, of defendant's teamster, the latter has testified that he was unable to restrain his horses, and that they were running against his will, it cannot be held indisputable that the damage was done by the teamster's wantonness.—Vernon v. Cornwell, 104 Mich. 62.

¶ 1547. The presumption of fault in a driver of a vehicle where he fails to turn to the right of the center of the road upon meeting another vehicle may be overcome by evidence showing reasonable grounds for his choice of position and that his presence there in no way interfered with the free passage of the other party.—Buxton v. Ainsworth, 138 Mich. 532.

¶ 1548. In an action for personal injuries caused by collision of two teams on the highway, testimony that the road looked as though gravel had been dumped, one load in a place, and had not been worked down any by travel, is sufficient to show that the gravel on the road had not been leveled.—Buxton v. Ainsworth, 138 Mich. 532.

§ 392. ——Negligent operation of motor vehicles.

¶ 1549. In a personal injury suit based on an automobile accident, proof of an absence of lights on the car is testimony tending to prove negligence in view of statutory requirements.—Zoltovski v. Gzella, 159 Mich. 620.

¶ 1550. A witness in a personal injury suit against an automobile owner testified that the machine was going "a good deal faster than a horse trots, and pretty fast." Held, the evidence did not establish the fact that the car was exceeding the ordinance speed limit or going with excessive rapidity. —Zoltovski v. Gzella, 159 Mich. 620.

¶ 1551. Plaintiff sued for personal injuries arising from the running away of his team caused by the negligent driving of defendant's automobile. There was clear testimony showing the excessive speed of the automobile and as to defendant's defective control of the same. The evidence was not definite as to whether or not defendant's automobile actually struck plaintiff's team. Held, the court properly refused to grant a new trial for defendant on the ground that the testimony was vague and uncertain.—Matla v. Rapid Motor Vehicle Co., 160 Mich. 639.

¶ 1552. The fact that an automobile when it struck a pedestrian, was not running in excess of the statutory speed limit in nonbusiness sections of the city, does not conclusively establish the driver's freedom from negligence.—Winckowski v. Dodge, 183 Mich. 303.

¶ 1553. The violation of a speed ordinance by the driver of a motorcycle, with whom another is riding, in attempting to cross a street in front of an approaching automobile is merely evidence of negligence. —Weber v. Beeson, 197 Mich. 607.

¶ 1554. A prima facie case of negligence on the part of the driver of an automobile, is shown where the undisputed testimony establishes a causal connection between the injury of a pedestrian and the negligent operation of such vehicle on the wrong side of the street at the time of the injury.—Winckowski v. Dodge, 183 Mich. 303.

¶ 1555. Testimony tending to show that an automobile running from twelve to fifteen miles an hour, was swung to the left side of a narrow street in order to pass on the wrong side of an approaching loaded vehicle which was closely followed by another, and that the automobile without slacking speed was turned diagonally across the street into the narrow space between the two vehicles, when a child who had been riding on the rear of the first vehicle, suddenly jumped off and as he started towards the side of the street was struck and injured by the automobile, is sufficient to support a finding that the latter vehicle was not being operated as required by statute with due regard to the safety of persons and traffic on the street.—Winckowski v. Dodge, 183 Mich. 303.

¶ 1556. In an action against the owner of an automobile for damages for injuries to a seven-year-old child sustained while endeavoring to cross a street diagonally and away from a well equipped automobile which was being driven slowly, within the speed limit, by an experienced driver, the view of the child being obscured by a high topped grocery wagon alongside the curb, evidence held insufficient to show negligence in failing to stop the car sooner upon sight of the child.—Barger v. Bissell, 188 Mich. 366.

¶ 1557. In an action for damages on account of the death of one who was struck by an automobile driven by the son of the owner, in which action the owner of the car and his son were both joint defendants, held, under the undisputed evidence, that the owner of the car was not guilty as alleged.—Johnston v. Cornelius, 193 Mich. 115.

¶ 1558. In an action for damages on account of the death of one who was killed by an automobile driven by the son of the owner of the car in which the owner and son are joint defendants, contradictory statements in the evidence of the son which tended to impeach him, held not to show any liability on the part of the father where such liability would not be shown if the son's testimony were eliminated from the case.—Johnston v. Cornelius, 193 Mich. 115.

§ 393. ——Contributory negligence.

¶ 1559. In a suit to recover for the death of plaintiff's intestate caused by a collision between intestate's bicycle and defendant's automobile, where the evidence shows that as the automobile was running south in the

center of the street, the intestate got on his bicycle on the east curb and rode in a southwesterly direction in front of the automobile, and the evidence does not show whether or not the intestate, in mounting his wheel, looked about him on the street, the plaintiff fails to discharge the burden of proof resting upon him to show absence of contributory negligence on the part of decedent.—Gibbs v. Dayton, 166 Mich. 263.

¶ 1560. Plaintiff, a teamster of mature years and in possession of all his faculties was struck by a taxicab while crossing the street. It appeared that the day was clear and bright, that the street was comparatively deserted, it being Sunday, and that an unobstructed view for half a mile could be had along the street. Defendant's testimony tended to show that the automobile was not running at excessive speed. Plaintiff testified that he did not see or hear the machine. Held, that plaintiff was guilty of contributory negligence.—Tolmie v. Woodward Taxicab Co., 178 Mich. 426.

¶ 1561. After a careful trial of an action for personal injuries sustained by a boy 13 years of age who was run over by a motor truck, the court is justified in declining to grant a new trial on the ground of alleged discrepancies in the boy's testimony given on the several trials of the case, as to whether he rode toward the curb on his bicycle after passing the truck in question and before he fell; since such discrepancies merely presented a question for argument to the jury.—Goosen v. Packard Motor Car Co., 174 Mich. 654.

§ 394. Questions of law and fact.

As to particular matters, see post §§ 395-398.

As to contributory negligence, see post §§ 399-403.

Occasion for directed verdict, see post § 404.

Necessity, propriety and sufficiency of instructions, see post §§ 405-410.

In actions for injuries from defects in highways, see ante XII, H, 4.

In action for negligent driving in private way, see post § 421.

¶ 1562. Usually, when persons having an equal right to use a highway come into collision and one is injured and brings an action, the question of his due care and of defendant's negligence are questions for the jury.—Hill v. Lappley, 199 Mich. 369.

¶ 1563. In an action for injuries caused by a collision with defendant's truck, the evidence as to whether there was a driver on the truck at the time of the accident is sufficient to go to the jury; where the plaintiff testifies that as he fell from his buggy he had a glance at the driver, still on his box, and a policeman testifies that immediately afterwards he conversed with the driver, still on the box.—Silsby v. Michigan Car Co., 95 Mich. 204.

¶ 1564. In an action for injuries received by being run over by defendant's runaway team, the testimony of the team's driver and of other witnesses was positive that the team was hitched by means of a strap and weight. Plaintiff testified on direct examination that she passed by the horses while they were standing, and that they were not fastened. On cross-examination she testified that the reason why she knew they were not hitched was because the horses stood with their faces towards her; that she meant that they were not hitched to some post or object, and her reason for so stating was that she did not see any post or object to which they could have been hitched. Held, that plaintiff was in a position to see, and that her testimony elicited upon cross-examination is not such as to justify the court in holding that there was no evidence to show that the team was unhitched.—Doyle v. Detroit Omnibus Line Co., 105 Mich. 195.

¶ 1565. Where in an action for personal injuries sustained by being struck by a runaway horse belonging to defendant, the testimony fairly raised the question as to whether the driver had hitched the horse, the case was properly submitted to the jury.—Jordan v. Le Messurier, 155 Mich. 188.

¶ 1566. In an action by one who rode on a motorcycle with another person against the owner of an automobile to recover for personal injuries due to the colliding of defendant's automobile with the rear wheel of the motorcycle, held that it was a question for the jury whether the collision occurred on the street on which plaintiff was proceeding or on the intersecting street from which defendant turned to go in the same direction as plaintiff.—Weber v. Beeson, 197 Mich. 607.

¶ 1567. The question of the ownership of an automobile which caused an injury was properly submitted to the jury when depending on conflicting testimony.—Webber v. Billings, 184 Mich. 119.

¶ 1568. In an action for damages for injury to an automobile due to a collision with another automobile held that it was a question for the jury whether the driver of defendant's car was operating it with defendant's knowledge and consent.—Cady v. Doxtator, 193 Mich. 170.

§ 395. ——Negligence or mismanagement of horses.

¶ 1569. Whether it is negligence toward other drivers and horses to drive across a city street a horse harnessed, and drawing a whiffletree with a long chain attached,

such as is commonly used in moving lumber, is a question for the jury, especially where the driver is shown to have been negligent in his manner of driving.—Bueck v. Lindsay, 65 Mich. 105.

¶ 1570. In an action for negligence in driving a certain horse and express wagon over plaintiff, there was evidence that the horse was nervous and prancing and that he was hurrying across a railroad track when plaintiff was knocked down. Held, that the question whether the driving was at too high a rate of speed was for the jury.—Post v. United States Express Co., 76 Mich. 574.

¶ 1571. To leave a horse unhitched is not negligence per se, but is to be judged as negligence by considering the temper of the horse, and the particular circumstances under which he was left, and the question is for the jury.—Doyle v. Detroit Omnibus Line Co., 105 Mich. 195.

¶ 1572. Where a witness testifies that plaintiff, a child, started to cross the street, and that defendant's milk wagon crossed from the other side, and drove toward the plaintiff, and up against the gutter, in a fast trot, and injured the plaintiff, there is evidence to go to the jury, of defendant's negligence.—May v. Hill, 152 Mich. 158.

¶ 1573. Plaintiff was at work as a street cleaner on the traveled portion between the street-car track and the curb, the strip being twenty-two feet in width. There was evidence that he was facing the west; that his scraper was making some noise; that he did not hear defendant's carriage approach from behind; that his companion working on the opposite side did not hear it; that it was daylight; and that defendant's horse was under her control. Defendant ran into plaintiff and injured him. Held, there was sufficient evidence to require the court to submit the question of defendant's negligence to the jury.—O'Donnell v. Lange, 162 Mich. 654.

¶ 1574. In an action for damages for personal injuries received as a result of being knocked down by a runaway horse, in which the evidence was conflicting as to the disposition of the horse to run away, and as to the sufficiency of the bridle used, held that defendant's negligence was a question for the jury.—Laskowski v. People's Ice Co., 190 Mich. 331.

¶ 1575. In an action by the driver of a horse and light wagon against an ice company to recover damages for personal injuries sustained as the result of a collision between plaintiff's wagon and defendant's wagon, while attempting to pass, alleged to be due to the defendant's horse, which was proceeding without a driver, turning to the left towards the curb when plaintiff's horse had passed defendant's horse, and bringing the rear inside wheels of the wagons in collision, held, on conflicting evidence, that it was a question for the jury whether defendant's horse turned towards the curb and caused the collision.—Hogendyk v. Consumers' Ice Co., 194 Mich. 631.

§ 396. ——Negligence or misuse of automotive vehicles.

¶ 1576. Whether, in a particular case, there is negligence in the management of a steam-engine as a means of locomotion in a highway is a question of fact for the jury.—Macomber v. Nichols, 34 Mich. 212.

¶ 1577. The use of a steam-engine as a means of locomotion on a highway is not necessarily a nuisance, and if injury arises from such use the question is one of fact whether negligence was imputable from the conduct of the parties, and to whom; it is immaterial that the engine was calculated to frighten horses of ordinary gentleness.—Macomber v. Nichols, 34 Mich. 212.

¶ 1578. The degree of care required of either the driver of a horse or the chauffeur of an automobile is governed by the character of the agency employed; and whether it is the exercise of due care for an automobile driver to run his machine in the dark without the warning to one approaching from the opposite direction which a headlight affords, is a question for the jury.—Wright v. Crane, 142 Mich. 508.

¶ 1579. In a suit for personal injuries from a runaway of plaintiff's horse, which was frightened by defendant's automobile, there was contradictory evidence as to whether defendant stopped when signaled to do so, and whether he gave a share of the road. Held, the question of defendant's negligence was properly left to the jury.—Chapman v. Strong, 162 Mich. 623.

¶ 1580. Where plaintiff was struck by defendant's automobile, there being evidence that defendant was driving his car at excessive speed without giving proper warning, the question whether defendant is guilty of negligence is properly submitted to the jury.—Schock v. Cooling, 175 Mich. 313.

¶ 1581. Plaintiff's testimony, in an action for injuries caused by an automobile collision, that he was driving his car at the rate of eight or ten miles an hour when he was struck by an automobile coming along an intersecting street at thirty miles an hour; that he saw the car when it was twenty feet away, and that his car was carried sideways across the street by the force of the collision, held to justify submission of the case to the jury.—Andries v. Everitt-Metzger-Flanders Company, 177 Mich. 110,

¶ 1582. Where a loaded wagon closely followed by another was turning into an intersecting street, and a small boy who was riding on the rear of the wagon jumped off, and as he started to run to the opposite side of the street, was struck and injured by an automobile coming from the opposite direction, which in violation of ordinance was turned to the left in order to pass around the loaded wagon and between it and the following one, the question of the negligence of the driver of the automobile is for the jury, where no warning of the approach of the automobile was given, and the testimony as to whether it might have been stopped in time to have averted the accident was conflicting.—Winckowski v. Dodge, 183 Mich. 303.

¶ 1583. Whether the circumstances justified the driving of an automobile on the wrong side of a street at the time of a collision with a pedestrian, is a question for the jury, and not one of law for the court. —Winckowski v. Dodge, 183 Mich. 303.

¶ 1584. The question of the negligence of the defendant whose automobile, to the injury of the plaintiff, was run into the rear of a vehicle in which the latter was riding, is for the jury.—Grogitzki v. Detroit Ambulance Co., 186 Mich. 374.

¶ 1585. In an action against the owner of an automobile truck for the negligent death of a pedestrian who was on or near the sidewalk in front of the driveway leading into defendant's building and was walking diagonally away from the building and an outcoming truck, where it appeared that defendant's driver saw decedent turn back, upon hearing some one call, held that the question of the negligence of the driver was for the jury.—Tuttle v. Briscoe Mfg. Co., 190 Mich. 22, 12 N. C. C. A. 909.

¶ 1586. In an action for damages for personal injuries sustained as a result of the buggy in which plaintiff was driving on the right side of an unlighted street at night being struck in the rear by an automobile having small kerosene lights, but no headlight, burning, where there was evidence on the part of the plaintiff that an approaching automobile gave such a bright light that he could not see clearly, that he was operating his car when and just before the collision occurred at a speed of four or five miles per hour, that he did not see the buggy until he was within 8 or 10 feet of it, that he did not intentionally strike it, and that he thought he could not go any farther out into the street without being struck by the approaching car, and that he could pass the buggy in which plaintiff was sitting, and other witnesses testified that they saw defendant's car approaching 150 to 200 feet, running close to the curb, and the count alleging negligence in driving an improperly lighted automobile was withdrawn, held that the question whether defendant was prudent or careless in driving his car upon the buggy was for the jury.—Jolman v. Alberts, 192 Mich. 25.

¶ 1587. In an action against the owner of an automobile to recover for the death of a person who was killed by defendant's automobile while walking diagonally across a street with a companion, held under conflicting evidence, that it was a question for the jury whether defendant's driver, who had just turned his car around and was proceeding on his way, was guilty of negligence and whether deceased was guilty of contributory negligence.—Amley v. Saginaw Milling Co., 195 Mich. 189.

¶ 1588. In an action against the owner of an automobile to recover for the death of a traffic policeman held, on conflicting evidence, that it was a question for the jury whether defendant's automobile was proceeding at a rate greater than 10 miles per hour when it struck deceased.—Wilson v. Johnson, 195 Mich. 94.

¶ 1589. In an action to recover damages for injuries to plaintiff's automobile from a collision with defendant's automobile, whether defendant should have discovered the alleged negligence of plaintiff in driving and operating his car in time to avoid such collision held for the jury.—Whitman v. Collin, 196 Mich. 540.

¶ 1590. In an action by one riding on a motorcycle with another person against the owner of an automobile to recover for personal injuries due to the colliding of defendant's automobile with the rear wheel of the motorcycle, where it appeared that when they reached the south line of an intersecting street they stopped for a moment and, seeing nothing to interfere, proceeded to cross the street; that when the street car tracks were reached an automobile was observed on the north side of the intersecting street 150 feet away coming at an unusual speed; that they thought they had time to cross; that the driver of the motorcycle blew his horn and proceeded north on his way at an increased speed in excess of that allowed by a city ordinance, and that the traffic on the intersecting street had the right of way, held that it was a question for the jury whether plaintiff was guilty of contributory negligence. —Weber v. Beeson, 197 Mich. 607.

¶ 1591. In an action by an occupant of an automobile against the owner of another automobile to recover damages for injuries sustained in a collision, where it appeared that the accident occurred at the southeast corner of a street intersecting a north and south street, from which latter street the car in which plaintiff was riding had turned to go east, defendant's car coming from the east and the driver intending to go south,

held that it was a question for the jury as to whether defendant was negligent or plaintiff was guilty of contributory negligence.—Hopkins v. Tripp, 198 Mich. 94.

§ 397. ——Negligence in coasting on street.

¶ 1592. It is not negligence per se to coast on a public street.—Burford v. City of Grand Rapids, 53 Mich. 98; Burt v. Staffeld, 121 Mich. 390.

¶ 1593. It is not negligence per se to coast on a public street, but a question for the jury is presented, as to negligence in coasting, where there is evidence that the coaster has attained a very high rate of speed, and is not able to control the sled so as to prevent collision with pedestrians.—Burt v. Staffeld, 121 Mich. 390.

§ 398. ——Negligence in driving or turning animals on way.

¶ 1594. In an action for injuries received from a wild bull, two and one-half years old, driven in the street, it is for the jury to say whether such driving with the animal's head tied to one foot, after notice that it would be safer to lead him by a ring in his nose, and with knowledge of his wildness and the nature of such an animal, was negligence.—Barnum v. Terpening, 75 Mich. 557.

¶ 1595. In an action for personal injuries the fact that the bull which attacked defendant had never attacked any one prior to the injury sued for is a circumstance to be considered by the jury as bearing upon the question of the defendant's negligence in driving it in a highway in a given manner.—Barnum v. Terpening, 75 Mich. 557.

§ 399. Contributory negligence as fact or law question.

Of particular persons, see post §§ 400-403.
In driving on private way, see post § 421.
Instructions as to contributory negligence, see § 410.

¶ 1596. Plaintiff was at work as a street cleaner on the traveled portion between the street-car track and the curb, the strip being twenty-two feet in width. There was evidence that he was facing the west; that his scraper was making some noise; that he did not hear defendant's carriage approach from behind; that his companion working on the opposite side did not hear it; that it was daylight; and that defendant's horse was under her control. Defendant ran into plaintiff and injured him. Held, that plaintiff was not obliged to neglect his work to avoid a collision and the question of his contributory negligence was for the jury.—O'Donnell v. Lange, 162 Mich. 654.

¶ 1597. In an action against the owner of an automobile to recover for the death of a traffic policeman, who was killed near the south crossing of a north and south street, while proceeding towards the center of the street, by defendant's automobile which was being driven in a northwesterly direction over the crossing and to the left of the center of the north and south street, where the evidence was conflicting as to whether the deceased, when the car had approached to within a couple of lengths from him, nodded his head towards the west and indicated that the car should go that way, held that it was a question for the jury whether the deceased was guilty of contributory negligence.—Wilson v. Johnson, 195 Mich. 94.

§ 400. ——Of persons driving or handling horses.

¶ 1598. The question of whether turning a horse suddenly in order to avoid a collision was in the exercise of ordinary care, is one for the jury.—Buxton v. Ainsworth, 153 Mich. 315.

¶ 1599. In a suit for personal injuries from a runaway of plaintiff's horse, which was frightened by defendant's automobile, the evidence indicated that while the horse was a spirited one, it could be controlled; that plaintiff did not see the automobile until he had started down the hill; that he could not well turn around; that there was room to pass; that plaintiff would have been successful in passing if defendant had turned to the right and given part of the highway; and that the defendant paid no attention to the plaintiff. Held, the question of contributory negligence was properly left to the jury.—Chapman v. Strong, 162 Mich. 623.

¶ 1600. In a suit against defendant automobile owner for an injury to plaintiff from the running away of his team caused by the negligent driving of defendant, held, it is for the jury to say under disputed evidence whether the plaintiff was guilty of contributory negligence in the way he handled his team.—Matla v. Rapid Motor Vehicle Co., 160 Mich. 639.

¶ 1601. In an action by the driver of a horse and light wagon against an ice company to recover damages for personal injuries sustained as the result of a collision between plaintiff's wagon and defendant's wagon, while attempting to pass, where it appeared that plaintiff's wagon, at the time he turned to go in the opposite direction from that in which he had been going, was on a line 3 or 4 feet from the ice wagon and 8 or 10 feet from the curb on his right and that defendant's horse, which was unattended, after the horses passed each other, turned sharply to the right so as to bring the rear wheels in collision, held that it was a question for the jury whether plaintiff was guilty of contributory negli-

gence in not driving closer to the curb or in not watching the final clearance of the wagons more closely.—Hogendyk v. Consumers' Ice Co., 194 Mich. 631.

¶ 1602. In an action to recover damages for injuries sustained as the result of the horse drawing the wagon in which plaintiff was riding becoming frightened at an automobile while passed to the right, and running away, evidence held insufficient to show that plaintiff was guilty of contributory negligence as a matter of law in failing to turn to the right to allow the automobile to pass.—Kasprzak v. Chapman, 197 Mich. 552.

¶ 1603. In an action by the owner of a team against the master of a driver of an automobile to recover damages for injury to the off horse of plaintiff's team, due to a collision at the northeast corner of a street intersection, when plaintiff's driver, who had driven from the north, was endeavoring to turn to the east on the north side of the east and west street, and defendant's driver, who had been driving west on the east and west street was endeavoring to turn to the north at such intersection, and it appeared that the automobile driver was driving his car at an excessive speed and did not see plaintiff's driver until close to the street intersection, held that it was question for the jury whether plaintiff's driver was guilty of contributory negligence.—Eberle Brewing Co. v. Briscoe Motor Co., 194 Mich. 140.

§ 401. ——Of persons driving or handling motor vehicles.

¶ 1604. In an action by the owner of a two-passenger motorcycle against the owner of a motor truck for damages for personal injuries sustained as the result of a collision when defendant's motor truck, which was ahead of plaintiff's motorcycle, started to turn to the left across the street before reaching a street intersection, where the evidence was conflicting as to the rate of speed of both the motorcycle and the motor truck and whether defendant gave a signal as he was about to turn, held that it was a question for the jury whether plaintiff was guilty of contributory negligence.—Greenleaf v. Lambert, 192 Mich. 411.

¶ 1605. In an action to recover damages for injuries to plaintiff's automobile from a collision with defendant's automobile, whether plaintiff was guilty of contributory negligence held for the jury.—Whitman v. Collin, 196 Mich. 540.

§ 402. ——Of bicyclists.

¶ 1606. A boy eighteen years of age, experienced in riding on a bicycle, is guilty of contributory negligence as a matter of law where at a street crossing in the daytime he clearly sees an automobile 100 feet away coming down the wrong side of the intersecting street at the rate of twenty miles an hour and continues on his way without looking again until within ten feet of the automobile, and it is too late to avoid a collision.—Ude v. Fuller, 187 Mich. 483.

¶ 1607. In an action by a bicycle rider against the driver of an automobile to recover damages for personal injuries sustained in a collision at a street intersection occurring after plaintiff had crossed the intersecting street and defendant had turned on the latter street to go in the same direction as plaintiff, held that the questions of negligence and contributory negligence were for the jury.—Vezina v. Shermer, 198 Mich. 757.

¶ 1608. A bicycle rider who is riding on the right side of a paved street beyond the intersection with a cross street with his head down because of the wind and is not on the lookout for vehicles going in the opposite direction on the same side of the street and does not see a runaway horse which was running on the other side of the street in the direction opposite to that in which he was going when it turned and crossed the street and ran down the same side of the street in the opposite direction to which he is going and collides with him, causing his death, is not guilty of contributory negligence, as a matter of law, so as to bar recovery for his death in an action against the driver of an automobile which collided with the wagon to which the horse was attached and caused the horse to run away.—Dier v. Voorhees, 200 Mich. 510.

§ 403. ——Of pedestrians.

¶ 1609. In an action for personal injuries received in a public street through being struck by a horse and buggy driven by defendant whether plaintiff was contributorily negligent in turning his back to defendant's approaching team, both being in a street where there were no other teams and there being sufficient room for defendant to pass, was for the jury to determine.—Lazell v. Kapp, 83 Mich. 36.

¶ 1610. Question of negligence and contributory negligence held to be for the jury where plaintiff's wife, on a rainy night but in a well lighted street was struck by defendant's horse which was being driven at the rate of six miles an hour, while she was proceeding from the curb a distance of 24 feet to a street car which she was about to board, it being the duty of both to exercise reasonable care.—Stroub v. Meyer, 132 Mich. 75.

¶ 1611. A pedestrian crossing a street is not required to exercise the same degree of care as when crossing a railroad, and the question of contributory negligence of a pedestrian, injured by colliding with a coasting sled is for the jury, where such pedestrian knew of the coasting on the street, which was icy, the collision occurring in the

evening, when there was no artificial light, although the evidence did not show that the pedestrian looked up the hill or knew that the sled was uncontrollable.—Burt v. Staffeld, 121 Mich. 390.

¶ 1612. The failure of a woman 74 years old, who had seen a vehicle approach 3 or 4 rods away when she stepped from the curb to cross the street in a diagonal direction, to look again in the direction of the approaching vehicle, was not negligence as a matter of law.—Graham v. Evening Press Co., 135 Mich. 298.

¶ 1613. In an action for personal injuries sustained by a woman 74 years old, who after looking in both directions before stepping into the street and seeing defendant's horse and wagon about 3 or 4 rods away, started to cross diagonally and was struck by the horse when she had traveled about 20 feet from the curb, the questions of the negligence of defendant and contributory negligence of plaintiff, were for the jury.—Graham v. Evening Press Co., 135 Mich. 298.

¶ 1614. In an action for injuries caused by being run over by an automobile, evidence that the plaintiff, in getting off his wagon, looked and saw no automobile, took out some packages, and had taken five or six steps when he was struck by defendant's automobile, did not show that plaintiff was guilty of contributory negligence as a matter of law, but the question was one for the jury.—Gerhard v. Ford Motor Co., 155 Mich. 618.

¶ 1615. Plaintiff testified that in crossing the street she stopped between the tracks of the street railway and looked in both directions; that she proceeded to cross the street and was struck by defendant's automobile; that no horn or signal was given of the approach of said automobile; that the large lamps in front were not lighted; and that the two oil lamps, while burning, were obscured by the rain covering the glass. There was evidence that plaintiff was pushed on the pavement some sixty feet after being struck. Defendant testified that he stopped his automobile to wait for plaintiff to cross; that he saw her stop on said tracks and supposing she was waiting for him to pass, started up again; and that he was going only about seven miles an hour. Held, under said evidence the questions of contributory negligence were properly left to the jury.—Bouma v. Dubois, 169 Mich. 422.

¶ 1616. Where plaintiff, while walking across the highway, was struck by defendant's automobile, the question whether plaintiff was guilty of contributory negligence is properly submitted to the jury.—Schock v. Cooling, 175 Mich. 313.

¶ 1617. In an action against the owner of an automobile truck for the negligent death of a pedestrian who was on or near the sidewalk in front of a driveway leading into a building, where there was evidence that the driver blew the horn and that decedent, who was walking away from the truck, did not hear the signal, held that the question whether decedent was unaware of his danger until too late was a question for the jury.—Tuttle v. Briscoe Mfg. Co., 190 Mich. 22, 12 N. C. C. A. 909.

¶ 1618. In an action against the owner of an automobile truck for the negligent death of a pedestrian who was on or near the sidewalk in front of the driveway leading into a building and was walking diagonally away from the building and an outcoming truck, and in which the evidence was conflicting as to whether, while on his way across the driveway, decedent turned back, upon hearing some one call, and suddenly stepped in front of the oncoming truck when it was so near him that the driver by exercising ordinary vigilance could not have avoided injuring him, held that the contributory negligence of decedent in the emergency situation was a question for the jury.—Tuttle v. Briscoe Mfg. Co., 190 Mich. 22, 12 N. C. C. A. 909.

§ 404. Directing verdict.

Weight and sufficiency of evidence, see ante § 321.

General law as to directing verdict, see Directing Verdict.

¶ 1619. Plaintiff was riding his bicycle north on Washington Street. At Tenth Street, intersecting Washington Street at right angles, plaintiff was along the east side of a wagon going in the same direction with him. Defendant was coming in his automobile from the north on Washington Street, and at the intersection instead of keeping to the right, as required by section 16, Act No. 196, Pub. Acts 1905, he swerved diagonally towards plaintiff, and injured him. Held, the court properly refused to direct a verdict for defendant on the ground of his lack of negligence or on the ground of plaintiff's contributory negligence.—Reed v. Martin, 160 Mich. 253.

¶ 1620. Plaintiff was driving west on a street. When she approached the cross street she saw a street car approaching from the north, and stopped a few feet from the track to let it pass. Defendant coming from the south in an automobile ran into her carriage and injured her. Held, the court properly refused to direct a verdict for the defendant on the ground that she was as a matter of law guilty of contributory negligence.—Ketchum v. Fillingham, 162 Mich. 704.

¶ 1621. Upon seeing defendant's automobile coming over a hill some twenty-five rods distant, on the public road, the plaintiff's

horse became restive and finally reared upon plaintiff, causing plaintiff's injury. Plaintiff clung to the horse's head stall and gave defendant no signal to stop. Held, the court improperly directed a verdict for defendant, as the questions of negligence and contributory negligence should have been submitted to the jury.—Cusick v. Kinney, 164 Mich. 25.

¶ 1622. In an action for injuries to plaintiff's automobile caused by collision with a runaway team, it was not shown that defendant's driver was negligent nor that the harness, sleigh or other appliances were defective. The court directed a verdict for defendant on the ground that the plaintiff could not maintain the action because of failure to comply with the statute as to licenses. Held, that a directed verdict could be sustained on the ground that plaintiff had failed to show that defendant was negligent.—Stuch v. Town, 178 Mich. 477.

¶ 1623. A motion to direct a verdict for the defendant in an action for a collision between automobiles, on the ground of the contributory negligence of the plaintiff in not stopping his car on observing the defendant approaching at an unlawful rate of speed, held properly denied.—Brown v. Mitts, 187 Mich. 469.

¶ 1624. In an action against the owner of a wagon to recover damages for personal injuries sustained as the result of plaintiff being run over by defendant's wagon which was being driven by defendant's son, while plaintiff was attempting to cross to the east side of a north and south street, and where it appeared that defendant's wagon had been driven from the east on the east and west street and had turned south on the right-hand side of the north and south street behind an automobile which obscured plaintiff's view, held that the evidence as to the negligence of the driver and contributory negligence of the plaintiff being conflicting, the court did not err in refusing to direct a verdict in favor of defendant.—Hook v. Soloman, 194 Mich. 517.

§ 405. Instructions.

Particular instructions, see post §§ 406-410.
Law and fact questions, see ante §§ 393-404.
General law of instructions, see Instructions.

¶ 1625. Plaintiff averred in his declaration that defendant ran his automobile at an excessive speed; that he failed to slow down at the crossing; that the machine ran into plaintiff's team; and that the team took fright, ran away, and injured plaintiff. Plaintiff's proof did not show that the automobile struck the team, but did support the other allegations. Held, the court properly refused to instruct that unless the automobile actually collided with the team, plaintiff could not recover.—Matla v. Rapid Motor Vehicle Co., 160 Mich. 639.

¶ 1626. An instruction in an action for injuries sustained in a collision between automobiles at a street crossing, held sufficient when considered as a whole.—Brown v. Mitts, 187 Mich. 469.

¶ 1627. An instruction that the mere happening of an accident and the receiving of an injury by the plaintiff, is in the absence of proof of negligence not sufficient to entitle him to recover should have been given in an action for injuries caused by the defendant's automobile running into the rear of the vehicle in which the former was riding.—Grogitzki v. Detroit Ambulance Co., 186 Mich. 374.

§ 406. ——As to burden of proof and presumptions.

Rules as to burden of proof and presumptions, see ante § 387.

¶ 1628. In an action against the owner of an automobile to recover for the death of a person who was killed by defendant's automobile while walking diagonally across a street with a companion, an instruction that the burden of proof was upon plaintiff to establish all the elements of his cause by a preponderance of the evidence and that he must show that the defendant, through its agent in charge of the car, was guilty of negligence that was the proximate cause of the injuries to the deceased and that the deceased himself was free from any carelessness or negligence that caused or contributed to cause the injuries that he received, held proper.—Amley v. Saginaw Milling Co., 195 Mich. 189.

¶ 1629. In an action for personal injuries caused by being struck by a wagon it was error to refuse an instruction in behalf of defendant that the burden was upon plaintiff to show by fair preponderance of the evidence that she was free from contributory negligence.—Beattie v. J. L. Hudson Co., 180 Mich. 111.

¶ 1630. An instruction that a presumption of negligence which the defendant must rebut by evidence showing the exercise of ordinary care and prudence, arose from the fact that his automobile ran into the rear of a vehicle in which the plaintiff was riding and injured him, held erroneous.—Grogitzki v. Detroit Ambulance Co., 186 Mich. 374.

¶ 1631. Where, in a suit by a plaintiff motorcyclist against a defendant automobile owner for injuries sustained in a collision, the defendant requests the court to charge that the presumption is against the person on the wrong side of the road, the court sufficiently covers the point by charging that if plaintiff so cut the corner as to come

into the way of defendant and cause the collision, he cannot recover.—Scott v. Dow, 162 Mich. 636.

§ 407. ——As to proximate cause.

Rules as to proximate cause, see ante § 381.

¶ 1632. In an action for personal injuries sustained in a collision between two automobiles whereby one was forced over an embankment, an instruction to find for defendant if the force of the collision was not in itself sufficient to force the car over the embankment was error.—Granger v. Farrant, 179 Mich. 19.

¶ 1633. In a suit for injuries by an automobile, the court instructed the jury as to the duty of defendant to sound his horn at the street crossing and to keep within the speed regulations, without stating in direct connection therewith, that defendant would not be liable for failure to do said things unless said failure caused the accident and unless plaintiff was free from contributory negligence. He also instructed that plaintiff would "perhaps" not be entitled to recover if she was crossing the street without taking notice and in a careless manner. In other parts of the charge the court clearly instructed the jury that plaintiff could not recover unless defendant's negligence was the proximate cause of the accident, and unless plaintiff was free from contributory negligence. Held, the charge should be read as a whole, and when so read was not erroneous.—Bouma v. Dubois, 169 Mich. 422.

§ 408. ——As to duty or negligence in driving horses.

¶ 1634. An instruction that under the evidence plaintiff, who sues for injury caused by reckless driving of defendant's servant, cannot recover unless the team was being driven too rapidly toward the place of the accident, is properly refused where there is evidence that the driver was otherwise negligent in managing the team.—Williams v. Edmunds, 75 Mich. 92.

¶ 1635. In an action for personal injuries it was error to instruct the jury that if plaintiff was injured by the defendant who was traveling in the same highway he cannot recover even though the defendant was negligent unless the defendant saw plaintiff in or approaching a place of danger, and knew or had reason to know that plaintiff was not aware of the danger, and saw him in such position of danger in time to prevent the injury by using ordinary care and did not use that care, where such an instruction was outside the issues made by the pleadings.—Denman v. Johnston, 85 Mich. 387.

¶ 1636. In an action for personal injury caused by a collision of vehicles on a highway, an instruction that even though the plaintiff was negligent if the defendant's conduct was wanton and wilful or reckless the plaintiff may recover, is erroneous where the jury is left without explanation of what constitutes wanton, wilful or reckless conduct in such a case.—Buxton v. Ainsworth, 138 Mich. 582.

¶ 1637. In an action to recover for personal injuries caused by a runaway team where there were several grounds of negligence alleged in the declaration, but the plaintiff claimed to recover upon one and upon this the case was submitted, the instructions on that one suffice if they correctly state the law.—Warren v. Porter, 144 Mich. 699.

§ 409. ——As to duty or negligence with automobiles and motorcycles.

Duty and rights in driving automotive vehicles, see ante § 369.

¶ 1638. In an action for injuries caused by a collision between two automobiles at a street intersection, an instruction to the effect that it was the duty of both drivers to use the care and caution that a man of average prudence would exercise under like circumstances, approved.—Andries v. Everitt-Metzger-Flanders Company, 177 Mich. 110.

¶ 1639. Upon the question of defendant's negligence in causing his automobile to collide with plaintiff's carriage at a street corner, a charge stated that the defendant owed the duty of having his automobile under control when approaching and passing street intersections, of operating it at such a speed as is reasonable and proper, having regard to the traffic conditions of the street and the safety of the people, and of using such ordinary care, prudence, and caution as the ordinarily prudent man would use under the circumstances. This was coupled with the charge that plaintiff could not recover unless she was free from negligence. Held, the instructions were sufficient to define the issues of negligence involved.—Ketchum v. Fillingham, 162 Mich. 704.

¶ 1640. In an action for injuries sustained by a pedestrian from an automobile operated at a speed in excess of that prescribed by Act No. 318, Public Acts 1909, How. St., 2nd Ed., ch. 31, an instruction that the defendant would not be liable if under the circumstances he exercised ordinary care, is reversible error.—Levyn v. Koppin, 183 Mich. 232.

¶ 1641. An instruction that the operation of an automobile at a speed in excess of that prescribed by Act No. 318, Public Acts 1909, How. St., 2nd Ed., ch. 31, is negligence per se, should be given in an action for injuries sustained by a pedestrian from the negligent operation of an automobile.—Levyn v. Koppin, 183 Mich. 232.

¶ 1642. A requested instruction as to the duties of drivers of automobiles towards

each other on approaching street intersections, held sufficiently covered by the general charge.—Brown v. Mitts, 187 Mich. 469.

¶ 1643. An instruction as to the degree of care required of the driver of an automobile upon approaching a horse and wagon and as to that required of the driver of the wagon, held not misleading when considered with other portions of the charge.—Jordan v. Wixson, 189 Mich. 288 (distinguishing Levyn v. Koppin, 183 Mich. 232).

¶ 1644. In an action for damages for personal injuries sustained as a result of the buggy in which plaintiff was riding on the right side of an unlighted street at night being struck in the rear by defendant's automobile, which had two kerosene lamps, but no headlight, burning, and where it appeared that defendant's view of the buggy was obscured as the result of the bright light of an approaching automobile, an instruction that the evidence was given so as to place the jury themselves at the place and time of the accident so that they could then say whether it had been proven by a preponderance of evidence that the defendant did not do what an ordinarily careful and prudent man would have done under the circumstances, and that the proof of the act alone was not proof of negligence, held not erroneous.—Jolman v. Alberts, 192 Mich. 25.

¶ 1645. In an action against the owner of an automobile to recover for the death of a traffic policeman near a street crossing while deceased was proceeding in a northeasterly direction towards the center of the intersecting streets, where it appeared that defendant turned his automobile while going north to the left of the center of the street, held that the refusal of a requested instruction for defendant that if defendant made a mistake in judgment in such a great emergency what the defendant did could not be construed as negligence or carelessness, was proper, as the question of whether or not the emergency was caused by the defendant should have been included.—Wilson v. Johnson, 195 Mich. 94.

¶ 1646. In an action to recover damages for personal injuries, where the testimony of the defendant showed he was driving his automobile at an excessive speed at a street intersection where, had he looked when he first reached the cross street, he could have seen another automobile which was approaching on the cross street at a high rate of speed in time to have stopped his own car before reaching the other car, but he failed to so look, and, when he later observed the other car, and in order to avoid it, turned suddenly and struck and injured plaintiff, held, having, by his own testimony, placed himself in a place of danger where he was obliged to act without care as to third persons, defendant was not entitled to an instruction on the doctrine of instinctive action.—Kovacevic v. Reid, 196 Mich. 288.

¶ 1647. In an action against the driver of an automobile to recover for the death of a pedestrian who was struck and killed on a dark night by the car defendant was driving, an instruction that defendant, in approaching the crossing was also approaching a third person standing in the highway waiting for a street car and that defendant should have given reasonable warning of his approach and slowed down to ten miles per hour; that the statute required that a reasonable warning be given a person standing in the street, and that if defendant and such third person saw each other as the car approached the crossing, the automobile having the usual lights upon it at the time, there was, as a matter of law, reasonable warning given such third person, was incorrect.—Johnston v. Cornelius, 200 Mich. 209.

§ 410. ——As to contributory negligence.

¶ 1648. It is proper to charge that age and sex should be considered in deciding the question of the negligence of one who had not avoided a collision on the highway; and that if the care is such as would ordinarily be taken by a person of the age and sex of the party concerned there is no contributory negligence.—Daniels v. Clegg, 28 Mich. 32.

¶ 1649. The court did not err, in an action for a personal injury, in refusing to charge the jury, that plaintiff cannot recover if the jury find from the evidence that had the plaintiff continued to drive straight ahead the collision would not have occurred; where there was testimony tending to support the claim of the plaintiff that as plaintiff was driving at the rate of 5 or 6 miles an hour well over on her right of way and within 12 or 14 inches of the curb, in broad day light and the street being unobstructed, and there being upwards of 30 feet of paved street on the left of plaintiff between her buggy and the curb of the street, defendant, approaching from the rear driving his team at the rate of 10 or 12 miles an hour, collided with the back of plaintiff's buggy causing the injury complained of.—Ladd v. Germain, 145 Mich. 225.

¶ 1650. A requested instruction in an action for a collision between automobiles at a street intersection, that the plaintiff could not recover if he approached the crossing on the wrong side of the street, held sufficiently covered by the general charge.—Brown v. Mitts, 187 Mich. 469.

¶ 1651. A requested instruction that the plaintiff could not recover for a collision with the defendant's automobile if the accident was traceable to the negligence of the plaintiff, held sufficiently covered by the general charge.—Brown v. Mitts, 187 Mich. 469.

¶ 1652. An instruction that if the plaintiff were sleeping or "nodding" he would be guilty of contributory negligence, should have been given in an action for injuries due to the defendant's automobile running into the rear of a vehicle in which the former was riding.—Grogitzki v. Detroit Ambulance Co., 186 Mich. 374.

¶ 1653. Plaintiff sued defendant automobile owner for injury in a collision between defendant's automobile and plaintiff's motorcycle. Defendant requested the court to charge that plaintiff's motorcycle was a motor vehicle within the meaning of the Michigan Motor Vehicle Law. The court charged that plaintiff was bound to observe the same rules of the road as defendant, and that if he was running his motorcycle in excess of the speed allowed under the laws of Michigan and the traffic ordinance of the city he could not recover.—Held, defendant's request was sufficiently covered.—Scott v. Dow, 162 Mich. 636.

XIV. MOTOR VEHICLE REGULATIONS, RIGHTS AND DUTIES.

§ 411. In general.

[Note. Because of the comparative newness of the motor vehicle laws the decisions thereunder are not numerous. Cases wherein a common law liability has been asserted are treated with other cases on common law liability for negligence in driving, although the automobile cases are distinguished as much as possible. See ante XIII, B.]

Duties and corresponding liabilities of drivers, see ante XIII.

Right to use the road, see ante § 366.

Duties in driving and handling cars, see ante §§ 369, 370.

Statutory liabilities for misuse of motor vehicles in driving, see ante §§ 374, 375.

Statutory liability of owner of car for injury done therewith, see post § 413.

Use of unusual vehicles or means of propulsion as nuisance, see ante § 176.

Liability of municipality for injury to heavy vehicles from defective highways and bridges, see ante §§ 229, 230.

Motor Vehicle Law as proper police regulation, see Constitutional Law § 100.

Due process in Motor Vehicle Law and Regulations, see Constitutional Law § 158.

Motor Vehicle Law as invasion of right of local government, see Constitutional Law § 81, ¶ 399.

Requiring display of number plate as unreasonable search or seizure, see Constitutional Law § 211.

Requiring motor vehicle to carry number as compelling self-crimination, see Constitutional Law § 201.

Validity and effect of Motor Vehicle Tax Law, see Taxes, I.

Rights and liabilities of garage keepers as bailees, see Bailments; Liens.

Garage and repair liens, see Liens; Bailments.

Automobile insurance, see Insurance.

General regulations respecting motor vehicles (Motor Vehicle Law), see Comp. L. 1915, chap. 89.

Registration laws, see Comp. L. 1915, chap. 89.

¶ 1654. A city or village may regulate by ordinance the use of automobiles within its limits, where such regulations do not conflict with any general state law.—People v. McGraw, 184 Mich. 233.

¶ 1655. Under the city charter of Detroit 1904, § 170, giving the common council authority to control, prescribe, and regulate the manner of using and enjoying its streets, and highways, the council has power to pass an ordinance requiring registration and numbering of motor vehicles for the purpose of identifying automobiles which endanger the safety of travelers.—People v. Schneider, 139 Mich. 673.

§ 412. Headlight and signal regulations.

Driving rules and regulations, see ante §§ 369, 370.

¶ 1656. The statutory duty to maintain headlights on automobiles is not for the sole purpose of warning persons not in the car but for the purpose of lighting the way for some distance for the driver of the car.—Jolman v. Alberts, 192 Mich. 25.

¶ 1657. Pub. Acts 1909, No. 318, § 6, providing that every motor vehicle operated on the public highways shall be provided with a suitable bell, horn or other device for signaling, and shall display at night at least two lighted lamps on the front and one on the rear of each vehicle, which shall also display a visible red light from the rear, and § 7, providing that upon approaching a person walking in the roadway of a public highway a person operating a motor vehicle shall slow down to a speed not exceeding ten miles per hour and give reasonable warning of its approach, when read together, contemplate an audible warning when approaching pedestrians in the streets and highways in the nighttime by the use of a suitable and adequate bell, horn or other device.—Johnston v. Cornelius, 200 Mich. 209.

Sufficiency of automobile headlights, see note, 15 N. C. C. A. 350-362.

§ 413. Statutory liabilities of owners.

Liability for negligence by servant or borrower, see also ante § 375.

Due process in law making owner liable for injury by motor vehicle, see Constitutional Law § 158.

¶ 1658. The term "owner" as used in Act 318, P. A. 1909 relating to the regulation of

motor vehicles and of the operators thereof does not include a person who may be only mediately or immediately in the possession of the vehicle but means the real owner or any person, firm, etc., renting such a vehicle or having the exclusive use thereof for more than 30 days.—Daugherty v. Thomas, 174 Mich. 371.

¶ 1659. The word "stolen" as used in Act 318, P. A. 1909, subd. 3, § 10, providing that owners of motor vehicles are liable for injuries caused by the negligent operation thereof by any person except by one who has stolen such vehicle does not mean vehicles taken in violation of Act 33, P. A. 1909 which makes it a felony to take or use them without authority "without intent to steal the same."—Daugherty v. Thomas, 174 Mich. 371.

¶ 1660. Where the owner of an automobile leaves it at a shop for repairs and employees at such shop while testing it, without the owner's knowledge or consent, negligently ran against plaintiff and injured him neither malfeasance, misfeasance or nonfeasance on the part of the owner is shown.—Daugherty v. Thomas, 174 Mich. 371.

¶ 1661. Under the Motor Act, sub. 3, of sec. 10 of Act 318, Public Acts of 1909, according to the decision in Daugherty v. Thomas, 174 Mich. 371, a corporation is not liable for death caused by one of its automobiles, driven by a daughter of one of its officers.—Mitchell v. Van Keulen & Winchester Lumber Co., 175 Mich. 75.

Liability of owner of automobile for death or injury due to negligent operation of car by member of the family, see note, 14 N. C. C. A. 453-481.

XV. PRIVATE ROADS AND FOOTWAYS.

§ 414. In general; establishment under statute.

Sufficiency of public user of private road to convert it into public highway, see ante § 15.

Petition and proceedings thereunder, see post §§ 415, 416.

Right of person connected by private way to notice of proceeding to vacate main road, see ante ¶ 466.

Proceedings for establishment of highways generally, see ante II, B.

General law of easements of way, see Easements.

Deed or reservation in deed of easements of way, see Deeds §§ 45-48, 70.

Provision of the constitution as to opening private roads, see Const. art. XIII, § 3.

Provisions for establishment and opening of private roads and passages, see Comp. L. 1915, chap. 92, and see also § 4447 et seq.

¶ 1662. Sections 7 to 10, c. 9, Act 283, Pub. Acts 1909, provide for the opening of highways for private and not for public use, and are unconstitutional as being in contravention of section 3, art. 13 of the Constitution.—Burdick v. Harbor Springs Lumber Co., 167 Mich. 673.

¶ 1663. Where a defendant owner of forty acres of land is entitled by circumstances to a way of necessity over complainant's "forty," he is not obliged to condemn a private way under the statute provided for that purpose.—Moore v. White, 159 Mich. 460.

¶ 1664. Property cannot be condemned for a private way as a mere convenience, but only when there is no other access to the petitioner's land, and when condemned its use must be limited by absolute necessity and confined to the petitioner and the owner.—People ex rel. Ayres v. Richards, 38 Mich. 214.

¶ 1665. One who has already a private right of way is not obliged to wait until his easement expires before instituting proceedings to obtain a continuance of or substitute for it, but may move a reasonable time before it expires.—Palmer v. Clement, 49 Mich. 45.

¶ 1666. The common council of Detroit cannot take proceedings to open a private alley except on application by responsible and interested parties.—People ex rel. City of Detroit v. Recorder's Court Judge, 40 Mich. 64.

§ 415. Petition and proceedings thereon.

Opening the road and applying it to use, see post § 418.

¶ 1667. A notice served on Friday of proceedings to be taken on the following Monday to lay out a private road, held too short, where the statute provided no particular time but where by analogy the highway law requires not more than ten nor less than five days.—People ex rel. Ayres v. Richards, 38 Mich. 214.

¶ 1668. Proceedings to open a private way must be quashed with costs where a petition fails to allege that the petitioner has no other access to his lands, where there is no service of notice on the owner or occupant, where the record contains no recital that eighteen disinterested freeholders were selected or that six names were struck off, or that a citation was issued by the commissioner to such freeholders, or that the jury was sworn, or that the commissioner proceeded to lay out the road, and where no record was made and recorded in the township clerk's office as required by How. St., § 1391.—Hall v. Pettit, 88 Mich. 158.

¶ 1669. The objection, in proceedings to lay out a private way, that the petition therefor was not sworn to, is waived if the

parties proceed to strike a jury without objection.—Palmer v. Clement, 49 Mich. 45.

¶ 1670. In a proceeding to lay out a private way a commissioner of highways has no authority to determine the facts contained in his return; they must be shown to have been proved before a jury.—People ex rel. Ayres v. Richards, 38 Mich. 214.

¶ 1671. In proceedings to lay out a private way the jury must find that there is a necessity for it; it is not enough that they "adjudge and determine that a private highway be established."—Rundell v. Highway Com'rs, 47 Mich. 575.

§ 416. ——Jury and jurors.

Jury in eminent domain proceedings, see Eminent Domain, V, C.

¶ 1672. In proceedings to lay out a private road the constitution requires a jury. —People ex rel. Ayres v. Richards, 38 Mich. 214.

¶ 1673. A jury is indispensable in laying out a private road over another's land without his consent.—People ex rel. Ayres v. Richards, 38 Mich. 214.

¶ 1674. A statutory requirement that the venire for a jury in proceedings to lay out a private way shall be returned forthwith is practically met by making it returnable next day at one o'clock.—Palmer v. Clement, 49 Mich. 45.

¶ 1675. Jurors in proceedings to lay out a private way are not disqualified by having served in previous ineffectual proceedings, taken by the same person, for obtaining another right of way to reach the same lands. —Palmer v. Clement, 49 Mich. 45.

¶ 1676. Where a party to condemnation proceedings, to lay out a private way, instead of striking off a juror says he does not care which name is struck off, and that the highway commissioner may strike one off himself, he cannot afterward object to the course taken.—Palmer v. Clement, 49 Mich. 45.

¶ 1677. One who has taken compensation for land condemned for a private way cannot afterwards object to the validity of the proceedings on the ground of a juror's incompetency; it was his duty to inquire therein while proceedings were pending.—Chatterton v. Parrott, 46 Mich. 432.

§ 417. Costs, expenses and assessments.

¶ 1678. Whether part of the expense of opening a private road can be assessed in the shape of benefits upon the property therefor, when the owners have not petitioned for the road and do not need it, quære.—Schehr v. City of Detroit, 45 Mich. 626.

¶ 1679. Whether persons petitioning for a private road through the private property of others who do not desire it should not pay the entire expense of opening it, quære. —Schehr v. City of Detroit, 45 Mich. 626.

§ 418. Opening and application to use.

¶ 1680. The statute (How. St., §§ 1388-1393) for laying out private roads contemplates not only a record of the description and laying out, but an actual opening of the road, involving the taking down of cross-fences, and excluding the presumption that the possession is to remain in the owner of the fee.—Harvey v. Crane, 85 Mich. 316.

§ 419. Rights and easements in the way.

Construction of railroad on private way as "taking" for which compensation must be made, see Eminent Domain ¶¶ 56, 57.

¶ 1681. The owner of a private road laid out under How. St., §§ 1388-1393, is entitled to fence the right of way when such fence is a necessary incident to the reasonable enjoyment of the road.—Harvey v. Crane, 85 Mich. 316.

¶ 1682. In an action of trespass for tearing down a fence on the line of a private road, the respective rights of the owner in fee and the owner of the private road are adjudicated, that the owner of the private road has a right to an unobstructed passage at all times over the fee owner's land, and possesses such other rights as are incident or necessary to the enjoyment of such right. Where the limits of the way are defined he not only has the right of free passage over the traveled part but on such portions as he thinks proper or necessary. The owner of the fee, subject to the easement may use the land for any purpose not inconsistent with the easement. The rights of the owners of the easement are paramount, to the extent of the grant, to those of the owner of the soil. The latter is under no obligation to repair the way as that duty belongs to the owner of the easement. What is a proper and reasonable use by the fee owner is a question of fact to be determined by the trial court or jury.—Harvey v. Crane, 85 Mich. 316.

§ 420. Duties and negligence towards users of way.

¶ 1683. Premises upon which gas works are located with driveways to and from the street for wagons hauling coke need not have fences along such driveways in order to prevent injury to persons who, for their convenience, or for other reasons than defects in the usual way of entrance and departure, leave such ways and one who leaves such a way to seek a different exit becomes at best a licensee, and cannot recover for injuries from a defect at a distance from the way.—Armstrong v. Medbury, 67 Mich. 250.

¶ 1684. An injury from a mining blast to a person passing along a thoroughfare on the premises of the mining company is not excused by the fact that the road is not a public highway, if the company had opened it for the convenience of all persons who had occasion to use it.—Beauchamp v. Saginaw Min. Co., 50 Mich. 163.

§ 421. ——Pleading, evidence and trial practice.

¶ 1685. In an action for negligence for injuries from a collision in a driveway from a street to a freight house and used by patrons going to and fro, the reputation of defendant's driver as a careful driver is not in issue, and is immaterial.—Boick v. Bissell, 80 Mich. 260.

¶ 1686. In an action for injuries sustained from a collision in a drive-way it is competent to show that plaintiff was loading his wagon in the customary manner in such drive-way, and that defendant's driver knew what the customary way of loading was there, as affecting the question of his negligence in driving as close as he did to plaintiff's wagon.—Boick v. Bissell, 80 Mich. 260.

¶ 1687. The court did not err in submitting to the jury the question of contributory negligence of plaintiff injured by falling over a railing 19 inches high into an open area beside a sidewalk in an alley on defendant's premises, used by permission as a public walk, where it appeared that plaintiff worked for some time in an office on the side of such alley, from the windows of which he could look down upon it, that he had many times passed along such sidewalk, and that on the evening of his accident, though it was quite dark, he could see the sidewalk, in going along upon it, but that his attention was diverted from such sidewalk.—Breeze v. Powers, 80 Mich. 172.

¶ 1688. Where in an action for injuries received from a collision in a drive-way it appeared that plaintiff was loading his wagon in the customary manner in such drive-way, and that defendant's truck passed so near as to injure plaintiff, although there was ample room in the way, that although plaintiff saw the truck approaching when it was ten or twelve feet distant, the question of negligence of the defendant should have been left to the jury.—Boick v. Bissell, 80 Mich. 260.

¶ 1689. The question of contributory negligence should have been left to the jury, where in an action for injuries received from a collision in a driveway, it appeared that there was plenty of room for defendant to pass without colliding with plaintiff, who while loading his wagon with lumber in the customary manner in such drive-way, and with his back to defendant's wagon, stooped over to fasten a chain, the plaintiff claiming that defendant swerved his team out of a straight course, and thus striking him, defendant claiming that plaintiff threw out his foot after the front wheels passed.—Boick v. Bissell, 80 Mich. 260.

¶ 1690. One engaged in unloading freight from a truck in a railroad company's private way, and who occupies such a position as to give passing vehicles a passage way eighteen feet wide, is not bound to assume that another truck will run over him; and his failure to cease removing his freight and to guard against being struck on hearing the approach of defendant's truck is not such contributory negligence as requires a verdict for defendant, but the question is for the jury.—Foley v. Riverside Storage & Cartage Co., 85 Mich. 7.

¶ 1691. It is not contributory negligence as a matter of law for a plaintiff whose team is standing across a narrow road to move them forward two or three feet and step between the rear of the wagon and the warehouse in order to secure his load before drivnig away.—Prieur v. E. H. Stafford Co., 126 Mich. 169.

¶ 1692. It is evidence of negligence sufficient to go to the jury where the defendant drove a wagon with projecting load along a narrow road so as to come in contact with another's team and wagon standing across the road and caused the horses to back the wagon against the plaintiff who was out of sight between the rear of his wagon and a warehouse, the space for passage being visibly insufficient.—Prieur v. E. H. Stafford Co., 126 Mich. 169.

HINDERING CREDITORS to HOLES.

Cross-References.

Hindering Creditors—
- Fraudulency of transfers, see Fraudulent Conveyances.
- Fraudulent chattel mortgages and conditional sale, see Chattel Mortgages, I, D; Sales, XII.
- Ground for creditors' suit or bill in aid of execution, see Creditors' Suits.
- Ground for attachment, see Attachment § 8 et seq.
- Ground for garnishment, see Garnishment § 16.

Hiring—
- Bailments for hire, see Bailments § 11.
- Of services and labor, see Master and Servant, II.

History—
- Subject of judicial knowledge, see Evidence § 8; Indictment, VIII, A.
- As aid in constitutional construction, see Constitutional Law § 9.

Hitching Horses—
- Duty and liability of persons hitching or allowing horses in streets, see Highways §§ 368, 379.

Hitching posts as obstructions or dangers in way, see Highways, XI, XII.
Hoists—
In buildings, see Buildings; Master and Servant, III.
In mines, see Mines; Master and Servant, III.
Holding Corporations—
See Corporations, especially Corporations §§ 85, 306 et seq.; Foreign Corporations.
Illegal combinations, see Combinations.
Holding Out—
As estoppel, see Estoppel, III; Agency §§ 19, 27; Partnership, I, IV, A.
As fraud, see Fraud; Fraudulent Conveyances, I.
Holding Over—
By tenant, see Landlord and Tenant.
Remedy to expel hold-over tenant, see Forcible Entry.
Adverse possession by holding over occupancy begun under grant or lease, see Adverse Possession § 26.
By officer, see Officers, IV.
Holding to Bail or for Trial—
See Arrest, VII et seq.; Civil Arrest § 16.
Holes—
Liability for negligence in allowing holes to exist causing injury, see Highways, XII; Buildings; Carriers, IV, E, 2; Master and Servant, III; Railroads, VIII; Negligence.

HOLIDAYS.

TREATS of days appointed or proclaimed for cessation of business as distinguished from Sunday, which see.

Computation of time respecting included or final days which are holidays, see Time.
Judicial notice of holidays, see Evidence § 6.
Detention of prisoner over holiday without opportunity for bail as false imprisonment, see False Imprisonment ¶ 62.
Statutory holidays for acceptance and payment of bills and notes, holding of courts, and relative to continuance of suits, see Comp. L. 1915, § 6232. The enumerated days are: New Year's Day, Lincoln's Birthday (Feb. 12th), Washington's Birthday (Feb. 22d), Decoration Day (May 30th), Fourth of July, Labor Day (first Monday in September), Christmas Day. Also every Saturday from noon to midnight is a half holiday, and all election days, and any day appointed by the President or by the Governor as a day of fasting or prayer and thanksgiving.
Provision for holiday on ensuing Monday where date of statutory holiday falls on Sunday, see Comp. L. 1915, § 6233.
Validity of instruments executed on Columbus Day (Oct. 12th), see Comp. L. 1915, § 1095.
Provision for ordering issuance and service of writs on holiday or Sunday, see Jud. Act, chap. XIII, § 26; Comp. L. 1915, § 12429.

¶ 1. A judgment of a justice of the peace rendered on December 26th, when that was a legal holiday, is void.—Orban v. Northwestern Fire & Marine Ins. Co., 169 Mich. 404.

¶ 2. It is a judicial act for a justice of the peace to render judgment, and the performance of it involves the "holding of court." This is forbidden by Comp. L. 1871, § 1559, How. St. § 1591, for statutory holidays, or for the day following where they fall on Sunday, and a judgment so rendered is void.—Hemmens v. Bentley, 32 Mich. 89.

¶ 3. Issue of justice's summons is a mere ministerial act and valid though done on a legal holiday.—Smith v. Ihling, 47 Mich. 614.

HOLOGRAPHS to HOMEOPATHY.

Cross-References.

Holographic Wills—
See Wills, IV.
Home—
In the sense of domicile, see Domicile.
In the sense of asylum for infirm, dependent or indigent persons, see Asylums; Charities; Poor Persons.
Homeopathy—
See Medicine and Surgery.

HOMESTEADS.

TREATS of the constitutional and statutory right of a person to hold exempt from execution or other judicial process land on which he dwells and of the right of his family to hold it in succession to him.

Analysis.

I. Nature of right in general.

§ 1. Policy and construction of the law.
§ 2. Nature of exemption.
§ 3. ——Homestead "as an entirety."

II. Persons entitled.

§ 4. In general; what debtors entitled.
§ 5. Nonresidents.
§ 6. Tenants in common.
§ 7. Life tenants and lessees.

III. Property claimable or exempt; proceeds and substitutes.

§ 8. In general; character and amount.
§ 9. Rural or urban character of land.
§ 10. Parcel or "lot" comprising several parts or tracts.
§ 11. ——Effect of previous several ownership.
§ 12. Common or joint undivided interests.
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§ 14. ——Partnership property.
§ 15. Buildings on another's land.
§ 16. Equitable interests and contract rights.
§ 17. Value of property.
§ 18. Wife's separate property.
§ 19. Proceeds of sale.
§ 20. ——Property purchased with proceeds or by exchange.

IV. Liabilities inferior and superior to exemption.

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§ 30. Necessity and sufficiency of occupancy.
§ 31. ——Occupancy after levy.
§ 32. ——Occupancy in part for other purposes or by other persons.
§ 33. ——Temporary absence.
§ 34. Necessity and sufficiency of intention.
§ 35. Right to claim, claim by wife.
§ 36. ——Claim by grantee.
§ 37. Mode of assertion of claim.

§ 38. ——Selection.
§ 39. ——Appraisal.
§ 40. Abandonment, waiver or loss.
§ 41. ——Removal of family.
§ 42. ——By act of one spouse.
§ 43. ——Conveyance by husband to wife.
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§ 45. Release.
§ 46. Separation of husband and wife.
§ 47. ——Desertion by wife or husband.
§ 48. Estoppel to claim.
§ 49. ——Two homesteads.
§ 50. Death without wife or issue surviving.

VI. Alienation or incumbrance of homestead property.

§ 51. Antenuptial mortgages, contracts and c
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§ 58. Rights under sole deed.
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VIII. Setting out homestead, and subjection of excess.

§ 78. Selection by claimant.
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§ 80. Setting out as incidental relief in othe
§ 81. Subjection of excess value.

IX. Protection and assertion of right in collateral acti

§ 82. In general.
§ 83. Suits in equity.

§ 84. Suits for specific performance.
§ 85. Ejectment and summary proceedings.
§ 86. Action for damages.
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§ 88. Foreclosure suits.

Exemptions of personalty, see Exemptions.
Exemption of building and loan stock, see Exemptions § 24.

I. NATURE OF RIGHT IN GENERAL.

§ 1. Policy and construction of the law.

Validity of legislation affecting right, see Constitutional Law § 290.
Provisions of the constitution guaranteeing homestead, see Const. art. XIV, §§ 2-4.

¶ 1. Provisions exempting homesteads from execution are to be construed liberally.—Barber v. Rorabeck, 36 Mich. 399; Lozo v. Sutherland, 38 Mich. 168; Bouchard v. Bourassa, 57 Mich. 8; Canney v. Canney, 131 Mich. 363.

¶ 2. An intention to modify to the debtor's prejudice the right of exemption is not lightly to be inferred from a statute having other purposes.—Barber v. Rorabeck, 36 Mich. 399.

¶ 3. The constitutional provisions which protect homestead rights are strictly exemption provisions and give the right only against the creditors, and the statutes have not enlarged it.—Patterson v. Patterson, 49 Mich. 176.

§ 2. Nature of exemption.

See also post ¶¶ 85, 152.
Homestead "as an entirety," see post § 3.
Persons entitled, see post II.
Property claimable or exempt, see post III.
Claim of homestead as evidence of place of domicile, see Domicile ¶ 23.
Reckoning homestead as part of husband's means in fixing alimony, see Divorce § 159.

¶ 4. The homestead exemption is not an exemption of the fee, but only of the land so long as it is occupied as a homestead; the land is assets when needed for the payment of demands against the estate. So where a widow bought lands sold by her husband's administrator for the payment of debts, and afterwards sold and left them, held, that after the children became of age no one could raise the question of homestead against the validity of the administrator's sale.—Drake v. Kinsell, 38 Mich. 232.

¶ 5. The homestead right is not strictly an estate; it is merely a right to enjoy the interest of the possessor, or of the deceased husband or ancestor, as against creditors who would take it away, or as against the grantee or mortgagee of a married owner whose wife did not in due form consent to his deed.—Robinson v. Baker, 47 Mich. 619.

¶ 6. A homestead is an artificial estate in land, devised to protect the possession of the owner against the claims of creditors while the land is occupied as a home; but it does not protect a person in possession against the claims of the legal owner of the land.—Buckingham v. Buckingham, 81 Mich. 89.

§ 3. ——Homestead "as an entirety."

¶ 7. The constitution exempts a homestead only as an entirety.—Beecher v. Baldy, 7 Mich. 488; Amphlett v. Hibbard, 29 Mich. 298; Tharp v. Allen, 46 Mich. 389.

¶ 8. The ultimate fee in land which is a homestead, cannot be taken and sold under execution against the owner.—Burkhardt v. James Walker & Son, 132 Mich. 93.

II. PERSONS ENTITLED.

§ 4. In general; what debtors entitled.

Nonresidents, see post § 5.
Tenants in common, see post § 6.
Life tenants and lessees, see post § 7.
Right of grantee to claim, see post § 36.
Right of wife to claim, see post § 35, ¶¶ 99, 100.

¶ 9. A homestead not exceeding in value the legal limitation is exempt from levy and sale on execution by creditors, even though it was purchased by one already indebted.—Meigs v. Dibble, 73 Mich. 101.

¶ 10. The nature and extent of the husband's interest in a homestead of which his wife is the owner in fee, has not been very accurately defined; but it has been said that he has no technical estate which he can transfer to anybody else; but as head of a family, he has possession jointly with his wife, and has therefore a right to complain of any unlawful interference. As against creditors of the wife, he is entitled to be protected in his possession and occupancy of the homestead.—Buckingham v. Buckingham, 81 Mich. 89.

§ 5. Nonresidents.

¶ 11. No homestead rights are acquired in her husband's lands in Michigan by a

wife who never comes to or resides in the state and whose husband resides here.—Black v. Singley, 91 Mich. 50.

§ 6. Tenants in common.

Joint or undivided interests as property claimable or exempt, see post §§ 12-14.

General law as to tenants in common, see Tenants in Common.

¶ 12. A tenant in common may have a homestead right in his interest in the undivided premises.—King v. Welborn, 83 Mich. 195.

¶ 13. A tenant in common may have the benefit of a homestead in lands held in common.—Lawrence v. Morse, 122 Mich. 269.

§ 7. Life tenants and lessees.

General law as to life tenants, see Life Estates.

General law as to landlord and tenant, see Landlord and Tenant.

¶ 14. A homestead may be acquired in land held by a life tenant.—Myers v. Myers, 186 Mich. 215.

¶ 15. A lessee of lands who erects a dwelling house thereon, and actually occupies the lands, is entitled to a homestead exemption.—Maatta v. Kippola, 102 Mich. 116.

¶ 16. A son who goes upon his father's land with the father's consent, and occupies a building already there, but who takes and holds possession under no claim of enjoyment that would create a homestead interest, and after his father's death pays rent to the representative of the estate, is merely a lessee, so far as his exclusive possession is concerned, and he can convey his interest without his wife's consent.—Tharp v. Allen, 46 Mich. 389.

III. PROPERTY CLAIMABLE OR EXEMPT; PROCEEDS AND SUBSTITUTES.

§ 8. In general; character and amount.

Rural or urban character of land, see post § 9.

Parcel or "lot" comprising several parts, see post §§ 10, 11.

Common or joint undivided interests, see post §§ 12-14.

Building on another's land, see post § 15.

Equitable interests and contract rights, see post § 16.

Value of property, see post § 17.

Wife's separate property, see post § 18.

Proceeds of sale, see post §§ 19, 20.

Alienation or incumbrance, see post VI.

Setting out homestead, see post VIII.

Property rights between husband and wife, see Husband and Wife, II.

Amount of homestead exemption, see Const. art. XIV, § 2.

What constitutes homestead, see Jud. Act, chap. XXIII, § 73; Comp. L. 1915, § 12888.

Statutory provisions where property exceeds $1,500 in value, see Jud. Act, chap. XXIII, §§ 80, 81; Comp. L. 1915, §§ 12895, 12896.

¶ 17. The constitution of 1850 is repugnant to the act of 1848 as respects the value of the homestead to be exempted, and to that extent repeals it. If a place occupied as a homestead is within the constitutional quantity, but exceeds the value of $1,500, it may be reduced in quantity so as to bring it within the required value, provided it can be so reduced by division as to leave a homestead within the specific value without cutting off any of that which, in fact, goes to constitute it a homestead. In other words, so as to leave a dwelling-house, with the out-buildings and appurtenances necessary to its ordinary use as such.—Beecher v. Baldy, 7 Mich. 488.

¶ 18. If, when reduced so far as it is divisible, the homestead still exceeds the value of $1,500, it is not such a homestead as is exempted by the constitution.—Beecher v. Baldy, 7 Mich. 488.

¶ 19. Execution was levied upon land in which the debtor did not designate his homestead. He afterward sold a portion of it, and this same parcel was afterward sold to satisfy the execution, and was bid in by the creditor. Ejectment by the execution purchaser was resisted by the debtor's grantee on the ground that the officer levying execution had not set off the homestead. Held, that the plaintiff in ejectment might show that the debtor, after selling what he had of the premises levied upon, had mortgaged the rest and had referred to it in the mortgage as "that portion occupied by me as a homestead."—First Nat. Bank v. Jacobs, 50 Mich. 340.

§ 9. Rural or urban character of land.

¶ 20. An extension of village limits so as to include a farm occupied as a homestead, and within the constitutional exemption as to size and value, will not operate to reduce or diminish the right of exemption to the equivalent of a town lot, according to the recorded plat, where the property is still occupied as a homestead and cultivated as a farm.—Barber v. Rorabeck, 36 Mich. 399.

¶ 21. Platting agricultural lands for partition only, and not for sale or as town lots, will not bring them within the constitutional provision which exempts a town lot only, with the house upon it, from sale on execution; the owner remains entitled to the exemption of forty acres.—Bouchard v. Bourassa, 57 Mich. 8.

§ 10. Parcel or "lot" comprising several parts or tracts.

Effect of previous several ownership, see post § 11.

¶ 22. A widow's homestead is properly considered as covering two city lots where they adjoin fronting on the same street in a single inclosure, and both together are worth less than the amount of the homestead exemption, and where, by a mistake, her house, which was meant to stand upon one of the lots, was so built as to encroach a few inches on the other.—Geiges v. Greiner, 68 Mich. 153.

¶ 23. Where a house is constructed upon two lots a homestead may be had in the premises, and if the property is worth more than $1,500, creditors can by a sale secure their rights in the balance.—King v. Welborn, 83 Mich. 195; Lamont v. Le Fevre, 96 Mich. 175.

¶ 24. On authority of King v. Welborn, 83 Mich. 195, there may be a homestead in a lot of 60 feet front containing a dwelling house occupied by a married man as his dwelling and built in the center of the lot, one-half on each side.—Barkume v. Phelps, Brace & Co., 141 Mich. 545.

§ 11. ——Effect of previous several ownership.

¶ 25. The homestead exemption of forty acres is not affected by the fact that the parcel claimed as exempt was formerly owned in severalty by two or more persons. —Bouchard v. Bourassa, 57 Mich. 8.

§ 12. Common or joint undivided interests.

Separate floors of buildings, see post § 13.
Partnership property, see post § 14.
Building occupied only in part as dwelling of claimant, see post § 32.
Life tenants as persons entitled, see ante § 7.
Property rights between husband and wife in general, see Husband and Wife, II.

¶ 26. A homestead right may be claimed in land held in joint tenancy or in common with the wife or with others.—Lozo v. Sutherland, 38 Mich. 168; Sherrid v. Southwick, 43 Mich. 515; Tharp v. Allen, 46 Mich. 389; Cleaver v. Bigelow, 61 Mich. 47.

¶ 27. Land held by entirety may be subject to homestead.—Cole v. Cole, 126 Mich. 569.

¶ 28. A husband cannot claim, as against a judgment creditor, a homestead in an undivided one-eighth interest in fifty-seven acres of land, the remaining seven-eighths of which is owned by his wife, where the entire tract exceeds in value $1,500.—McBride v. Putnam, 99 Mich. 469.

¶ 29. A homestead will not attach to an undivided interest in a tract of land which, as a whole, exceeds the homestead limit both in acreage and in value, where there has been no separation of the undivided interests; and therefore it is not necessary to the validity of a mortgage upon such undivided interest that the wife of the owner should join therein.—Hooper v. McAllister, 115 Mich. 174.

¶ 30. Where a testator wills land upon which buildings stand to his daughter, and to his son a one-third interest in the buildings, intending the daughter to own the land where they stand and to control them, the son, living in the house but paying board to her, cannot be said to have a homestead interest therein; since he does not own the land.—Barbo v. Jeru, 155 Mich. 353.

§ 13. ——Separate floors of buildings.

¶ 31. Whether, under Comp. L. 1871, §§ 6137-6145, How. St. §§ 7721-7729, there is any practical mode, without further legislation, of working out and securing any homestead in an undivided portion of premises, particularly where a claim of homestead is set up to the upper story only of a building owned in common with other persons, quære.—Amphlett v. Hibbard, 29 Mich. 298.

§ 14. ——Partnership property.

General law of partnership, see Partnership.

¶ 32. A homestead interest in partnership land cannot be acquired by one partner.—Michigan Trust Co. v. Chapin, 106 Mich. 384.

¶ 33. A claim of homestead in partnership lands is not sustainable on a record showing no permanent residence on the land before it became partnership assets.—Chase v. Angell, 148 Mich. 1.

§ 15. Buildings on another's land.

See also ante ¶ 15.
House on leased land as homestead, see Jud. Act, chap. XXIII, § 78; Comp. L. 1915, § 12893.

¶ 34. Comp. L. 1871, §§ 6137, 6142, 6145, How. St. §§ 7721, 7726, 7729, bring within the homestead exemption houses that stand on land not owned by the person claiming the exemption. Held, that the removal of such a house by its owner to another site does not subject it to seizure and sale on execution while in transit.—Bunker v. Paquette, 37 Mich. 79.

¶ 35. No homestead right can attach to a house erected on land under contract of purchase and wrongfully removed by the vendee to a third person's land; such house being personal property.—Michigan Mut. Life Ins. Co. v. Cronk, 93 Mich. 49.

§ 16. Equitable interests and contract rights.
General principles of equity, see Equity.

¶ 36. A homestead may be claimed in land of which a party is in possession under a contract to purchase.—McKee v. Wilcox, 11 Mich. 358.

¶ 37. Where a contract purchaser, on completing his payments, causes the land to be deeded to another, he cannot claim homestead rights in it.—Fairbairn v. Middlemiss, 47 Mich. 372.

¶ 38. Homestead rights can be claimed in land held under a part-paid certificate of purchase of school land.—Allen v. Cadwell, 55 Mich. 8.

¶ 39. A written contract provided that S., in consideration of the sum of $225, would convey certain lots to L.; that L. should erect a dwelling house upon one of the lots, for which S. would furnish the lumber and do the mason work; and that L. should purchase the lots, and pay for them, and for the labor and material in the manner thereinafter provided. By a further provision, S. was to deliver to L., when the house should be completed, a statement of labor and materials furnished by him, the full amount whereof should, when agreed upon, with the $225 for the lots, be filled into "the annexed land contract," which should then be executed by the parties. No time for the payment or conveyance was otherwise provided and the contract was never executed. Held, that L. acquired no homestead rights by virtue of his possession under such contract, it amounting merely to an agreement between the parties that, in case certain conditions should be performed, a contract of sale would be made on terms to be agreed upon.—Rentchler v. Lawton, 113 Mich. 14.

¶ 40. Homestead attaches under oral contract for purchase of land followed by occupancy and where a written contract is subsequently entered into, and improvements are made.—Gardner v. Gardner, 123 Mich. 673.

§ 17. Value of property.
Subjection of excess of value, see post § 81.
Necessity for finding as to value of land in judgment for ejectment, see post ¶ 269.
Necessity that bill for protection of homestead show value, see post ¶ 245.
Constitutional provisions as to value, see Const. art. XIV, § 2.

¶ 41. In determining, in case of asserted homestead, the value of the premises with reference to the question of exemption, the value at the time the lien is claimed to have attached, not when the improvements are made, governs.—Mills v. Hobbs, 76 Mich. 122.

¶ 42. On the question whether land purchased at execution was worth more than $1,500 and therefore not within limits of a homestead, the sum paid at the execution sale is not the controlling evidence; hence in ejectment by the purchaser where the jury found the value to be less than $1,500; defendant was entitled to judgment.—Riggs v. Sterling, 60 Mich. 643.

§ 18. Wife's separate property.
See also ante ¶ 10.
What constitutes wife's separate property, see Husband and Wife, II, C.

¶ 43. Premises having the legal qualities of a homestead and occupied as such by husband and wife, though the husband has only an equitable interest, will be protected as a homestead, although the legal title in the property is vested in the wife.—Orr v. Shraft, 22 Mich. 260.

¶ 44. A husband occupying a dwelling house owned by his wife does not have a "homestead" within the meaning of Pub. Acts 1887, No. 50 (How. St. § 3981) providing for exemption from execution of building association stock unless holder has a "homestead."—Morley Bros. v. National Loan & Investment Co., 120 Mich. 171.

§ 19. Proceeds of sale.
Property purchased with proceeds or by exchange, see post § 20.
Exemption of proceeds of sale to amount of $1,500, see Jud. Act, chap. XXIII, § 81; Comp. L. 1915, § 12896.

¶ 45. General creditors of a husband have no lien on the proceeds of the sale of his homestead pursuant to a decree of divorce.—Canney v. Canney, 131 Mich. 363.

§ 20. ——Property purchased with proceeds or by exchange.

¶ 46. A homestead is established so as to defeat a bill in aid of execution by evidence that the lot in question was purchased to replace a prior homestead taken on condemnation proceedings, and that subsequent to the levy, the old house had been purchased and moved upon the new lot.—Corey v. Waldo, 126 Mich. 706.

¶ 47. A house and lot received in exchange for a homestead by a widow, or the proceeds of the sale of the homestead which are to be invested in a new home, are exempt during the transition, provided neither exceed the statutory limit of $1,500.—Steel v. Blanchette, 193 Mich. 167.

IV. LIABILITIES INFERIOR AND SUPERIOR TO EXEMPTION.

§ 21. In general.
Attachment or execution liens, see post § 22.
Judgments founded in tort or fraud, see post § 23.
Decree for alimony, see post §§ 24, 25.

Equities and equitable liens, see post § 26.
Vendor's contracts and mortgages, see post §§ 27, 28.
Incumbrances on homestead, see post VI.
Right of dower in homestead lands, see Dower § 53.
Rights and priorities under mechanics' liens, see Mechanics' Liens, VI.
Mechanics' liens on homesteads, see Mechanics' Liens, III, IV.
Invalidity of oral agreement for mechanics' lien, see Mechanics' Liens, IV.
Priorities over lien by agreement for work done on premises, see Liens.
Nonexemption of homestead from levy for taxes, see Jud. Act, chap. XXIII, § 79; Comp. L. 1915, § 12894.
Mechanics' liens on homesteads, see Comp. L. 1915, § 14797.
Liability for taxes and sale for taxes, see Jud. Act, chap. XXIII, § 79; Comp. L. 1915, § 12894.

¶ 48. While lands of an intestate descend subject to his debts under Comp. L. 1897, § 9064, an interest or estate may exist in such lands or in a part of them superior immediately to the rights of creditors; homestead rights are such interests, and these rights attach whether the estate be solvent or insolvent.—In re Emmons' Estate, 142 Mich. 299.

¶ 49. As an administrator is trustee of the assets that come into his hands for the benefit of all interested therein, he cannot, by misapplying the trust funds belonging to the estate in the purchase of a homestead, obtain a right superior to that of the creditors who have been injured by such application.—Pierce v. Holzer, 65 Mich. 263.

§ 22. Attachment or execution liens.

General law as to attachment liens, see Attachment.
Lien and priorities on execution, see Executions, V.

¶ 50. Execution cannot be levied on joint property of the husband and wife occupied by them as their homestead.—Vinton v. Beamer, 55 Mich. 559.

¶ 51. When a lien by attachment has once become operative a subsequent taking of possession for a homestead will not defeat it, although no provision is made for ascertaining the homestead right until execution is sued out.—Davis Sewing Machine Co. v. Whitney, 61 Mich. 518.

¶ 52. An attachment, levied upon a homestead during the absence of the husband and wife therefrom, fails to operate if they resume possession before the deposit in the office of the Register of Deeds of the certified copy of the writ and description of the attached property, under How. St., § 7995.—Davis Sewing Machine Co. v. Whitney, 61 Mich. 518.

¶ 53. A levy under a judgment in attachment against land alleged to have been conveyed in fraud of creditors takes precedence over a right of homestead acquired by the debtor upon a reconveyance to him subsequent to the levy.—Noble v. McKeith, 127 Mich. 163.

§ 23. Judgments founded in tort or fraud.

¶ 54. The homestead exemption holds against a judgment for costs in the defendant's favor on reversal of a judgment in the plaintiff's favor in an action of tort.—Kruger v. LeBlanc, 75 Mich. 424.

¶ 55. Const. art. XVI, § 2, exempting homesteads from forced sale on execution "for any debt contracted after the adoption of this constitution" applies to executions on judgments in actions of tort.—Mertz v. Berry, 101 Mich. 32.

¶ 56. Defendant and his wife contracted to pay $2,550 for a home, and went into possession after having paid $577, most of which was furnished by the wife. Defendant, by fraud and deceit, sold certain secret processes to complainant for $2,500, for which wrong complainant recovered a judgment of $1,500 in an action at law for deceit. Part of the $2,500 went to pay for the homestead. The execution for the $1,500 judgment was returned unsatisfied. Complainant by this bill ask to have the homestead subjected to sale to satisfy the $1,500. Held, that the bill could not be maintained, as the homestead was exempt.—Allen v. Crane, 152 Mich. 380.

§ 24. Decree for alimony.

Rights of purchaser under decree, see post § 25.
Alimony in general, see Divorce, X.

¶ 57. The constitutional provision exempting the homestead from execution has no application to the divestment of a husband's homestead right by a chancery court in allotting alimony upon divorce.—Reeves v. Reeves, 117 Mich. 526.

§ 25. ——Rights of purchaser under decree.

¶ 58. A purchaser of a homestead at an execution sale under a decree for alimony in favor of the owner's wife succeeds to her right to attack a prior mortgage as invalid because she did not join therein.—Rogers v. Day, 115 Mich. 664.

§ 26. Equities and equitable liens.

¶ 59. Where a defendant claiming property under an alleged gift inter vivos, expends the same in good faith in buildings and land, under a bill brought by the administrator to impress a lien on the same, the lien will not extend to the homestead rights of the defendant therein.—Chamberlain v. Eddy, 154 Mich. 593.

§ 27. Vendor's contracts and mortgages.
Purchase mortgages, see post § 28.
Mortgages and incumbrances of homestead, see post, VI.

¶ 60. The vendor in a land contract agreed by supplemental later contract to advance to the vendee, to enable him to make improvements upon the land, 60 per cent of the estimated value of such improvements, as the work progressed. The money so advanced was used by the vendee and his wife for the sole purpose of establishing a homestead. Nothing was paid upon the contract. Held, that the wife had no claim in equity to homestead rights as against either of the contracts.—Converse v. Barnard, 114 Mich. 622.

§ 28. ——Purchase mortgages.
Mortgages given on exchange of homesteads, see also post ¶ 203.
Validity of purchase mortgages without joinder of wife, see Jud. Act, chap. XXIII, § 74; Comp. L. 1915, § 12889.

¶ 61. A mortgage for purchase money, though not signed by the wife, is a valid security even against a homestead.—Amphlett v. Hibbard, 29 Mich. 298.

¶ 62. Where one, his wife not joining, gave a purchase-money mortgage on certain property, in half of which he possessed a homestead right, and afterward, his wife joining, conveyed an undivided half of the property with warranty, it was held fair to presume that if it was intended to convey either half, as distinct from the other, it was the half least incumbered. The mortgage would then be void as to both husband and wife so far as the homestead half was concerned, and would not be made valid by the subsequent conveyance, even though the property should cease to be a homestead.—Amphlett v. Hibbard, 29 Mich. 298.

¶ 63. A wife has no equity to interpose her homestead right against a mortgage which she had not signed, where it is given for moneys advanced for the purpose of establishing the homestead.—Fournier v. Chisholm, 45 Mich. 417.

V. ACQUISITION, CLAIM AND LOSS OR BAR OF RIGHT.

§ 29. In general.
Necessity and sufficiency of occupancy, see post §§ 30-33.
Necessity and sufficiency of intention, see post § 34.
Right to claim, claim by wife, see post §§ 35, 36.
Mode of assertion of claim, see post §§ 37, 38.
Appraisal, see post § 39.
Abandonment, waiver or loss, see post §§ 40-45.
Separation of husband and wife, see post §§ 46, 47.
Estoppel to claim or death without surviving wife, see post §§ 48-50.

¶ 64. A deed from one having no relation to the title cannot give the grantee any standing or his wife any apparent right to claim homestead.—Scofield v. Scofield, 47 Mich. 245.

§ 30. Necessity and sufficiency of occupancy.
Occupancy after levy, see post § 31.
Occupancy in part for other purposes or by other persons, see post § 32.
Temporary absence, see post § 33.
Occupancy as sufficient mode of assertion, see post § 37.
Right where wife has not lived on premises, see also post ¶ 185.

¶ 65. To entitle a party to claim land exempt as a homestead, under the law of 1848, he must both own and occupy it.—Wisner v. Farnham, 2 Mich. 472.

¶ 66. Neither the constitution nor the statute exempts a contemplated future homestead; and therefore land on which no dwelling-house has ever been erected or commenced, and on which neither the owner nor his family had ever resided, is not exempt as a homestead.—Coolidge v. Wells, 20 Mich. 79.

¶ 67. There can be no homestead rights in premises which were never occupied by husband and wife and of which it does not appear that they ever intended to make a homestead.—Lake v. Nolan, 81 Mich. 112.

¶ 68. One who resides upon property owned by him cannot claim a homestead in unoccupied property upon which he is having a dwelling house erected.—Delray Lumber Co. v. Keohane, 132 Mich. 17.

¶ 69. A city lot, purchased by a single man in contemplation of his marriage, and with the intention of making it a homestead, will be exempt as such from execution, even before any dwelling is erected on it, if the man and his wife have inclosed, improved and used it with the constant purpose of making it their home as soon as their means would permit.—Reske v. Reske, 51 Mich. 541.

¶ 70. A city lot purchased with the intention of making it a homestead for the purchaser and his family will be exempt from levy and sale on execution from the time of purchase, even though unimproved and without a dwelling thereon, if the purchaser incloses it and uses and occupies it with the constant purpose of making it his home, and uses the proceeds thereof and such means as he can procure, within a reasonable time, to erect a home thereon for his family, provided it does not exceed in quantity and value the constitutional limit. What is a reasonable time depends on the circumstances of each particular case.—Deville v. Widoe, 64 Mich. 593.

¶ 71. From October, 1881, to August, 1884, is not an unreasonably long time to begin the erection of a dwelling on a city lot claimed and bought for a homestead, where the delay was due to inability to obtain a necessary loan sooner, and where the claimant's shop had been promptly established there and the lot occupied as part of a design to build living quarters and have the shop and dwelling under one roof.—Deville v. Widoe, 64 Mich. 593.

¶ 72. A married woman and her daughter owned a lot on which there were two houses, both of which were rented at the time of the levy of an execution issued on a judgment against the mother and her husband, both of whom resided elsewhere. Held, that the mother could not constitute the property a homestead by saying that she intended to occupy it at some future time as a home.—Evans v. Calman, 92 Mich. 427.

¶ 73. Occupation of a lot for homestead purposes is shown by corroborated testimony, though it is contradicted in some particulars, that a woman sold her mortgage homestead to relieve herself of the incumbrance, and with the intention of purchasing an adjoining unimproved lot, and building and occupying a house thereon. She purchased the lot, and, before the same was levied upon at the suit of a judgment creditor of herself and husband, the location of the house had been staked out, the stone drawn upon the lot for use in constructing a cellar, which a party had been engaged to excavate, and negotiations had been had with a builder in relation to the construction of the house.—Myers v. Weaver, 101 Mich. 477.

¶ 74. Homestead was established as against an execution creditor, where a debtor to whom a village property had been devised jointly with his sister, immediately upon the vesting of the title, removed some household goods into the house and slept there nights and took breakfast and supper therein, although his wife and family continued to reside on her farm, and where the levy in question was made within 10 days of the death of the testator, but after the debtor had taken possession.—Lawrence v. Morse, 122 Mich. 269.

§ 31. ——Occupancy after levy.

¶ 75. Land under attachment levy cannot be brought within the homestead exemption merely by occupying it before the levy of execution.—Avery v. Stephens, 48 Mich. 246.

¶ 76. To exempt as a homestead land not actually so occupied at time of levy, it must appear that the intention exists in good faith to occupy it as such, and such intention must have existed prior to and at the time of the levy. If the idea is conceived after the levy, and for the purpose of defeating the lien created thereby, it cannot be upheld, although a dwelling, after the levy and before sale, is erected or moved upon the premises and occupied by the owner and his family.—Bowles v. Hoard, 71 Mich. 150.

¶ 77. Evidence that the husband expressed an intent after a levy to build on the tract levied on and that he did live there in a house for three months before sale, that the house was furnished by his father-in-law, who held a mortgage on the land, that the wife soon thereafter sued for divorce on grounds antedating their residence there and eventually procured a lien to be declared on it for alimony, does not show satisfactorily that the intention existed in good faith to occupy it as such, prior to and at the time of the levy.—Bowles v. Hoard, 71 Mich. 150.

§ 32. ——Occupancy in part for other purposes or by other persons.

¶ 78. The premises must have been set apart as a home for the purposes of the owner and his family. Where the owner of a city lot built a double house upon it, in such a way as to show that he designed it for the use of two families, and not for one, and leased one part of it, occupying the other part himself, it was held that he could not claim the whole as exempt from execution as a homestead.—Dyson v. Sheley, 11 Mich. 527.

¶ 79. Where the owner of a city lot built a double house upon it, occupying one part and leasing the other, the fact that the yard of the part leased was used by the owner in common with the tenant did not entitle the owner to claim the whole as a homestead.—Dyson v. Sheley, 11 Mich. 527.

¶ 80. A building may be exempt as a homestead though it is not exclusively occupied as a dwelling, part being used for business purposes.—Orr v. Shraft, 22 Mich. 260.

¶ 81. A homestead may be had in a hotel and the land upon which it stands.—King v. Welborn, 83 Mich. 195; Lamont v. LeFevre, 96 Mich. 175.

¶ 82. The act of a husband as occupant of a homestead in making over an old barn on part of the premises into a dwelling house and letting it for a time at a small rental does not operate to divest the entire lot of its character as a homestead, unless the value thereof is in excess of $1,500, or unless the change or leasing of the property has been consented to by the wife of such occupant in writing.—Cope v. Merriam, 194 Mich. 55.

¶ 83. Where it did not appear that the wife of a deceased occupant of a homestead, she continuing to reside there, ever consented to the barn on the premises being changed over into a dwelling house or to the leasing of the same and that the value of the lot, including the leased portion, was less than $1,500, evidence held sufficient to show

that the entire lot constituted the homestead. —Cope v. Merriam, 194 Mich. 55.

§ 33. ——Temporary absence.

Temporary absence on account of illness, see also post ¶ 117.

Loss of right by removal of family, see post § 41.

Effect of absence to validate sole mortgage, see post § 64.

¶ 84. A homestead is not lost by a temporary removal with intention of a speedy return.—Burkhardt v. James Walker & Son, 132 Mich. 93.

¶ 85. A homestead right is an artificial estate in land for the protection of the family in possession of it as a home, and its character as such depends upon both possession and the actual intention of the parties, and, while the owners may live elsewhere temporarily and, intending to return, retain their homestead rights, it is largely a matter of continuing intent, and is a fact to be proved like any other fact.—Stotts v. Stotts, 198 Mich. 605.

¶ 86. Unless one abandons his homestead right in a house, he does not lose it by living temporarily in a rented house, especially if he has left part of his furniture in it. So held where the owner was absent on business for two years and kept his family with him. —Bunker v. Paquette, 37 Mich. 79.

¶ 87. That a man rents a part of his homestead and is sometimes away from it are circumstances that do not affect his right so long as he retains a possession and claims the homestead privilege.—Pardo v. Bittorf, 48 Mich. 275.

¶ 88. A claim of homestead exemption was sustained, where, although at the time of the levy the owners were occupying other land not their own, it appeared that they had left some property in the house and had only gone elsewhere from poverty and necessity, and had always regarded it as their homestead.—Karn v. Hanson, 59 Mich. 380.

¶ 89. The temporary absence of the owner from his homestead, leaving it in a tenant's possession, but intending to return and continue it as such homestead, will not deprive the property of its exempt character.—Earll v. Earll, 60 Mich. 30.

¶ 90. The retention of homestead rights, though the party lives elsewhere temporarily, is largely a matter of continuing intent, and is a fact to be proved like any other fact.— Hoffman v. Buschman, 95 Mich. 538.

¶ 91. Absence from a homestead for six years will not deprive the owners of the protection of the statute, if during such absence they had a continuing intent to return to and occupy said homestead.—Kaeding v. Joachimsthal, 98 Mich. 78.

¶ 92. The question of good faith is one of fact where the owners of a homestead, seeking the benefit of the statute, have been absent from their homestead for six years, but claim during that period to have had a continuing intent to return to and occupy their homestead.—Kaeding v. Joachimsthal, 98 Mich. 78.

¶ 93. A woman 74 years of age who is unable to work a farm of 40 acres after the death of her husband, and has no other property, and rents the land from year to year, and works as a nurse and lives with relatives during a period of 4 or 5 years after leaving the premises, and has expressed her intention of returning to the farm cannot be deemed to have abandoned her homestead, even though she offered to sell or trade the premises so as to obtain a home near her relatives.—Steel v. Blanchette, 193 Mich. 167.

§ 34. Necessity and sufficiency of intention.

Intention to return after temporary absence, see also ante § 33, ¶¶ 84, 85, 89-93.

¶ 94. The mere ownership and occupancy of premises was not sufficient to constitute the same a homestead, under the act of March 25, 1848 (How. St. § 7721), unless there was an actual selection and choice of the premises as such by the owner and occupant.—People v. Plumsted, 2 Mich. 465.

¶ 95. Present intention of occupancy as a homestead, with present action to carry the intention into effect, constitutes a homestead in law.—Mills v. Hobbs, 76 Mich. 122.

¶ 96. Intention to erect a house without occupancy of the land in question other than to use it for the garden during the 3½ years of ownership and with no move to build, and no means to pay for the building, is not sufficient to establish a homestead.—Ware v. Hall, 138 Mich. 70.

¶ 97. On a bill to set aside a levy of land on execution on the ground that the land constituted complainant's homestead, where the only question was as to his intention to return to the property and occupy it; held, that he had no definite intention to return where it appeared that he had leased it and removed therefrom leaving a bed and some household furniture, and upon the tenant's leaving he had unsuccessfully attempted to sell the land whereupon he again leased it for five years, and again tried to sell it, and had finally occupied it when the latter tenant vacated it at the end of two years.— Ungers v. Chapman, 146 Mich. 643.

§ 35. Right to claim, claim by wife.

Claim by grantee, see post § 36.

Persons entitled to claim, see ante II.

Property claimable, see ante III.
Right of representative to invest funds of estate in homestead to injury of creditors, see Estates of Decedents ¶ 375.
Judgment or decree as bar to homestead claims of spouse not made a party, see Former Adjudication § 66.
Judgment as concluding homestead claims which might have been interposed by way of defense, see Former Adjudication § 50.

¶ 98. The object of the exemption is quite as much to protect the wife and family as the husband.—Beecher v. Baldy, 7 Mich. 488.

¶ 99. A wife can claim a homestead exemption in a farm owned by her, and upon which she lives with her husband, even though he is the head of the family, and manages the farm.—Kruger v. Le Blanc, 75 Mich. 424.

¶ 100. A wife can claim a homestead exemption in a farm on which she lives with her husband, he owning the buildings and she the land, as against her judgment creditors, to whom she has given notice of such claim, neither she nor her husband having made the statutory selection, and the husband making no claim different from or adverse to that of the wife.—Kruger v. Le Blanc, 75 Mich. 424.

§ 36. ——Claim by grantee.

¶ 101. A grantee cannot set up and rely upon a homestead right which his grantor had not made specific for his own benefit.—First Nat. Bank v. Jacobs, 50 Mich. 340.

§ 37. Mode of assertion of claim.

Selection, see post § 38.
Appraisal, see post § 39.
Setting out as incidental relief in other suits, see post § 80.
Validity of sole deed made before selection of homestead, see post § 61.
Necessity for assertion of claim, see also post ¶ 152.
Setting out homestead and subjection of excess, see post VIII.
Statutory mode for assertion and selection on levy or foreclosure sale, see Jud. Act, chap. XXIII, §§ 75-77; Comp. L. 1915, §§ 12890-12892.

¶ 102. Under said act of 1848, the homestead exemption is to be claimed after a levy and before sale. And when the land consists of a town lot, the value is to be estimated at that time.—Herschfeldt v. George, 6 Mich. 456.

¶ 103. The notification to the officer of a homestead claim was not required to be in writing under the law of 1848. It might be in any form which indicated to the officer, with reasonable certainty, the land claimed as a homestead, and might be made within a reasonable time after the debtor had notice of the levy.—Beecher v. Baldy, 7 Mich. 488.

§ 38. ——Selection.

Effect of conveyance prior to selection of homestead, see post § 61.

¶ 104. Selection is, under the constitution, only required where the tract out of which a homestead is claimed consists of a greater quantity, or is of greater value, than that instrument exempts. If the tract claimed by the debtor as exempt is all that he claims and occupies as a homestead, and is of the limited quantity and value, the whole is exempt without any other selection than is evinced by its ownership and occupation as a homestead.—Beecher v. Baldy, 7 Mich. 488.

¶ 105. A village lot and house, of less than $1,500 value, and not greater in size than the law requires for exemption, occupied by the owner with his family, does not require any action on the owner's part to exempt it from execution.—Thomas v. Dodge, 8 Mich. 51.

¶ 106. The homestead right of an execution defendant is not forfeited by his omission to select his homestead, if, being within reach, he is not actually notified of the levy or of the proceedings thereunder, and therefore does not know that any occasion has arisen to make a selection.—Griffin v. Nichols, 51 Mich. 575.

¶ 107. The selection of a homestead need not be in writing and recorded, nor need any particular formality be observed to fix the right. Occupancy of a parcel of land, within the $1,500 limit, by the placing of a dwelling-house thereon, and making the home there, is sufficient to declare it a homestead, and is notice to all of its selection.—Evans v. Grand Rapids, L. & D. R. Co., 68 Mich. 602.

§ 39. ——Appraisal.

See also post § 228.

¶ 108. Where a levy is made on land used as a homestead, the owner is not compelled to choose her homestead until the levying officer offers her an appraisal of the land.—Holley v. Horton, 164 Mich. 31.

§ 40. Abandonment, waiver or loss.

See also post ¶¶ 158, 251.
Removal of family, see post § 41.
By act of one spouse, see post § 42.
Conveyance by husband to wife, see post § 43.
Release, see post § 45.
Effect of separation of husband and wife, see post § 46.
Partial abandonment for residence purpose, see post § 44.
Loss of right by removal of house from premises, see ante ¶¶ 34, 35.

Effect on right of infant of abandonment of homestead by deceased parent, see also post ¶ 217.
Intention as affecting acquisition and claim of right, see ante § 34.
Effect on validity of sole deed of subsequent abandonment, see post § 60.
Adverse possession of homestead by one member of family against others, see Adverse Possession § 6.

¶ 109. The question of abandonment of a homestead is one of intention.—Steel v. Blanchette, 193 Mich. 167.

¶ 110. The duration of a man's absence from his own house does not of itself supply a conclusive presumption that he has abandoned it as a homestead.—Bunker v. Paquette, 37 Mich. 79.

¶ 111. In an action to establish a homestead, the question as to whether there was an intention to abandon the homestead is one of fact.—Gardner v. Gardner, 123 Mich. 673.

¶ 112. On a bill for partition of a former homestead, evidence held insufficient to show an abandonment of the homestead by the wife of the owner during the latter's lifetime.—Liebetreu v. Liebetreu, 197 Mich. 668.

¶ 113. Evidence held sufficient to show an abandonment by a husband and wife of their homestead rights in property occupied as a homestead.—Stotts v. Stotts, 198 Mich. 605.

¶ 114. A husband and wife are estopped by laches from asserting the right of a homestead in a life lease of land brought under contract, where they both abandon the property and remain away for 12 years and only make claim when the contract has been paid up by the daughter to whom the father had assigned the contract and by another daughter and her husband, and the father had been more than compensated by what his older daughters did in raising and educating one of his children.—Stotts v. Stotts, 198 Mich. 605.

¶ 115. A father's right of homestead in a farm is waived, where he has lived thereon with a son in whose favor a will was made in consideration of support, and, after the son's death has lived there and elsewhere with the son's widow in whose favor he made a new will to carry out the contract with her.—Lee v. Lee, 199 Mich. 507.

§ 41. ——Removal of family.

Effect of removal from homestead of minor children after death of parent, see also post § 75.
Loss by temporary absence, see ante § 33.

¶ 116. By removing with his family from his farm and living for five years thereafter in a city where he votes and claims his residence, one abandons the farm as his homestead even though he has left some of his household effects upon it, and has with another occupied it as a tenant.—Hoffman v. Buschman, 95 Mich. 538.

¶ 117. Complainant filed a bill to set aside an attachment levy upon property alleged to be his homestead. It appeared that he had vacated the premises a year and a half before the levy, and, with his family, had removed to a house occupied by his father, and had accepted from the latter a deed to the premises mentioned. Complainant claimed that the removal was necessary on account of his father's ill health, and was for a temporary purpose; that he never intended to abandon his homestead; that he had agreed to sell the property deeded to him by his father, and to pay the latter the surplus remaining after reimbursing himself for certain expenditures. Held, that the facts shown did not necessarily constitute an abandonment of the homestead so as to render it subject to attachment.—Hitchcock v. Misner, 111 Mich. 180.

¶ 118. A homestead is abandoned where the householder removes with his family to another building in the same city and after a year makes his home with his sister in one city and his wife and children remove to another, and where the householder never returned to the locality of the former homestead and voted elsewhere.—Smith v. Kidd, 123 Mich. 193.

¶ 119. On a bill to set aside a sale of land under execution on the ground that the land was a homestead where it appeared from the evidence that complainant had leased the land and moved with his family to the city where he had bought a house and lot taking the title in the name of his wife and they continued to live therein for five years at the expiration of which time, having separated from his wife he removed back to the farm, held that he had abandoned the homestead in the farm, and that no new homestead right had been established by his removal back to the farm because there was no fixed purpose of making the farm a homestead until complainant found occupancy necessary to save it from his creditors.—Swift v. Kleckner, 146 Mich. 91.

¶ 120. A man agreed to sell a piece of land on which he lived and which exceeded a statutory homestead. The family moved to another place and the purchaser made payments after the removal, which were accepted, the last being made after the vendor's death to his widow. Held, that the vendor's devisees could not contest the contract on the ground that it was for the sale of the homestead.—Lamore v. Frisbie, 42 Mich. 186.

§ 42. ——By act of one spouse.

¶ 121. Where a waiver of a homestead right is claimed it lies upon the party asserting it to show it by affirmative proof. But where the debtor is a married man he cannot, by any waiver, consent to a sale on execution, so as to render the sale valid, without the consent of the wife, any more than he could convey it by deed without the wife's signature.—Beecher v. Baldy, 7 Mich. 488.

¶ 122. Waiver of the homestead right by the husband does not affect the wife's interest therein, as a homestead once established cannot be waived except by abandonment or by alienation by deed.—Riggs v. Sterling, 60 Mich. 643.

¶ 123. The right of a wife to a homestead cannot be barred by desertion by the husband, or his surrender of a contract for the purchase of the land used as a homestead, nor by a conveyance of the land by the party to whom the contract was surrendered, made without the wife's consent.—Gardner v. Gardner, 123 Mich. 673.

¶ 124. Title acquired by a man and wife by adverse possession to land occupied by them as a homestead, is not divested by his sole act in subsequently contracting for the purchase of the premises from the owner of the record title.—Carlson v. Wisconsin Land & Lumber Co., 186 Mich. 212.

§ 43. ——Conveyance by husband to wife.

See also ante ¶¶ 121-123.
Alienation or incumbrance of homestead property, see post VI.
Conveyances from one spouse to other, see Husband and Wife, II, D.

¶ 125. A husband left his wife and children living upon their homestead, and bought land in another county and resided there nine years. Held, that a deed from him to his wife of his interest in the original homestead does not operate as an abandonment by her of such homestead so that she can claim homestead rights in the land upon which he now resides.—La Plant v. Lester, 150 Mich. 336.

§ 44. Partial abandonment for residence purpose.

¶ 126. Where the owner of two lots takes up his residence on one, and puts up a building which covers all the other lot and a small part of that on which he resides, his homestead right does not cover that portion of the residence lot used for the building.—Geney v. Maynard, 44 Mich. 578.

§ 45. Release.

Release of claim or right as sufficient consideration, see Contracts § 115.

¶ 127. The homestead interest can only be released to the owner of the fee.—Showers v. Robinson, 43 Mich. 502.

§ 46. Separation of husband and wife.

Desertion by wife or husband, see post § 47.

¶ 128. A wife driven from her home in this state by her husband's misconduct does not lose her homestead or other property right though she lives abroad.—Sherrid v. Southwick, 43 Mich. 515.

¶ 129. A wife driven from the homestead by her husband's cruelty loses none of her homestead rights.—Rogers v. Day, 115 Mich. 664.

¶ 130. A homestead is not abandoned by the mere absence of the owner from the state, where his wife continues to occupy the house, and it does not appear that the husband has acquired an independent homestead elsewhere.—Gadsby v. Monroe, 115 Mich. 282.

¶ 131. A letter written by a wife to her husband, who has driven her from home by his cruelty, in which she states that she will not go back to live with him, that he can use the place to help himself with, and that she will have what she took away, does not amount to a declaration of abandonment of her homestead interest.—Rogers v. Day, 115 Mich. 664.

§ 47. ——Desertion by wife or husband.

¶ 132. When a man has a homestead, if his wife leaves him without his consent to reside elsewhere, but he refuses to go with her and continues in the homestead, he is not by her leaving deprived of his exemption privilege.—Pardo v. Bittorf, 48 Mich. 275.

¶ 133. A man's homestead exemption is not necessarily destroyed by the act of his wife in abandoning him, or in beginning proceedings against him for a divorce, if he continues to treat the place as his home, working upon it from time to time, and sometimes eating or sleeping there, even though he parts with his furniture, and admits other occupants.—Griffin v. Nichols, 51 Mich. 575.

¶ 134. A homestead does not cease to be such because the homesteader's wife does not live with him.—Earll v. Earll, 60 Mich. 30.

¶ 135. Where after husband and wife had occupied certain property for three years they moved away and two years later she deserted him without cause, and subsequently wrote a letter urging him to sell the property to which he had returned, and where she afterwards conveyed it to a person who some days later reconveyed to her husband, held, that she had abandoned her

homestead right.—Farwell Brick, Tile & Clay Shingle Co. v. McKenna, 86 Mich. 283. See also Martin v. Platt, 64 Mich. 629.

§ 48. Estoppel to claim.

See also ante ¶ 114.

To claim two homesteads, see post § 49.

Estoppel or laches of creditors barring their right to question, see post ¶ 239.

Estoppel of infant by acts of abandonment by parents, see also post ¶ 217.

General principles of estoppel, see Estoppel.

¶ 136. A widow is not estopped from claiming a homestead in lands by the fact that she desired its sale for the payment of debts, and requested a party to buy the land, and received from the proceeds the amount of a claim allowed in her favor.—Showers v. Robinson, 43 Mich. 502.

¶ 137. Where a man and wife acquired title by adverse possession to land occupied by them as a homestead, the act of the husband alone in subsequently contracting with the owner of the record title for the purchase of the premises does not estop the former's widow and heirs from asserting the title previously adversely acquired.—Carlson v. Wisconsin Land & Lumber Co., 186 Mich. 212.

¶ 138. A widow having no homestead in her own right, and where no children are left surviving, is not estopped to claim homestead, under Const. art. XVI, § 4, where she elects to take under a will which provides for a sale of the real estate and the payment to her of such a sum as dower as might be agreed on between the widow and the executor, or which the court might allow in case of disagreement; and where she petitioned the court to fix the amount and the property is sold under the will, the estate being solvent and the sale not having been made to pay debts.—Koster v. Gellen, 124 Mich. 149.

§ 49. ——Two homesteads.

¶ 139. A person is not entitled to claim a homestead right in two distinct places.—La Plant v. Lester, 150 Mich. 336.

¶ 140. Two homesteads cannot exist at once; and a wife who, with her husband, has abandoned one and taken up another cannot maintain ejectment against bona fide purchasers for the first, if the deed thereof to her husband was never recorded, and he, without her knowledge or consent, but without her subsequent protest, has allowed his grantor to retransfer the premises to a stranger.—Wheeler v. Smith, 62 Mich. 373.

¶ 141. One who, at the time when a contract was made with him for building a house upon his land, and when work was begun under such contract, owns and occupies a house elsewhere in the same city, cannot defeat the contractor's lien by claiming that the premises whereon the house was built were his homestead, and that his wife did not sign the contract.—McMonegal v. Wilson, 103 Mich. 264.

§ 50. Death without wife or issue surviving.

Rights of surviving spouse and children, see post VII.

¶ 142. A homestead exemption ceases on the death of a man without wife or minor children.—Brown v. Keiser, 182 Mich. 432.

VI. ALIENATION OR INCUMBRANCE OF HOMESTEAD PROPERTY.

§ 51. Antenuptial mortgages, contracts and conveyances.

Postnuptial mortgages and conveyances, see post §§ 52, 53.

Necessity and sufficiency of wife's joinder, see post §§ 54-56.

Necessity of husband's signature to wife's deed, see post § 57.

Rights under sole deed, see post §§ 58-62.

Rights under sole mortgage, see post §§ 63, 64.

Rights under sole contracts, assignments and leases, see post § 65.

Conveyances from one spouse to other, see post § 66.

Conveyances to wife through third person, see post § 67.

Exchanges of homesteads, see post § 68.

Repurchase and revival of right, see post § 69.

Antenuptial contracts and settlements in general, see Husband and Wife, I.

Sufficiency of antenuptial contract to cut off homestead rights, see also Husband and Wife ¶ 6.

¶ 143. The assignment by a husband, one day before his marriage, of his interest in a land contract to one of his daughters, does not constitute a fraud upon the rights of the intended wife so as to be void as to her, because depriving her of homestead rights, since there was no marital relation at such time, and especially where the purpose of the assignment was to relieve the assignor of what had become, because of his financial condition, an onerous obligation.—Stotts v. Stotts, 198 Mich. 605.

§ 52. Postnuptial mortgages and conveyances.

Formal requisites, see post § 53.

Conveyance by husband to wife as abandonment or waiver, see ante § 43.

Effect of mortgage by administrator of husband, see post ¶ 215.

Vendor's mortgages and purchase mortgages, see ante §§ 27, 28.

Power of husband to alien or transfer homestead of which wife is owner in fee, see also ante ¶ 10.

Right and capacity of husband to transfer interest as lessee without wife's consent, see ante ¶ 16.
Contract rights of married woman generally, see Husband and Wife, IV.
Contract for mechanics' lien, see Mechanics' Lien, IV.
Procedure to institute and perfect mechanics' liens, see Mechanics' Liens, V.
Invalidity of mortgage or conveyance executed by both spouses where one of them is minor, see Infants, III.
Transfer of homestead as fraud on creditors, see Fraudulent Conveyances § 16.
Transfer of homestead for inadequate consideration as fraud on creditors, see Fraudulent Conveyances § 40.
Right of representative to mortgage homestead to pay debts, see Estates of Decedents ¶ 793.
Reservation in assignments, see Assignments for Creditors § 10.
Proceedings in probate court for sale of property including homestead for payment of debts of estate, see Jud. Act, chap. LIX, §§ 45-48; Comp. L. 1915, §§ 14031-14034.

¶ 144. Where husband and wife join in a mortgage of their homestead it is a renunciation of their privilege, and on foreclosure the purchaser succeeds to all their rights as if no exemption ever existed; though as to third parties the exemption continues until foreclosure.—Chamberlain v. Lyell, 3 Mich. 448.

¶ 145. A wife joined in her husband's mortgage of certain lands including the homestead. On foreclosure she claimed that the home lot was her separate property, and that she had not known that the mortgage covered it; that she had not read the mortgage nor heard it read, and that if she had she would not have recognized the home lot by its description. It appeared that the mortgagee had acted in good faith and had done nothing to mislead her. Held, that the home lot was subject to the foreclosure decree.—Peake v. Thomas, 39 Mich. 584.

¶ 146. A lease of a homestead, the title to which is in the husband, suffices to bar her right (Const. art. XVI, § 2; How. St. § 7722) if signed by both husband and wife, although the husband only is named in the body of the instrument.—Barrett v. Cox, 112 Mich. 220.

§ 53. ——Formal requirements.

See also post ¶ 154.
Necessity for husband's signature to wife's deed, see post § 57.
Invalidity of homestead mortgage where acknowledgment taken in language not understood by mortgagor, see Execution of Instruments ¶ 80.
Validity of homestead mortgage where acknowledgment made by wife in presence of her husband, see Execution of Instruments ¶ 81.
Law as to execution of instruments in general, see Execution of Instruments.
Right to have conveyance set aside for mere defect in acknowledgment, see also Acknowledgments ¶ 80.

¶ 147. A woman may unite in her husband's deed of the homestead, but her act will be wholly inoperative as a release unless it conforms to the statutory requirements.—Fisher v. Meister, 24 Mich. 447; Showers v. Robinson, 43 Mich. 502.

¶ 148. A homestead mortgage, made at the joint solicitation and in the presence of the husband and one of the mortgagees, and acknowledged in their presence, if at all—the wife not understanding English, and the acknowledging officer making a merely formal inquiry of her in that language—was held invalid.—Fisher v. Meister, 24 Mich. 447.

¶ 149. Prior to Laws 1877, Act No. 62 of 1877 (How. St. § 5662) the husband's presence during the wife's acknowledgment of a mortgage, in which she joined to bar dower or homestead rights, raised a presumption of coercion, and defeated such acknowledgment.—Fisher v. Meister, 24 Mich. 447.

¶ 150. Misdescription does not invalidate a mortgage of a homestead where it would not invalidate a mortgage of any other property and where the premises can be identified by the aid of possession.—Beyschlag v. Van Wagoner, 46 Mich. 91.

¶ 151. A verbal promise to give security cannot create a mortgage lien upon the homestead.—King v. Wellborn, 83 Mich. 195.

§ 54. Necessity and sufficiency of wife's consent or joinder.

See also ante ¶ 29.
Nonjoinder of wife as defense in suit for specific performance, see post ¶ 255.
Sufficiency of subsequent separate deed of wife, see post § 62.
Effect of subsequent divorce, desertion or death, see post § 55.
Consent obtained by fraud, see post § 56.
Effect of nonjoinder by wife in dedication to public, see also Dedication ¶ 99.
Necessity for wife's joinder for alienation or incumbrance, see Const. art. XIV, § 2.
Statutory provision as to necessity for wife's joinder, see Jud. Act, chap. XXIII, § 74; Comp. L. 1915, § 12889.

¶ 152. Under the constitution, the homestead exemption is not a personal privilege, to be claimed by the debtor, but an absolute right, necessary to the welfare of the household, of which he cannot be deprived, if a married man, without the joint convey-

ance of himself and wife.—Dye v. Mann, 10 Mich. 291.

¶ 153. The husband cannot sell, mortgage or otherwise charge the homestead without the wife's consent.—Snyder v. People, 26 Mich. 102.

¶ 154. A homestead cannot be conveyed or mortgaged without the signature of the wife as a party to the conveyance.—Ring v. Burt, 17 Mich. 465; Fisher v. Meister, 24 Mich. 447.

¶ 155. It is necessary for a wife to join her husband in the execution of a deed of their homestead.—Agar v. Streeter, 183 Mich. 600.

¶ 156. A mortgage given by a married man of his homestead requires to its validity the signature of his wife, even though at the time she is not living with him, having been driven from her home by his misconduct. The signature of a woman, then passing as his wife, when she is not, is merely void.—Sherrid v. Southwick, 43 Mich. 515.

¶ 157. A contract made by a husband to convey the homestead in consideration of the support of himself and wife is void as to her, even though she orally assents to it.—Ring v. Burt, 17 Mich. 465.

¶ 158. A homestead once selected cannot be abandoned or alienated by the husband without the wife's consent.—Evans v. Grand Rapids, L. & D. R. Co., 68 Mich. 602.

¶ 159. A contract, by which a husband and wife agreed to convey an undivided half of land consisting of a homestead to a son of the wife in consideration of the son giving the crop to the parents and the survivor of them during life and paying taxes and making repairs, and providing that at the death of the survivor the son was to receive a deed in fee simple from the heirs, executors and administrators, was void by reason of the failure of the wife to sign; and the execution of a deed by both husband and wife to the other half of the land as part of the transaction, did not avoid the force of How. St. § 7722 and Const. art. XVI, § 2, relating to conveyances of a homestead.—Webster v. Warner, 119 Mich. 461.

¶ 160. Under Comp. L. 1897, § 10363, providing that the homestead right may be cut off by a mortgage or other alienation of the land, signed by the wife, a written authority signed by a contract purchaser and his wife directing the owners of the legal title to convey the same, is an effective and legal mode of alienating the homestead.—Stephens v. Leonard, 122 Mich. 125.

§ 55. ——Effect of subsequent divorce, desertion or death.

¶ 161. Whether the wife's desertion of her husband operates to bar the constitutional provision which declares that a mortgage given upon a homestead without her signature is void, quære.—Martin v. Platt, 64 Mich. 629.

¶ 162. A covenant of warranty of title in a mortgage of a homestead, which was originally void because the mortgagor's wife did not join therein, does not operate to cure the invalidity upon the subsequent granting of a divorce to the wife.—Rogers v. Day, 115 Mich. 664.

¶ 163. A wife driven from home by her husband's misconduct carries with her all her marital rights respecting alienation or incumbrance of homestead property.—Sherrid v. Southwick, 43 Mich. 515.

¶ 164. The wife's death does not validate a mortgage made by a married man covering his homestead and not signed by her.—Shoemaker v. Collins, 49 Mich. 595.

§ 56. ——Consent obtained by fraud.

General law of fraud, see Fraud.

Frauds in procuring alienation or release, see Fraud.

¶ 165. A husband sold his homestead, inducing his wife by false pretenses to join in the deed, and immediately the grantee conveyed to the husband's mother, within four days after which the husband abandoned his home and his wife. No consideration passed for either conveyance. Held, that both deeds should be set aside for fraud.—Spiegel v. Spiegel, 64 Mich. 345.

§ 57. Necessity of husband's signature to wife's deed.

¶ 166. A married woman may convey land owned by her in fee, but occupied by herself and husband as a homestead, without his joining in the instrument.—Buckingham v. Buckingham, 81 Mich. 89.

§ 58. Rights under sole deed.

Conveyances subject to life estate of wife, see post § 59.

Effect of subsequent abandonment, see post § 60.

Conveyance prior to selection of homestead, see post § 61.

Separate quit claim deed by wife, see post § 62.

Rights under sole mortgages, see post §§ 63, 64.

Rights under sole contracts, assignments and leases, see post § 65.

Right of wife to convey by her sole deed, see ante § 57.

¶ 167. A deed by the husband, not signed by his wife, of premises occupied by them as a homestead, is not merely voidable, but wholly void, even as against the husband.—Beecher v. Baldy, 7 Mich. 488; Phillips v. Stauch, 20 Mich. 369.

¶ 168. The attemped transfer of a homestead interest, the wife not having joined, was simply void, and the money put up by the intending purchaser could be recovered in an action for money had and received. —H. Stern, Jr. & Bros. Co. v. Wing, 135 Mich. 331.

¶ 169. A conveyance of the homestead by the husband without the signature of the wife is void.—Clement v. Buckley Mercantile Co., 172 Mich. 243.

¶ 170. A husband's sole deed of land that includes his homestead is not necessarily invalid except as to so much as lies in the homestead.—Wallace v. Harris, 32 Mich. 380.

¶ 171. A deed of a tract of land including a homestead, in which the wife does not join, is void as to the entire tract, if the homestead is incapable of severance.—Sammon v. Wood, 107 Mich. 506.

¶ 172. Neither a husband nor wife can alone convey or incumber a homestead, and such an instrument being void, no action for damages for its breach lies.—Way v. Root, 174 Mich. 418.

§ 59. ——Conveyances subject to life estate of wife.

¶ 173. An attempted conveyance of a homestead by a husband without the wife's signature is invalid, though expressly made subject to a life estate previously conveyed to the wife.—Gadsby v. Monroe, 115 Mich. 282.

¶ 174. A deed of a homestead, in trust for a wife and children, providing for the use of the premises by or for the benefit of the wife and children, and an ultimate division of the land and its proceeds among the survivors of them, is void without the signature of the wife, and does not operate to convey any title to the children. The question of the wife's acquiescence not being involved, to hold that title is in the children, would operate as a decision that husband may cut off the homestead rights of his wife by a deed without her signature.—Sirr v. Miller, 121 Mich. 598.

§ 60. ——Effect of subsequent abandonment.

¶ 175. A husband's attempted conveyance of the homestead without the wife's signature is not validated by the subsequent abandonment of the homestead by the wife.—Rogers v. Day, 115 Mich. 664.

§ 61. ——Conveyance prior to selection of homestead.

¶ 176. A conveyance of premises owned and occupied, but not previously selected as a homestead, was valid without the signature of the owner's wife.—People v. Plumsted, 2 Mich. 465.

¶ 177. Where a husband and wife live on a portion of a tract of land, a deed by the husband alone will not convey the wife's homestead interest despite the fact that the husband made no definite selection of a homestead.—Cooper v. Cooper, 162 Mich. 304.

§ 62. ——Separate quitclaim deed by wife.

¶ 178. Where a married man made an oral contract with his two sons giving them moities of his farm the fact that the wife afterwards executed a separate quitclaim deed pursuant to the oral contract was not enough to comply with Const. art. XVI, § 2, providing that a homestead cannot be alienated by a married man without the valid signature of his wife.—Hooker and Grant dissenting.—Lott v. Lott, 146 Mich. 580.

§ 63. Rights under sole mortgage.

Effect of secret marriage or absence from homestead, see post § 64.

General law of mortgages, see Mortgages.

¶ 179. A mortgage of a homestead is absolutely void as to the homestead if not signed by the wife. It is not merely void as against the wife.—Dye v. Mann, 10 Mich. 291; Amphlett v. Hibbard, 29 Mich. 298; Watertown Fire Ins. Co. v. Grover & B. S. M. Co., 41 Mich. 131; Sherrid v. Southwick, 43 Mich. 515; Shoemaker v. Collins, 49 Mich. 595.

¶ 180. A subsequent mortgagee, whose mortgage is executed by both husband and wife, may take advantage of the invalidity of a mortgage given by a married man upon his homestead without his wife's signature. —Dye v. Mann, 10 Mich. 291.

¶ 181. A homestead mortgage, which is void in its inception by reason of not being executed by the mortgagor's wife, is not made valid by a subsequent conveyance by the mortgagor and wife to a third person, though the property should cease to be a homestead.—Amphlett v. Hibbard, 29 Mich. 298.

¶ 182. A. made a mortgage, his wife not joining. Held, that her homestead rights in the land thus mortgaged were not affected, either by the mortgage or by the decree foreclosing the same, she not having been a party to the foreclosure suit.—Shoemaker v. Collins, 49 Mich. 595.

¶ 183. The invalidity of a mortgage of the family homestead by the husband without the wife's joining may be availed of by an heir-at-law of the mortgagor after the latter's death.—Sherrid v. Southwick, 43 Mich. 515.

¶ 184. A court of equity has power to revive a mortgage lien on a homestead which has been discharged by means of money equitably belonging to complainant, such re-

vival not being a violation of the rule against creating a lien on a homestead without the consent of the wife.—Markillie v. Allen, 120 Mich. 360.

§ 64. ——Effect of secret marriage or absence from homestead.

Rights of absent or nonresident wife, see post § 72.

Effect of temporary absence, see ante § 33.

¶ 185. A wife, secretly married to a mortgagor and who does not join in the mortgage, is not entitled to homestead rights in the premises as against a mortgagor who was ignorant of the marriage, where she has not lived on the premises.—Hall v. Marshall, 139 Mich. 123.

§ 65. Rights under sole contracts, assignments and leases.

Rights under antenuptial contracts, see ante § 51.

¶ 186. The husband's contract not signed by the wife, and intended to have a present operation, to convey premises occupied as a homestead, is void, and cannot be enforced. —Phillips v. Stauch, 20 Mich. 369; Hall v. Loomis, 63 Mich. 709.

¶ 187. If a man conveys to his wife their homestead, and then agrees with a third person without her consent that this person, in consideration of supporting the married couple, shall have possession of the premises except the house thereon, the wife is not bound by such agreement, and is entitled to recover possession if she only gave it up on condition of support which she has not received.—Ganson v. Baldwin, 93 Mich. 217.

¶ 188. An oral contract by a married man with his two sons whereby he gave them moities in his farm, which was a homestead, is absolutely void both in equity and at law unless the wife has assented thereto in writing, being in violation of Const. art. XVI, § 2.—Lott v. Lott, 146 Mich. 580.

¶ 189. A vendee in possession under a contract of purchase cannot, where a homestead may be claimed, alienate his contract interest without his wife joining with him. —McKee v. Wilcox, 11 Mich. 358.

¶ 190. No lien is established on the homestead by a contract, signed by the husband and not by the wife, purporting to declare a lien thereon for a debt due for the construction of the dwelling house on the homestead.—Girzi v. Carey, 53 Mich. 447.

¶ 191. A patent that has been taken out by the assignee of a certificate of purchase of school land is void as between the patentee and the wife of the assignor, if she had homestead rights in the land and did not join in the assignment.—Allen v. Cadwell, 55 Mich. 8.

¶ 192. A contract giving a railroad company the right of way over land occupied as a homestead is void as against such homestead unless signed by the wife.— Evans v. Grand Rapids, L. & D. R. Co., 68 Mich. 602.

¶ 193. A contract whereby one party agrees to set out and cultivate for ten years on his homestead certain peach trees to be furnished by the other parties, who are to receive in payment a share of the peaches, the trees being planted upon a part only of the land, and the occupation and possession of buildings and land not being interfered with, need not be signed by the landowner's wife.—Dickey v. Waldo, 97 Mich. 255.

¶ 194. Const. art. XVI, § 2, providing that no mortgage or other alienation of a homestead by a married man shall be valid without the signature of the wife, includes a lease of the homestead which contemplates the exclusion of the wife from all enjoyment of the premises.—Mailhot v. Turner, 157 Mich. 167.

¶ 195. The lease of a part of a homestead by a husband without the signature of his wife is void.—Township of Jasper v. Martin, 161 Mich. 336.

¶ 196. The assignment of a life lease in a homestead, in which the wife does not join, does not deprive her of homestead rights.— Stotts v. Stotts, 198 Mich. 605.

¶ 197. Where a tenant at will erects a house on the leased land, and with his wife occupies the same as a home, an assignment of his leasehold interest, made with the assent of the lessor, is ineffectual to convey the homestead rights thus acquired, if not signed by the wife.—Maatta v. Kippola, 102 Mich. 116.

¶ 198. Under Const. art. XVI, § 2, a contract by a husband to sell a homestead, not joined in by the wife, is absolutely void, and no right of action for damages against the husband for refusal to convey pursuant to such contract can be based thereon. (By a divided court, per Blair, C. J., Ostrander, Hooker and Moore, JJ., concurring; McAlvay, Grant Montgomery and Brooke, JJ., dissenting.)—Lawrence v. Vinkemulder, 157 Mich. 294.

§ 66. Conveyance from one spouse to other.

Conveyance to wife through third person, see post § 67.

Award of homestead to one spouse on divorce, see Divorce § 140.

¶ 199. A husband's conveyance of the homestead to his wife is not void because

she does not join therein.—Lynch v. Doran, 95 Mich. 395.

§ 67. Conveyance to wife through third person.

¶ 200. A deed from A. to B. of a homestead, for the mere purpose of transferring the title to A.'s wife, which is accomplished by B.'s conveying at once to her, is not void for want of her signature. The whole transaction should be treated as a conveyance from A. to his wife.—Stevens v. Castel, 63 Mich. 111.

¶ 201. A deed from the husband to a third person of a homestead for the mere purpose of transferring the title to the wife and the husband, which is accomplished by the grantee at once executing a deed to the husband and wife, is not void for want of the signature of the wife under the Constitution, art. XIV, § 2, requiring the signature of the wife to a conveyance of a homestead, as the object of such provision is to protect the interest of the wife, and such interest is not impaired by such conveyance. —Weaver v. Michello, 193 Mich. 572. (Ostrander, J., dissenting.)

¶ 202. A wife who joins her husband in a deed of the homestead to a third party who immediately reconveys to her, does not thereby abandon her homestead right in the property.—Burkhardt v. James Walker & Son, 132 Mich. 93.

§ 68. Exchange of homesteads.

¶ 203. Where land occupied as a homestead is to be exchanged for other land evidently contemplated to be used as a homestead in lieu thereof, and the wife relinquishes her rights in the former land, the husband cannot, without her consent and signature, mortgage the other land to secure a loan from a third party with which to pay the difference agreed to be paid on such exchange.—Dikeman v. Arnold, 71 Mich. 656.

¶ 203a. A deserted husband sued for divorce and, supposing he had got his decree, married a woman who joined with him in conveying his homestead in exchange for other land upon which he was preparing to build, and in a mortgage of which his new companion joined. Subsequently he obtained his divorce, the mortgage was foreclosed by advertisement and his first wife died. Held, that he could not defeat ejectment by claiming that the mortgage was void as upon his homestead without his first wife's signature; the only homestead, so far as the latter was concerned, was that occupied before the desertion.—Trout v. Rumble, 82 Mich. 202.

§ 69. Repurchase and revival of right.

Revival of mortgage lien by court of equity, see ante ¶ 184.

Right of wife to redeem from foreclosure lands occupied as homestead but mortgaged by husband before marriage, see Mortgage, IX.

¶ 204. Where a wife has joined with her husband in an absolute deed of property which her husband had already mortgaged, a subsequent purchase of the property by her cannot revive her original rights so as to enable her, in resisting foreclosure of the mortgage, to claim homestead in the lands. —Johnson v. Van Velsor, 43 Mich. 208.

VII. RIGHTS OF SURVIVING SPOUSE, CHILDREN OR HEIRS.

§ 70. Rights of widow.

See also ante ¶ 138.

Remarriage, see post § 71.

Rights of absent or nonresident wife, see post § 72.

Protection of wife and family as purpose of exemption, see ante ¶ 98.

Rights in dower, see Dower.

Nature of widow's tenancy where she continues to occupy jointly with children of decedent, see also Descent ¶ 53.

Homestead rights of widow, see Const. art. XIV, §§ 3, 4.

Statutory provisions as to rights of widow in exemption, see Jud. Act, chap. XXIII, § 73; Comp. L. 1915, § 12888.

Rights of widow after sale of real property by administrator, see Comp. L. 1915, § 11795.

¶ 205. The constitutional provisions exempting a homestead from forced sale for the payment of debts continue the exemption after the death of the owner during the minority of his children or during the widowhood of his surviving wife.—Showers v. Robinson, 43 Mich. 502.

¶ 206. The homestead right does not attach in favor of a widow and children unless the estate is insolvent and in debt; and if it is not, it goes to the heirs at once subject to the widow's right of dower.—Zoellner v. Zoellner, 53 Mich. 620.

¶ 207. The right of a widow surviving with no children to the homestead mentioned in Const. art. XVI, § 4, is not dependent on insolvency of the estate, and may be claimed out of an estate in addition to dower or a provision in lieu of dower.—Koster v. Gellen, 124 Mich. 149.

¶ 208. Where there are no minor children of a decedent and his widow the widow cannot acquire a homestead in land occupied by decedent as a homestead during his life free from decedent's debts.—Rasor v. Mott, 196 Mich. 445.

¶ 209. No provision is made by law for a widow and children where the estate of the deceased exceeds the homestead exemption in value, but is incapable of partition and

the widow is the only creditor. In such a case, if the heirs are not in occupation and seek partition, the administrator may properly take possession and collect rents, and apply them to the payment of the widow's claim; and if she herself occupies the premises she must account for two-thirds of the rental value, which may also be applied on the debt to her. But she is entitled, as the administrator would be, to the amount of necessary expenditures made by her for repairs, taxes, etc. And in a suit to which she and the heirs are parties, if there are no other creditors, this may be ordered without impleading the administrator.—Zoellner v. Zoellner, 53 Mich. 620.

§ 71. ——Remarriage.

See also post ¶ 239.

¶ 210. A widow whose child dies after her husband, and who marries again, loses the homestead right acquired through her former husband.—Dei v. Habel, 41 Mich. 88.

§ 72. ——Rights of absent or nonresident wife.

See also ante ¶¶ 4, 185.

¶ 211. A man living with his wife and children in New York left them and came to this state, where he illegally married another woman, with whom he lived until his death. The legal wife never came to this state. Held, that the latter could claim no homestead rights in property occupied in Michigan as a homestead by the husband with the second wife.—Stanton v. Hitchcock, 64 Mich. 316.

§ 73. Homestead in addition to dower.

Dower rights in general, see Dower.

¶ 212. A widow's homestead right is not affected by the fact that dower has been set off to her in the lands.—Showers v. Robinson, 43 Mich. 502; Patterson v. Patterson, 49 Mich. 176.

§ 74. Rights of minor children.

Removal from homestead, see post § 75.
Sale subject to homestead, see post § 76.
Joinder of minor children as plaintiffs in ejectment for homestead, see post ¶ 258.
Homestead rights of minor children, see Const. art. XIV, § 2.
Statutory rights of minor children in exemption, see Jud. Act, chap. XXIII, § 73; Comp. L. 1915, § 12888.

¶ 213. Under Const. art. XVI, § 3, the homestead of a family, after the death of the owner thereof, is exempt from the payment of his debts during the minority of his children, and neither the probate nor chancery court has power to decree its sale to pay debts allowed against the estate of said owner.—Kraft v. Kraft, 102 Mich. 439.

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VIII. SETTING OUT HOMESTEAD, AND SUBJECTION OF EXCESS.

§ 78. Selection by claimant.

Suits or proceedings to set out or allot value, see post § 79.

Setting out as incidental relief in other suits, see post § 80.

Subjection of excess value, see post § 81.

Statutory mode for assertion and selection on levy or foreclosure sale, see Jud. Act, chap. XXIII, §§ 75-77; Comp. L. 1915, §§ 12890-12892.

¶ 222. After another's rights have attached to property they cannot be avoided by the capricious location of a homestead upon it in such manner as to injure the value of the adjacent premises included under these rights; as, by fixing the homestead in the center of a block of city lots.—Hanchett v. McQueen, 32 Mich. 22.

§ 79. Suits or proceedings to set out or allot value.

Sale in partition proceedings of premises indivisible in character and exceeding homestead allowance in value but not in area, see Partition.

Procedure for appraisal and setting out of homestead in course of administration of estate of decedent or guardian, see Jud. Act, chap. LIX, §§ 46-48; Comp. L. 1915, §§ 14032-14034.

¶ 223. Equity may assume jurisdiction of bill to have value of homestead ascertained and premises set off, no method having been provided by the statutes for that purpose.—Beecher v. Baldy, 7 Mich. 488; Ring v. Burt, 17 Mich. 465.

¶ 224. A wife may file a bill in equity to have a homestead right set off to her.—Comstock v. Comstock, 27 Mich. 97.

¶ 225. Where a widow is entitled to a homestead in forty acres of land worth more than $1,500 her proper remedy was by bill in equity to have a homestead of the proper value set off.—Ring v. Burt, 17 Mich. 465.

¶ 226. Comp. L. 1871, § 4594 (How. St. § 6074), the statute limiting the time for bringing suits for land held under probate sale to five years, has no application to a suit by a widow for the recovery of her homestead; since her title is such that the administrator's sale is immaterial to it.—Showers v. Robinson, 43 Mich. 502.

¶ 227. In the absence of any statutory mode of determining the value of premises claimed as a homestead, when the value is disputed, either party, after a levy has been made, may file a bill in equity asking that a selection may be made by the householder should the property be found divisible, and that the value may be ascertained whether divisible or not. The value may then be ascertained either by directing an issue to the jury or by reference to a commissioner to take proofs and report; and in this manner the rights of both parties may be secured according to the nature of the case.—Beecher v. Baldy, 7 Mich. 488.

¶ 228. In the settlement of an estate a widow was entitled as against the claims of creditors to a homestead interest of $1,500 in a certain lot, which if sold as a whole was worth $2,500, but which if divided so as to carve out a homestead interest would be worth only $1,800. Under a partition setting aside about one-third of the lot for creditors, the part so set aside would be worth only about three hundred dollars. Held, said lot was incapable of partition and the proper course was to sell the same as a whole and pay to the widow $1,500 of the proceeds.—Hamilton v. Wilcox, 167 Mich. 551.

¶ 229. Where a married woman files a bill to have a homestead right set off to her, it is no defense that her husband is, at the time of filing the bill, providing her with a comfortable home.—Comstock v. Comstock, 27 Mich. 97.

§ 80. Setting out as incidental relief in other suits.

See also ante ¶ 19.

Appraisal and setting out of homesteads on execution, see Executions §§ 47, 48.

Proper persons to be homestead appraisers on execution, see Executions § 48.

Presumption that in selling surplus interest proper allowance for incumbrances was made in appraisal, see Executions ¶ 243.

Setting out homestead as relief incidental to levy or foreclosure sale, see Jud. Act, chap. XXIII, §§ 75-77; Comp. L. 1915, §§ 12890-12892.

Proceedings in probate court for setting out homestead in administration of estate of decedent or guardian, see Jud. Act, chap. LIX, §§ 45-48; Comp. L. 1915, §§ 14031-14034.

¶ 230. Where a bill was filed in aid of an execution that was levied on a lot which had been conveyed in fraud of creditors and was occupied as a homestead, and the answer did not aver its value to be low enough to bring it within the constitutional exemption, the levy was held legal, and action should have been taken under it to ascertain the homestead right or secure such interest as might remain over in case the value of the property exceeded the amount of the levy.—Matson v. Melchor, 42 Mich. 477.

¶ 231. Where a married man gives a mortgage covering his homestead without his wife's signature, and the premises are of more than $1,500 value, the mortgage, though void as to a homestead of that value, is

good as to the residue. On bill filed to foreclose such a mortgage the court ordered a reference to a commissioner to set off as a homestead so much of the premises, with the improvements, as was worth $1,500 at the date of the mortgage, including the dwelling-house and, as far as practicable, such of the out-buildings and other improvements as might be found most essential to the enjoyment of the homestead; to the end that, on the coming in and confirmation of the report, the mortgage might be declared void as to the homestead thus set off, and good as to the residue.—Dye v. Mann, 10 Mich. 291.

¶ 232. Where a conveyance of land which embraces an undefined homestead interest, and something besides, is assailed in equity as fraudulent as against creditors, the decree setting off so much as is not exempt as a homestead should provide for an admeasurement and setting off of the homestead according to the situation and value at the date of such conveyance.—Smith v. Rumsey, 33 Mich. 183.

§ 81. Subjection of excess value.

See also ante ¶¶ 23, 42.
Value of property claimable, see ante § 17.
Necessity on creditors' bill of proof of value above homestead, see also Creditors' Suits § 5.
Mechanics' liens against excess when insufficient to bind homestead, see Mechanics' Liens, III, VIII.
Liability of excess over $1,500 under mechanics' lien where agreement therefor not signed by wife, see Mechanics' Liens, III.
Statutory provisions for subjection of excess value, see Jud. Act, chap. XXIII, §§ 80, 81; Comp. L. 1915, §§ 12895, 12896.

¶ 233. A creditor has no right to take homestead property where the interest over the amount of an existing incumbrance is less than $1,500, even though he offers to pay $1,500 for the interest.—Palmer v. Bray, 136 Mich. 85.

¶ 234. Article XVI, § 2, of the Michigan Constitution, and Comp. Laws 1897, § 10362, provide for the exemption of not over forty acres of land as a homestead. A judgment creditor of the contractual vendor of a homestead farm of forty-one acres brought garnishment to have the vendee make the payments in the contract to him. Held, the exemption applied only to the forty acres and the vendor was entitled to an exemption on only forty forty-firsts of the purchase money.—Holley v. Horton, 164 Mich. 31.

¶ 235. In distributing the surplus received from a foreclosure sale of a homestead exceeding $1,500 in value and incapable of division, a mortgage of the homestead interest is entitled to be paid before anything is applied on antecedent levies.—Vermont Sav. Bank v. Elliott, 58 Mich. 256.

IX. PROTECTION AND ASSERTION OF RIGHT IN COLLATERAL ACTIONS.

§ 82. In general.

Suits in equity, see post § 83.
Suits for specific performance, see post § 84.
Ejectment and summary proceedings, see post § 85.
Action for damages, see post § 86.
Creditors' suits and suits in aid of execution, see post § 87.
Foreclosure suits, see post § 88.
Suits to set out or allot value, see ante § 79.
Setting out as incidental relief in other suits, see ante § 80.
Actions by and against husband or wife as affected by coverture generally, see Husband and Wife, VI.
Right of other spouse to move for dissolution of attachment, see Attachment § 105.
Modifying or amending judgment to exclude homestead, see Judgments, V.
Survivability of right to sue to protect, see Abatement § 17.

¶ 236. Adverse and paramount homestead rights claimed by an execution defendant, may be brought under consideration in ejectment brought by an execution purchaser; or the defendant can move to set aside the execution sale or file a bill in equity.—Riggs v. Sterling, 51 Mich. 157.

¶ 237. A wife's homestead rights will be protected in whatever form they come in question, whether at law or in chancery.—Dikeman v. Arnold, 71 Mich. 656.

¶ 238. In a suit to establish a lien on the homestead, the wife must be joined with the husband as a party, despite the fact that the wife did not sign the instrument purporting to declare the lien on the homestead.—Girzi v. Carey, 53 Mich. 447.

¶ 239. Where an intestate died leaving a homestead valued at less than $1,500 and his widow remarried before the settlement of the estate had been closed, an unexcused delay of six years by the creditors who all the time knew of their rights to subject the homestead to the payment of their debts is such laches as will prevent them from enforcing their rights.—In re Emmons' Estate, 142 Mich. 299.

§ 83. Suits in equity.

See also ante ¶ 236.
Suits for specific performance, see post § 84.
General principles of equity, see Equity.
Suits to quiet title against homestead right, see Jud. Act, chap. XII, §§ 20-27; Comp. L. 1915, §§ 12371-12378.

¶ 240. The wife is a proper party to a bill filed by the husband to protect the homestead

against a mortgage not signed by her.—Shoemaker v. Gardner, 19 Mich. 96.

¶ 241. A wife may maintain a bill to set aside an execution levy and sale of the homestead though title thereto is in the husband.—Burkhardt v. James Walker & Son, 132 Mich. 93.

¶ 242. A husband is not a necessary party to his wife's suit to set aside a deed of their homestead for fraud practiced upon her in procuring it.—Sanborn v. Sanborn, 104 Mich. 180.

¶ 243. Where a married man, who was in possession of land not exceeding in quantity and value what is exempt from execution as a homestead, under a contract to purchase the same, surrendered and cancelled his contract of purchase without the assent of the wife, it was held that such surrender was invalid and that the wife might file a bill in equity in her own name and have a specific performance of the contract.—McKee v. Wilcox, 11 Mich. 358.

¶ 244. Where a bill is filed to protect a homestead right in land mortgaged by the husband alone, and against which a foreclosure decree has been rendered, he was properly made a party complainant although the decree is for the benefit of his family.—Shoemaker v. Collins, 49 Mich. 595.

¶ 245. A bill to protect a homestead must show all the facts necessary to a description of a homestead as defined by law, e. g., that the value of the premises does not exceed $1,500.—Shoemaker v. Gardner, 19 Mich. 96.

¶ 246. An allegation that complainants are owners in fee of certain described premises, that there is a building situated on the land, and they have their residence in it and occupy it as a homestead, sufficiently alleges that there is a "dwelling" on the premises.—Lozo v. Sutherland, 38 Mich. 168.

¶ 247. In a bill to protect a homestead against one who claims under a contract signed by the husband only, an averment that complainants live upon forty acres of land which is their homestead necessarily implies that the value of the land does not exceed the constitutional limit of $1,500, and it is therefore sufficient to support the claim of a homestead.—Evans v. Grand Rapids, L. & D. R. Co., 68 Mich. 602.

¶ 248. In a bill to set aside an execution as levied upon a homestead, an allegation "that the whole value of said premises over and above the amount of two mortgages prior in date to the date of the record of the levy of the execution * * * does not exceed the sum of $1,500," was considered sufficient on a general demurrer, though it would have been better to set forth the mortgages in detail.—Lozo v. Sutherland, 38 Mich. 168.

¶ 249. Where the homestead right is absolutely denied and its actual enjoyment seriously endangered by the foreclosure of what are claimed to be purchase-price mortgages, a bill filed by the wife to have a homestead right set off to her cannot be called premature because no execution had been levied on the premises and no sale advertised under any decree; the right properly calls for preventive remedies.—Comstock v. Comstock, 27 Mich. 97.

¶ 250. Upon a bill by a woman to set aside an assignment by her husband of a land contract, the evidence showed that the land in question was the homestead of complainant's husband and family, and that complainant did not join in the assignment, but that she did voluntarily abandon said homestead with her husband, and move to the farm taken in exchange for it, and that defendant had in good faith made valuable improvements upon the property and also incumbered it. Held, that although the assignment of the homestead without the wife's signature was void, still complainant's claim is inequitable, and the bill should be dismissed.—Bovine v. Selden, 155 Mich. 556.

¶ 251. A judgment creditor of the contractual vendor of a homestead farm brought garnishment to have the vendee make the payments on the contract to him. Complainant vendor immediately filed a bill claiming her homestead exemption and seeking an injunction of the garnishment suit. Held, she acted reasonably in claiming her exemption, and did not waive it.—Holley v. Horton, 164 Mich. 31.

¶ 252. In an action by an execution debtor to set aside an execution and levy, where it appears that he was the owner of three lots, all in one inclosure, in a village, which constituted his homestead, and which were occupied by him as such at the time of the levy, the three lots must be treated as one by the sheriff, and proceedings taken under Comp. L. 1897, §§ 10364-10366, and a levy and sale made of the two lots not occupied by his house is not authorized.—Averill v. Benzie County State Sav. Bank, 143 Mich. 306.

§ 84. Suits for specific performance.

General principles of specific performance, see Specific Performance.

¶ 253. Where the husband, without his wife's assent, cancelled his contract for the purchase of land, possessed by them as a homestead, in a suit for specific performance brought in the wife's name, the decree should be that the land be conveyed to the husband, but subject to a lien in favor of the wife for the amount she pays in fulfilling the contract.—McKee v. Wilcox, 11 Mich. 358.

¶ 254. Specific performance of a husband's contract of sale of eighty acres, including a

homestead which had never been set off, decreed. The law cannot select a homestead if one has not been already chosen.—Stevenson v. Jackson, 40 Mich. 702.

¶ 255. Where a vendee in a land contract has gone into possession, and the other party and his wife have removed therefrom and established a homestead on land bought with the purchase-money, the wife's not joining in the contract as for the sale of a homestead is no defense in specific performance.—Walker v. Kelly, 91 Mich. 212.

¶ 256. Where one party to an oral contract for the transfer of a farm containing three forty-acre tracts and an adjoining parcel of sixty-nine acres, had by fulfilling the contract on his part entitled himself to a decree of specific performance, except that the contract was void as to a homestead, it was held, no dower rights being involved, that the infirmity did not affect the parcels capable of severance, and that the forty-acre tract upon which the vendor's dwelling was situated would be treated as the homestead, and the contract declared operative as to the rest.—Engle v. White, 104 Mich. 15.

§ 85. Ejectment and summary proceedings.

General law of ejectment, see Ejectment.

General law as to summary proceedings, see Forcible Entry.

Necessity of joining defendant's wife in ejectment for lands presumptively outside homestead, see Ejectment ¶ 101.

Disability to try right in forcible entry or summary proceedings, see Forcible Entry ¶ 129.

¶ 257. A wife can maintain ejectment to recover from her husband the possession of land owned by her in fee, while he continues in occupation of it as a homestead, after she has separated from him, removed from the land and taken up her residence elsewhere, and abandoned the homestead.—Buckingham v. Buckingham, 81 Mich. 89.

¶ 258. Minor children may be joined as plaintiffs, but are not necessary, in ejectment brought by their mother to recover a homestead.—Showers v. Robinson, 43 Mich. 502.

¶ 259. Where two brothers and their wives occupied a lot of land within the constitutional requirements necessary to constitute a homestead, all are necessary parties to an action of ejectment to recover said premises.—Stoinski v. Pulte, 77 Mich. 322.

¶ 260. In an ejectment where husband and wife both occupy premises as a homestead, both must be made parties defendant.—Carby v. Combs, 166 Mich. 347.

¶ 261. In ejectment for land occupied by man and wife as their homestead both are necessary party defendants.—Cleaver v. Bigelow, 61 Mich. 47; Davis Sewing Machine Co. v. Whitney, 61 Mich. 518.

¶ 262. In an action of ejectment to recover possession of premises occupied by man and wife as a homestead the wife is a necessary party.—Kalkes v. Storms, 93 Mich. 480.

¶ 263. Where husband and wife together occupy as a homestead lands claimed to belong to the wife, ejectment against the husband alone is not the proper proceeding to test the validity of a conveyance to the wife, whose rights can be affected by no judgment respecting the title when she is not a party; a judgment against the husband cannot be the basis for disturbing her possession or expelling him from her. Action should be against both.—Hodson v. Van Fossen, 26 Mich. 68.

¶ 264. Where the claim of homestead is set up in defense to an action of ejectment in which, but for the question of homestead, the right of recovery is clear, the burden of proving the facts necessary to establish the homestead right is upon the defendant.—Amphlett v. Hibbard, 29 Mich. 298.

¶ 265. Where a homestead right is set up in defense to a suit in ejectment brought on a title obtained under a mortgage foreclosure, evidence that the defendants had conveyed to a third person after the time at which they claimed that their homestead right had attached is admissible as bearing directly on the question of their homestead rights.—Amphlett v. Hibbard, 29 Mich. 298.

¶ 266. The burden of proving a homestead right is upon the defendant who asserts it as a defense in ejectment.—Hoffman v. Buschman, 95 Mich. 538.

¶ 267. A homestead right, though not strictly an estate, cannot be tried in summary proceedings for possession.—Riggs v. Sterling, 51 Mich. 157.

¶ 268. In ejectment to recover a parcel of land claimed to have been a homestead, and therefore unlawfully sold, the finding of the trial court neither found that a homestead existed nor found facts from which it could be identified. Held, that plaintiff could not recover.—Gardner v. Thayer, 50 Mich. 128.

¶ 269. A judgment for plaintiff in ejectment based on a finding that the land claimed was occupied as a homestead, and that the mortgage thereon—under which defendant got possession—was void as not signed by plaintiff's wife, cannot be sustained where there is no finding or evidence showing the value of the land.—Martin v. Platt, 64 Mich. 629.

¶ 270. In ejectment by a mortgagee, after the foreclosure of a purchase-money mortgage without making the wife of the mortgagor a party, to recover possession of the

mortgaged premises, which are occupied by the mortgagor and his wife as a homestead, the wife is a necessary party.—Gibbs v. O'Neil, 85 Mich. 633.

¶¶ 271, 272. A mortgagor's heir at law may maintain ejectment against one who holds under a foreclosure of a mortgage of the homestead not signed by the mortgagor's wife.—Sherrid v. Southwick, 43 Mich. 515.

§ 86. Action for damages.

Measure of damages for condemnation of railroad right of way through homestead, see Eminent Domain ¶ 105.

Asserting homestead in condemnation suit to entitle to damages for lands contiguous to those taken, see Eminent Domain ¶ 246.

¶ 273. Whether a husband, when his wife owns the title to a homestead, has by virtue of the marital relation such an interest in it as entitles him to damages when she has by fraud been induced to part with it, quære.—Devereaux v. Hubbard, 117 Mich. 119.

¶ 274. Both husband and wife must join in a suit to recover damages, where the wife owns the title to a homestead and has been induced by fraud to part with it, if the husband by virtue of the marital relation has such an interest in it as entitles him to damages.—Devereaux v. Hubbard, 117 Mich. 119.

§ 87. Creditors' suits and suits in aid of execution.

Remedy to set aside representative's sale of homestead, see Estates of Decedents ¶ 746.

Proper decree on bill in aid of execution to protect and adjust homestead rights, see also Creditors' Suits § 35.

¶ 275. Where a defendant conveyed premises, after 1848, and before the new constitution, and the wife did not unite in the deed, and a judgment creditor levied upon them, and then filed bill in equity in aid of the execution, it was contended that, as the wife did not join in the conveyance, the deed was void, and she was entitled to be protected in the enjoyment of forty acres as a homestead. It was held that, if she had any equitable interest in a homestead to be selected from the premises, it could not be adjudicated in that suit, but she must join her husband in a cross-bill for the purpose.—Wisner v. Farnham, 2 Mich. 472.

¶ 276. Decree subjecting to complainants' judgments land conveyed by a father to his son in fraud of creditors, modified so as to exempt a homestead.—Walker v. Sauer, 97 Mich. 464.

¶ 277. In the settlement of an estate the widow claimed as against the creditor the entire interest in a certain lot, the latter contending that she obtained such interest by fraud upon them and was only entitled to her homestead, and a bill was filed to determine this question. The chancery court held with the creditors. Held, said court thereupon had jurisdiction to pass upon the question whether said lot should be partitioned or sold, and to determine the values involved, and this despite any provisions in Comp. Laws 1897, c. 287, §§ 10364, 10365, as amended by Pub. Acts 1899 or Comp. Laws 1897, §§ 9134, 9364 et seq.—Hamilton v. Wilcox, 167 Mich. 551.

§ 88. Forclosure suits.

See also ante ¶¶ 249, 270.

Repurchase by wife as defense to foreclosure of mortgage previously joined in with her husband, see ante ¶ 204.

General law as to foreclosure of mortgages, see Foreclosure.

Foreclosure of mechanics' liens, see Mechanics' Liens, VIII.

On foreclosure of mortgage covering homestead and other parcels, necessity of resort to homestead last, see Foreclosure ¶ 480.

¶ 278. The actual occupancy of a homestead by a wife entitles her to be made a party defendant to forclosure of a mortgage covering the homestead.—Haviland v. Chase, 116 Mich. 214.

¶ 279. Where a bill is filed to foreclose a mortgage on a homestead, a general demurrer on the ground that there is an adequate remedy at law and that it is an attempt to deprive the defendants of constitutional rights, is properly overruled as not stating an objection to the bill sufficiently specific to comply with requirements of chancery court rules.—People's Sav. Bank of Saginaw v. McKay, 173 Mich. 236.

¶ 280. The wife of a mortgagor is not a necessary party defendant to foreclosure suit despite the fact that she claims a homestead right in the premises, where mortgage was given as purchase-money mortgage by husband alone.—Amphlett v. Hibbard, 29 Mich. 298.

¶ 281. Suffering a decree foreclosing a mortgage made by a married man and covering his homestead to be taken pro confesso in a suit where no issue as to homestead rights was raised, and where the wife was not impleaded does not conclude her.—Shoemaker v. Collins, 49 Mich. 595.

HOMICIDE.

TREATS of the criminal killing of human beings and of assaults with homicidal intent or intent to do great bodily injury or with weapons or means endangering life. It excludes general law of crimes, indictments and prosecutions in matters not distinctively or peculiarly pertaining to homicide or homicidal assaults (see Crimes; Indictment).

Analysis.

I. The killing or corpus delicti.

§ 1. In general.

II. Murder.

§ 2. Nature and elements of the crime.
§ 3. Intent.
§ 4. Malice and premeditation.
§ 5. Degrees.
§ 6. Murder or manslaughter.
§ 7. Heat of passion and cooling time.
§ 8. Killing in perpetration of other crime.
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III. Manslaughter.

§ 10. Nature, elements and degrees of the crime.
§ 11. Killing incident to unlawful act.
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§ 13. Killing by misuse of weapons without homicidal intent.
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IV. Assault with intent to kill; attempt to kill.

§ 15. Nature and elements of homicidal assaults.
§ 16. ——To do great bodily harm less than murder.
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§ 18. Assault on several without specific person in mind.
§ 19. Assault on one intending another.

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§ 23. ——Menace and apprehension of danger.
§ 24. ——Duty to retreat or avoid encounter or seek help.
§ 25. ——Right as affected by malice, anger or intent.
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§ 27. Defense of property or habitation.
§ 28. Defense of another.
§ 29. Resistance to unlawful arrest.
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§ 31. Participation under duress or unwillingly.

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§ 33. Averments as to manner and means.
§ 34. Averments as to other intended felonies.

§ 35. Averments as to grades and degrees.
§ 36. For statutory homicides.
§ 37. For manslaughter.
§ 38. For homicidal assaults.
§ 39. For assault with intent to do great bodily harm.
§ 40. Issues and variance.
§ 41. Sufficiency of murder indictment to support second degree or manslaughter.
§ 42. Sufficiency to charge included and lesser assaults.

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§ 82. Verdict.
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I. THE KILLING OR CORPUS DELICTI.

§ 1. In general.
Admissibility of evidence, see post § 47.
Weight and sufficiency of proofs, see post § 62.
Instructions, see post § 73.

¶ 1. Where a fatal wound has been given it is no defense that death, when it took place, was precipitated by medical treatment. —People v. Cook, 39 Mich. 236.

¶ 2. There can be no conviction of manslaughter on evidence that the accused knocked the deceased down with his fist and a horse jumped on him or kicked him and thus killed him.—People v. Rockwell, 39 Mich. 503.

¶ 3. The doctrine of relation cannot be so applied as to make the crime of murder complete at a specified time if the death did not take place until later.—Chapman v. People, 39 Mich. 357.

II. MURDER.

§ 2. Nature and elements of the crime.
Corpus delicti and cause of death, see ante § 1.
Effect of statutory division of crime into degrees, see post § 5.
Assault with intent to murder, see post IV.
Justification or excuse for killing, see post V.
Sufficiency of the indictment or information, see post § 32 et seq.
Admissibility of evidence, see post § 46 et seq.
Admissibility of dying declaration, see post § 54 et seq.
Sufficiency of evidence, see post § 61 et seq.
Instructions, see post § 72 et seq.
Killing outside of conspirators' purpose, complicity of all, see also Crimes ¶ 56.
Murder defined, see Comp. L. 1915, § 15192.

¶ 4. Murder is where a person of sound memory and discretion unlawfully kills any reasonable creature in being, in the peace of the state, with malice prepense or aforethought, either express or implied.—People v. Potter, 5 Mich. 1.

§ 3. Intent.
Intent in homicidal assaults, see post §§ 16, 17.
Malice in the crime, see post § 4.
Presumptions and burden of proof, see post § 44.
Instructions, see post § 74.
Incapacity for specific intent from drink, see also Crimes § 14.

¶ 5. To constitute murder the intent need not be to take the life of the person killed, or even to inflict a personal injury upon him, but must be equivalent to a criminal purpose aimed against life, and generally there must be an intent to commit either a specific felony, or at least an act involving all the wickedness of a felony; if the intent be directly to produce a bodily injury it must be such an injury as may be expected to involve serious consequences, either perilling life or leading to great bodily harm.—Wellar v. People, 30 Mich. 16.

§ 4. Malice and premeditation.
Heat of passion and cooling time, see post § 7.
As to meaning of "deliberate," see post ¶ 10.
Absence of premeditation as reducing crime to manslaughter, see also post § 10.
Provocation as defense by justification, see post § 20.
Presumptions and burden of proof, see post § 44.
Instructions, see post § 74.

¶ 6. Malice aforethought does not signify deliberate and calculating malice, but only malice existing at any time before the act, so as to be its moving cause or concomitant.—Nye v. People, 35 Mich. 16.

¶ 7. Malice, as used in defining murder, includes not only anger, hatred and revenge, but every other unlawful and unjustifiable motive. It is not confined to particular ill-will to the deceased, but is intended to denote an action flowing from a wicked and corrupt motive; a thing done, as the books say, malo animo; where the fact has been

attended with such circumstances as carry in them the plain indication of a heart regardless of social duty, and fatally bent upon mischief.—People v. Borgetto, 99 Mich. 336.

¶ 8. The rule of the common law in respect to malice is not changed by the statute dividing the offense of murder into degrees; the statute only relates to its application by the jury in determining the degree of guilt. —People v. Potter, 5 Mich. 1.

§ 5. Degrees.

In manslaughter, see post ¶ 24.
Facts warranting charge on second degree, see post ¶ 254.
Murder by poisoning, see also post ¶ 249.
Intended degree in homicidal assault, see post ¶ 42.
Specification of degree in verdict, see post § 82.

¶ 9. The statute has not altered the common-law definition of murder, but, recognizing it, has simply divided it into classes or degrees of enormity, for the purpose of apportioning the punishment.—People v. Doe, 1 Mich. 451; People v. Potter, 5 Mich. 1; People v. Scott, 6 Mich. 287.

¶ 10. In dividing murder into degrees its common-law qualities are not changed, but (except in special cases) the division is chiefly between cases where the malice aforethought is deliberate and where it is not; and the term "deliberate" is not applicable to any act done on a sudden impulse.—Nye v. People, 35 Mich. 16.

¶ 11. Facts which constitute murder at the common law do not necessarily make the act murder of the first degree under the statute.—People v. Potter, 5 Mich. 1.

§ 6. Murder or manslaughter.

See also post ¶ 37.
What constitutes heat of passion or cooling time, see post § 7.
Killing in commission of other crime, see post § 8.
Evidence as to malice and premeditation, see post § 48.
Weight and sufficiency of evidence, see post §§ 63, 64.
Questions for court or jury as to grade of the crime, see post § 70.
Instructions as to degree or character of killing, see post §§ 75, 76.
Killing of quickened unborn child as manslaughter, see Comp. L. 1915, §§ 15223, 15224.

¶ 12. The distinction between manslaughter and murder is vital, resting chiefly on the greater disregard for human life shown in murder. In determining whether an unintentional killing is murder or manslaughter, the nature and extent of the injury or wrong actually intended must usually be of controlling importance.—Wellar v. People, 30 Mich. 16.

¶ 13. Manslaughter may in some cases be intentional; and in such case it differs from murder because it is provoked. It is not justifiable to take life under provocation, and yet the provocation may be serious enough to deprive the intentional killing of its malicious character so that it is neither murder on the one hand nor justifiable or excusable on the other.—Nye v. People, 35 Mich. 16.

¶ 14. Voluntary homicide is no more than manslaughter if provoked by unlawful violence and by a display of deadly weapons, designed to compel submission to an unlawful arrest.—People v. Burt, 51 Mich. 199.

¶ 15. A homicide is murder and not manslaughter where there is evidence of actual malice, or if the provocation to it was resented in a brutal and ferocious manner evincing a malignant disposition, or if before it was committed there was time for the perpetrator's passion to subside and his blood to cool.—People v. Lilley, 43 Mich. 521.

¶ 16. If a homicide is committed under the influence of passion, or in heat of blood, produced by an adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control, and is the result of the temporary excitement by which the control of reason was disturbed, rather than any wickedness of heart or cruelty or recklessness of disposition, the offense is manslaughter only, and not murder.—Maher v. People, 10 Mich. 212.

¶ 17. To reduce the offense to manslaughter the reason must, at the time of the act, be disturbed or obscured by passion to an extent which might render an ordinary man of fair average disposition liable to act rashly, or without due deliberation or reflection, and from passion rather than judgment. —Maher v. People, 10 Mich. 212.

¶ 18. In order to reduce a crime from murder to manslaughter, the rule is that reason should, at the time of the act, be disturbed or obscured by passion to an extent which might render ordinary men, of fair, average disposition, liable to act rashly or without due deliberation or reflection, and from passion, rather than judgment.—People v. Poole, 159 Mich. 350.

§ 7. Heat of passion and cooling time.

See also ante ¶ 15.
Killing in heat of passion as manslaughter, see ante § 6.
Evidence of facts to excite passion, see post § 48.
Questions for jury, see post § 70.
Instructions, see post § 74.

¶ 19. Where the whole transaction from the first attack on accused out of doors to the final shooting in the house to which he went is in its nature a single transaction, occupying altogether less than fifteen minutes, it is not proper, for the purpose of raising the question of cooling time, to treat it as two distinct and separate transactions. —Hurd v. People, 25 Mich. 405.

§ 8. Killing in perpetration of other crime.

Killing incident to unlawful act as manslaughter, see post § 11.

¶ 20. A criminal assault resulting in death is either murder or manslaughter in Michigan.—People v. Adams, 52 Mich. 24.

§ 9. Killing in execution of process.

Justifiable killing of officer making unlawful arrest, see post § 29.

¶¶ 21, 22. One who kills an actual felon in trying to arrest him, without knowing or believing him to be guilty, commits murder, especially if he is not an officer, since an arrest cannot be made without a warrant on causeless suspicion, and in the absence of actual belief of guilt, based on actual facts that create probable cause.—People v. Burt, 51 Mich. 199.

III. MANSLAUGHTER.

§ 10. Nature, elements and degrees of the crime.

Corpus delicti and cause of death, see ante § 1.
Intent and malice, see post §§ 3, 4.
Degrees of crime and facts amounting to murder as distinguished from manslaughter, see post §§ 5, 6.
What constitutes heat of passion and cooling time, see post § 7.
Killing in commission of other crime, see post § 8.
Killing in execution of process, see post § 9.
Murder and manslaughter distinguished, see ante § 6.
Heat of passion as reducing killing to manslaughter, see ante § 6.
Intentional manslaughter, see ante ¶ 13.
Killing in repulsion of attack but not in fear of life, see post ¶ 59.
Homicidal assaults, see post IV.
Sufficiency of the indictment or information, see post §§ 37, 38.
Weight and sufficiency of proofs, see post § 64.
Instructions, see post § 72 et seq.
Defining manslaughter in charge, see post § 72.

¶ 23. Manslaughter is the unlawful killing of another without malice or premeditation, though it often involves a direct intent to kill; where voluntary it arises from the sudden heat of the passions and is the result of temporary excitement wherein the reason is so distu sion that an ordin disposition is liable due deliberation or sion rather than ju 43 Mich. 521.

¶ 24. There is slaughter fixed by recognize any gra People v. Rogulski,

§ 11. Killing incide
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¶ 25. A person tempting to do an human life, unde guilty of manslaug the act attempted common law. So a woman pregnan child, resulted fro a miscarriage by made punishable a St. § 9108.—People

¶ 26. One who, two persons, runs without provocatio him down, for the other to whip him, if the person so s placed in a helple the other a kick —People v. Carter

§ 12. Negligent ki
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¶ 27. The term something more t as wantonness a quences which m to the rights of to a criminal inte Mich. 179.

¶ 28. That the was struck and ki ning in excess o law, was the resu negligence of th order to convict People v. Barnes,

¶ 29. In order manslaughter for struck by an aut of the speed fixed

that the driver's conduct was wilful, and with reckless disregard for the safety of others, and that the unlawful speed was the proximate cause of the accident.—People v. Barnes, 182 Mich. 179.

¶ 30. That an automobile at the time it struck and killed a pedestrian was running slightly in excess of the speed fixed by statute is not sufficient to render the driver guilty of manslaughter, where the deceased, in her excitement and confusion, jumped in front of the car at a time when it was impossible to stop it.—People v. Barnes, 182 Mich. 179.

¶ 31. Notwithstanding that the contributory negligence of a person who was struck and killed by an automobile running in excess of the speed fixed by statute, is no defense to a charge of manslaughter, yet his conduct should be considered as bearing upon the claimed culpable negligence of the respondent.—People v. Barnes, 182 Mich. 179.

¶ 32. The law recognizes that under some circumstances the omission of a duty owed by one individual to another, where such omission results in the death of the one to whom the duty is owing, will make the other chargeable with manslaughter; but the duty neglected must be a legal duty, not a mere moral obligation, and the omission to perform such duty must be the immediate and direct cause of death.—People v. Beardsley, 150 Mich. 206.

¶ 33. Where a man and woman voluntarily drink and become intoxicated together in the man's room, and the woman commits suicide by taking an overdose of morphine, the man owes her no such legal duty of care and protection as will render him guilty of manslaughter through his failure to obtain medical assistance for her.—People v. Beardsley, 150 Mich. 206.

§ 13. Killing by misuse of weapons without homicidal intent.

¶ 34. If one knowingly draws a revolver which he is unlawfully carrying, and, pointing it at another for the purpose of scaring him, shoots and kills him, or if while in a state of voluntary intoxication he unknowingly shoots him, he is equally guilty of manslaughter.—People v. Slack, 90 Mich. 448.

¶ 35. One who kills another as the result of failure to use reasonable care in handling firearms at common law is guilty of manslaughter.—People v. Rogulski, 181 Mich. 481.

¶ 36. Where the respondent attempted, either by a ruse or violence, to take a gun from its owner with the intention of permanently depriving him of it, and while the respondent wrongfully but without malice was pointing the gun towards its owner it was discharged and he was killed, the respondent was guilty of manslaughter as the result of the careless use of firearms in violation of Comp. Laws 1897, § 11511, How. Ann. St., 2nd Ed., § 14560.—People v. Rogulski, 181 Mich. 481.

¶ 37. Upon the question whether, where one chases another with intent to catch him and slap his face, and draws a pistol with intent to fire in the air and scare the fugitive, and accidentally shoots and kills him, the offense is manslaughter, the court was equally divided.—People v. Stubenvoll, 62 Mich. 329.

§ 14. Killing in drunken assaults.

Death in drunken debauch for want of care, see ante ¶ 33.

¶ 38. One who, while in a state of voluntary intoxication, unknowingly shoots and kills another, is guilty of manslaughter.—People v. Slack, 90 Mich. 448.

IV. ASSAULT WITH INTENT TO KILL; ATTEMPT TO KILL.

§ 15. Nature and elements of homicidal assaults.

Assaults with intent to do great bodily harm, see post § 16.
Intent and malice, see post §§ 17, 19.
Conviction for assault under indictment for assault with intent to murder or to do great bodily harm, see post § 42.
Weight and sufficiency of proofs, see post § 65.
Instructions, see post § 78.
Simple assaults and specific statutory assaults below an assault with intent to do great bodily harm less than murder, see Assault, I.
Shooting as simple assault, see Assault § 1.

¶ 39. There is no such statutory offense in Michigan as an assault with "intent to kill," and as all killing is not unlawful, such an intent will not necessarily involve guilt or malice so as to make the killing murder. There is no such qualified assault at common law differing in any way from a simple assault.—Wilson v. People, 24 Mich. 410; Wright v. People, 33 Mich. 300.

¶ 40. There can be no specific intent without deliberation, and as an act done on sudden impulse, like manslaughter, cannot be deliberate, there can be no such offense as an assault with intent to commit manslaughter.—People v. Lilley, 43 Mich. 521.

¶ 41. Wherever an assault with intent to kill is committed, and the circumstances are such that, if death had ensued, the killing would have constituted murder at the common law, the offense of assault with intent to commit murder, under the statute, is complete.—People v. Scott, 6 Mich. 287.

¶ 42. On an indictment for assault with intent to murder it is immaterial whether the murder intended would, if consummated, have been murder of the first or second degree.—People v. Scott, 6 Mich. 287.

§ 16. ——To do great bodily harm less than murder.

Fear of great bodily harm as justifying killing in self-defense, see post §§ 22, 23.
Sufficiency of indictment to sustain conviction of lesser assault, see post § 42.
Presumptions and burden of proof, see post § 45.
Evidence as to the intent in the assault, see post § 50.
Evidence as to gravity of harm done, see post § 53.
Weight and sufficiency of proofs, see post § 66.
Instructions as to character of assault, see post § 75.
Assault with intent to do great bodily harm, see Comp. L. 1915, § 15227.
Lesser felonious assaults defined, see Comp. L. 1915, § 15228.

¶ 43. How. St. § 9122a, defining the crime of assault with intent to do great bodily harm less than the crime of murder, contemplates an intent to do a serious injury of an aggravated nature.—People v. Troy, 96 Mich. 530.

¶ 44. How. St. § 9122a, adopted in 1883, providing for the punishment of persons who commit assaults with intent to do great bodily harm, less than the crime of murder, was designed to prescribe a more severe punishment than could be imposed under pre-existing laws for assaults committed with intent to do serious injury of an aggravated nature; and it is not essential to a conviction under such statute that the assault should have been such that, if death had resulted, respondent would have been guilty of murder.—People v. Ochotski, 115 Mich. 601.

¶ 45. A respondent on trial for assault with intent to do great bodily harm should not be confined to the right of repelling an assault from the person struck by him, where it appears that there was a quarrel going on at the time; the character and extent of the provocation should not be omitted from the inquiry.—People v. Ross, 66 Mich. 94.

¶ 46. The fact that respondent indicted for assault with intent to do great bodily harm did not intend to fracture a rib or injure the kidneys when he kicked the person assaulted asserting an intent to kick his "liver out," will not avail to reduce the offense to assault and battery. If his intent was to injure the assaulted party seriously in one vital organ, and he missed it, and injured another, the intent to do great bodily harm existed, and could be inferred from the fact that resp
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§ 17. Intent and m
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§ 18. Assault on se
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V. JUSTIFIABLE

§ 20. In general.

Resisting or preven
Self-defense, see po
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Defense of relative
§ 28.
Resistance to unlav
Killing or aiding
§ 31.

Justification as servant or by superior command, see post § 30.
Right to defend against provoked assault, see post ¶ 72.

¶ 51. There is no positive rule for the definition of justifiable homicide; it must depend upon the circumstances and surroundings of each case.—Patten v. People, 18 Mich. 314.

¶ 52. A mistake of law as to one's right to take life will not justify or excuse homicide.—People v. Cook, 39 Mich. 236.

¶ 53. Uncontrollable anger and excitement do not excuse the commission of desperate acts of violence, whatever the provocation, and render them less liable to punishment.—People v. Mortimer, 48 Mich. 37.

§ 21. Resisting commission of crime.
Protection of parent or relative from riot, see also post ¶¶ 79, 81.
Killing of suspected despoiler of master's wife, see post ¶ 83.

¶ 54. A dangerous felony may be forcibly prevented by any one who is not himself in the wrong directly or by complicity.—People v. Curtis, 52 Mich. 616.

¶ 55. Private persons may forcibly interfere to suppress a riot or resist rioters; and they may justify homicide in so doing, if they cannot otherwise suppress them or defend themselves, their families or property. —Pond v. People, 8 Mich. 150.

¶ 56. Threats will not excuse a homicide where the respondent could not reasonably have supposed that the killing was necessary to prevent forcible felony.—People v. Cook, 39 Mich. 236.

¶ 57. It is immaterial to the justification of homicide in resisting a forcible felony whether the act was a felony at the common law, or made such by statute.—Pond v. People, 8 Mich. 150.

§ 22. Self-defense.
See also post ¶ 66.
Apparent menace and apprehension as test, see post § 23.
Duty to retreat or avoid encounter, see post § 24.
Effect of malice, anger or intent on right of self-defense, see post § 25.
Allowable force to be used, see post § 26.
Defense of property, habitation or of other persons, see post §§ 27, 28.
Threats not menacing to life or portending felony, see ante ¶ 56.
Excessive force under provocation as raising killing to murder, see also ante ¶ 15.
Self-defense against mere assaults, see Assault § 7.
Burden of proof and shifting of burden on self-defense, see post § 43.
Sufficiency of evidence, see post § 67.
Questions for jury and instructions, see post §§ 70, 79.

¶ 58. It is the right and duty of one who is assailed and put in personal peril to protect himself without leaving it to others to protect him to their own risk.—People v. Lilly, 38 Mich. 270.

¶ 59. Where one who has just been assaulted and set upon by another is immediately followed up in a threatening manner by the person committing such assault with the intention of scaring or frightening him, into his own house, and through one of the rooms, in the presence of his family, and there shoots and kills such intruder, the killing, if done under the belief, with good reason, that it was necessary to shoot the assailant to save his own life, or to protect himself from danger of great bodily harm, is excusable homicide; and if done under a less degree of fear, and in the excitement and confusion caused by the threatened repetition of the attack, and if, but for this provocation, the shooting would not have occurred, the crime does not exceed manslaughter.—Hurd v. People, 25 Mich. 405.

§ 23. ——Menace and apprehension of danger.
See also ante ¶ 59.
Evidence to show menace and fear, see post § 52.
Instructions as to danger and fear or belief in danger, see post § 79.

¶ 60. Any serious bodily harm, like mayhem, apprehended from a felonious attack, justifies extreme resistance, and the assailed cannot be required to draw very fine distinctions as to the extent of the injuries likely to be inflicted.—Brownell v. People, 38 Mich. 732.

¶ 61. One who is threatened with immediate attack by an assailant is authorized to act, and his actions are to be judged, in the light of the circumstances as they appeared to him at the time; and if the assailant follows him up in a threatening manner, for the purpose of frightening him, and so as to make him believe that a violent attack is imminent, it is immaterial whether a forcible attack was actually intended or not. —Hurd v. People, 25 Mich. 405.

¶ 62. The necessity for taking human life need not be one arising out of actual and imminent danger, in order to excuse the slayer; but he may act upon a belief, arising from appearances which give him reasonable cause for it, that the danger is actual and imminent, although he may turn out to be mistaken. His guilt must depend upon the circumstances as they appeared to him. —Pond v. People, 8 Mich. 150; Patten v. People, 18 Mich. 314.

¶ 63. One cannot justify the killing of an assailant on the ground of self-defense, if

it was done through mere cowardice, or under circumstances that, as they appeared to him at the time, were not sufficient to induce in him a reasonable belief that he was in danger of bodily harm.—People v. Coughlin, 67 Mich. 466.

§ 24. ——Duty to retreat or avoid encounter or seek help.

Dependence on others for self-protection, see ante ¶ 58.
Question for the jury, see post § 70.
Instructions, see post § 79.

¶ 64. It is not necessary for a person, if without fault, when suddenly assaulted upon the public highway or upon his own premises, and when an instant's delay may be at the expense of his own life, to retreat before using his weapon.—People v. Macard, 73 Mich. 15.

¶ 65. One who honestly believes that his life is in danger and that immediate shooting is the only way to get rid of his assailant is not guilty of murder if he shoots and kills before retreating into his house and locking the door.—People v. Keuhn, 93 Mich. 619.

¶ 66. Homicide in resisting an assault not made with felonious intent is excusable where the danger to be resisted is to life, or of serious bodily harm of a permanent character, and unavoidable by other means in the power of the slayer so far as he is able to judge at the time. But he is bound, if possible, to get out of his adversary's way, and has no right to stand up and resist if he can safely retreat or escape.—Pond v. People, 8 Mich. 150.

¶ 67. A man assaulted in his dwelling is not obliged to retreat, but may use such means as are absolutely necessary to repel the assailant from his house, or prevent his forcible entry, even to the taking of life.—Pond v. People, 8 Mich. 150.

¶ 68. When a forcible felony is attempted against person or property, the person resisting the attempt is not obliged to retreat, but may pursue his adversary, if necessary, till he finds himself out of danger. But he may not properly take life if the evil may be prevented by other means then within his power.—Pond v. People, 8 Mich. 150.

¶ 69. A man was attacked after dark upon his own premises, where his wife and family were, by a powerful and violent man who was in liquor, and in self-defense killed him. Held, that if he believed with reason that it was necessary to kill his assailant for the protection of his own life, or to save himself from great bodily harm, it was an excusable homicide, and that he was under no obligation to flee, or to call for the interference of by-standers.—People v. Lilly, 38 Mich. 270.

¶ 70. One who
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card, 73 Mich. 15.

§ 25. ——Right as intent.

Provocation as a
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Instruction on arn
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¶ 71. Where th
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card, 73 Mich. 15.

¶ 72. It is erro
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People v. Curtis,

§ 26. ——Degree

¶ 73. The degr
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Mich. 451.

§ 27. Defense of

Attempted entry
use of force,
Boat as dwelling
Admissibility of
Instructions, see

¶ 74. The owne
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Mich. 490.

¶ 75. A root-h
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defense.—People

¶ 76. A mere
homicide.—People

¶ 77. And as regards the right of self-defense a building thirty-six feet distant from a man's dwelling-house, used for preserving the nets employed in the owner's ordinary occupation of a fisherman, and also as a permanent dormitory for his servants, is, in law, a part of his dwelling, though not inclosed with the house by a fence; a fence is not necessary to include buildings within the curtilage, if within a space no larger than that usually occupied for the purposes of the building and the customary outbuildings.—Pond v. People, 8 Mich. 150.

§ 28. Defense of another.

See also ante ¶ 69.

Justification of servant by cause pertaining to master, see post § 30.

¶ 78. The same circumstances which excuse or justify homicide in defense of one's self will excuse or justify it in defense of his servant.—Pond v. People, 8 Mich. 150.

¶ 79. A person whose mother resides with him, and who, from his knowledge of her weak and peculiar physical condition, has reason to believe that her life is endangered by riotous proceedings about his dwelling, is justified in the like steps to protect her against the consequences of the riotous proceeding that he would be in case of a direct attack upon her person, provided he has first informed the rioters of her condition, or used all reasonable or practical efforts to do so.—Patten v. People, 18 Mich. 314.

¶ 80. Homicide in defense of a woman's chastity is not justified by a belief that the deceased had been using fraudulent, but not forcible, means, as by administering drugs, to effect a seduction not accomplished at the time of the killing.—People v. Cook, 39 Mich. 236.

¶ 81. A man has a right, in a riotous affray, to interfere for the protection of a brother who is in personal danger, whether the brother was blameless or not. And the use of a deadly weapon in such interference does not of itself show malice where neither began the affray and there had been no space for cooling time nor opportunity to withdraw safely.—People v. Curtis, 52 Mich. 616.

§ 29. Resistance to unlawful arrest.

Killing officer unlawfully executing process as murder, see also ante § 9.

Admissibility of evidence, see post § 52.

Instructions, see post § 79.

Facts warranting officer in attempting arrest without warrant, see Arrest §§ 2, 3.

Crime of resisting officer, see Crimes § 113.

¶ 81a. Where an officer, attempting to make an arrest on reasonable suspicion of felony, is asked for his authority, and says he has a warrant, but refuses to produce it, and makes no explanation whatever, but makes the arrest with circumstances of violence, and the person arrested resists and kills the officer, he is not guilty of murder in so doing.—Drennan v. People, 10 Mich. 169.

¶ 82. A small river boat is not a dwelling so as to excuse an assault with intent to commit murder, committed upon an officer attempting to serve process by the owner who slept on one of the seats of the boat.—People v. Bernard, 125 Mich. 550. Writ of error dismissed, 184 U. S. 697, 46 L. ed. 764, 22 Sup. Ct. Rep. 940.

§ 30. Justification as agent or servant.

Defense of servant as justification, see ante § 27.

¶ 83. One who is the mere agent of the husband for the purpose of detecting his wife's adultery cannot justify or excuse the killing of the suspected adulterer by proof of his previous adultery with the employer's wife.—People v. Horton, 4 Mich. 67.

§ 31. Participation under duress or unwillingly.

Sufficiency of evidence, see post ¶ 223.

¶ 84. One is not excused for aiding and assisting in a murder by having been threatened three days before with the loss of his life if he does not aid in the commission of the offense.—People v. Repke, 103 Mich. 459.

VI. INDICTMENT OR INFORMATION.

[Note. Formal matters relating to indictments or informations and matters of substance or averment not peculiar to indictments for homicide are treated in Indictment, I.]

§ 32. In general; for murder.

Averments as to manner or means, see post § 33.

Averments as to other intended felonies, see post § 34.

Averments as to grades and degrees, see post § 35.

Indictments for manslaughter and statutory homicides, see post §§ 36, 37.

Indictments for homicidal assaults, see post § 38.

Indictments for assault with intent to do great bodily harm, see post § 39.

Variance as to time and place, see post § 40.

Charge of "murder" in manslaughter indictment as surplusage, see post ¶ 94.

Matters general to all indictments, see Indictment, I.

Necessity of essential matters of description in simplified forms of indictments, see Indictment, I, B.

Allegations as to aiding and abetting, see Indictment, I, B.

Different counts and joinder of counts in same indictment, see Indictment, I, C.

Statutory form, see Comp. L. 1915, § 15739.

¶ 85. An indictment for murder purporting to set out the crime specifically and substantially in the common-law method must be construed by common-law rules.—People v. Carr, 64 Mich. 702.

¶ 86. An information for murder cannot omit or misdescribe any fact which at common law was regarded as an essential element of the crime.—Chapman v. People, 39 Mich. 357.

§ 33. Averments as to manner and means.

Essentials of description, see also ante § 32.
Provision dispensing with allegations of manner and means, see Comp. L. 1915, § 15739.

¶ 87. A count in an information charging an attempt to murder by poison cannot be objected to on the ground that it does not set forth the special circumstances.—Templeton v. People, 27 Mich. 501.

¶ 88. An information charging that the accused, at a time and place stated, "feloniously, wilfully, and of her malice aforethought, did kill and murder," etc., without stating the means by which the murder was done, is sufficient.—People v. Bemis, 51 Mich. 422.

§ 34. Averments as to other intended felonies.

¶ 89. The words "ravish" and "rape," as used in alleging manner and means in an information charging respondent with murder committed in the perpetration or attempted perpetration of rape, imply force and violence in the man and want of consent in the woman, and are equivalent to the words "by force and against her will." Rape need not be technically charged.—People v. Willett, 105 Mich. 110.

¶ 90. An information for murder in the form of the statute, Comp. Laws 1915, § 15739, is sufficient, although it does not state that the murder was committed while a robbery was being perpetrated or attempted.—People v. Page, 198 Mich. 524.

§ 35. Averments as to grades and degrees.

Information for murder by poisoning without averment of degree, see also post ¶ 249.
Conviction of second degree under indictment for murder, see post § 41.

¶ 91. An information charging murder without specifying the degree is sufficient, under the statute, to support a conviction for murder in the first degree.—Sneed v. People, 38 Mich. 248; Cargen v. People, 39 Mich. 549.

§ 36. For statutory homicides.

Variance as to force in manslaughter by abortion, see post § 40.

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§ 37. For manslaught

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see ante § 36.
Variance of proof fr
§ 40.
Conviction under in
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Joinder of counts, se
Statutory form, see

¶ 93. A statutory
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v. Olmstead, 30 Mich

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§ 38. For homicidal a

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Assault with "intent
charge, see post
Sufficiency of indict
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§ 39. For assault wi bodily harm.

¶ 96. An informati
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language of the statute, is sufficient to support a conviction of assault with the intent to do great bodily harm less than the crime of murder, although it fails to aver willfulness or malice aforethought.—People v. Wright, 144 Mich. 586.

¶ 97. An information for an assault with intent to do great bodily harm, less than the crime of murder, which charges the offense in the words of the statute (How. St. § 9122a) is sufficient, without setting out the weapon with which the assault was made.—People v. Ochotski, 115 Mich. 601.

§ 40. Issues and Variance.

Conviction of lesser degree or included assault, see post §§ 41, 42.

Issues and variance in indictments other than for homicide or in matters general to all indictments, see Indictment, I, E.

¶ 98. An information for murder, which sets forth the assault and death as concurrent in time and place is bad, where the evidence shows that the person assaulted died at a different place from that at which he was struck.—Chapman v. People, 39 Mich. 357.

¶ 99. An information for manslaughter, which clearly apprises the respondent that he is charged with causing the death of a pregnant woman through an unlawful attempt to procure a miscarriage, but alleges that the act was committed "with force and arms," will support a conviction under proof that the deceased consented to the attempt; the question of consent being immaterial.—People v. Abbott, 116 Mich. 263.

§ 41. Sufficiency of murder indictment to support second degree or manslaughter.

Instructions on included degrees, see post § 81.

Conviction of lesser assaults under indictment for murderous assault, see post § 42.

¶ 100. Under the statutory short form of information for murder, there may be a conviction of manslaughter.—People v. Roguiski, 181 Mich. 481.

¶ 101. Under an indictment in the common-law form the defendant may be found guilty of murder in the second degree.—People v. Doe, 1 Mich. 451.

§ 42. Sufficiency to charge included and lesser assaults.

Sufficiency of evidence of lesser assault, see post ¶ 222.

Instructions on included offenses, see post § 81.

General rules as to indictments covering lesser included crimes, see Indictment, I, E.

Conviction or acquittal of simple assault as bar to felonious assault, and vice versa, see Crimes § 21.

Verdict of manslaughter as bar to higher degrees, see Crimes § 21.

¶ 102. An information charging an assault with intent to murder sustains a conviction of the lesser offense of an assault with an intent to do great bodily harm less than the crime of murder.—People v. Prague, 72 Mich. 178.

¶ 103. An information charging assault with intent to kill and murder will sustain a conviction for assault with intent to do great bodily harm less than the crime of murder, where the evidence justifies such verdict.—People v. Townsend, 120 Mich. 661.

¶ 104. The offense of an assault with intent to do great bodily harm, less than the crime of murder is a statutory offense and does not include the lesser one of battery.—Turner v. Circuit Judge, 88 Mich. 359.

¶ 104a. A defendant cannot be convicted of assault and battery under an information charging him with the offense of assault with intent to do great bodily harm, less than the crime of murder, but not charging a battery.—People v. Andre, 194 Mich. 524.

¶ 104b. Defendant was indicted on a charge of assault with a pistol with intent to do serious bodily harm. The theory of the defense was that defendant did not use a pistol at all. Held, that under this charge and defense, the defendant might be convicted of a simple assault with a pistol without intent to do bodily harm, since the jury might not believe the evidence of either side in its entirety.—People v. Hoffman, 154 Mich. 145.

¶ 105. Two persons tried for assault with intent to do great bodily harm less than the crime of murder may be convicted of assault and battery if the lesser offense was properly alleged in the information.—People v. Ellsworth, 90 Mich. 442.

¶ 106. A respondent cannot be convicted of assault and battery under an information charging him with the statutory offense of "assault with intent to do great bodily harm less than the crime of murder," but not charging a battery; nor can the information be amended, after verdict and before judgment, so as to include such latter charge.—Turner v. Muskegon Circuit Judge, 88 Mich. 359.

VII. EVIDENCE.

A. IN GENERAL.

§ 43. Presumptions and burden of proof.

As to intent or malice, see post § 44.

As to intent to do great bodily harm, see post § 45.

Judicial notice, presumptions and burden of proof generally, see Indictment, VIII, A.

Statutory rule as to necessity of disproving that abortion was necessary to save life, see Comp. L. 1915, § 15226.

¶ 107. Where it is sought to have the jury convict of murder in the first degree, the burden of proof is upon the prosecution to show such facts, in addition to the act of killing, as will make the act murder in the first degree.—People v. Potter, 5 Mich. 1; People v. Scott, 6 Mich. 287.

¶ 108. Malice aforethought is as essential an ingredient of the offense of murder as the act of killing and the presumption of innocence applies equally to both ingredients. Hence the burden of proof as to each rests upon the prosecution.—Maher v. People, 10 Mich. 212.

¶ 109. Where there is evidence tending to show that defendant acted in self-defense, the burden of proof is upon the people to satisfy the jury that the homicide was not committed in self-defense, and that no reasonable belief existed in defendant's mind that he was in great bodily danger as the facts and circumstances appeared to him at the time.—People v. Coughlin, 65 Mich. 704, 67 Mich. 466.

¶ 110. It is not a presumption that the mere presence of by-standers will prevent an assailant from inflicting extreme injury. —Brownell v. People, 38 Mich. 732.

§ 44. ——As to intent and malice.

See also ante ¶ 108.

¶ 111. In general, where the assault is not committed with a deadly weapon, the intent must be clearly felonious to make the killing murder, and though the presumption arising from the character of the instrument of violence is not conclusive, yet where such weapons are used as do not usually kill, the deadly intent ought to be left in no doubt.—Wellar v. People, 30 Mich. 16.

¶ 112. In a prosecution for murder, an intent to take life justifying a verdict of murder in the first degree is, in the absence of explanatory evidence, presumable from proof that the mortal wounds were inflicted by respondent with a deadly weapon.—People v. Wolf, 95 Mich. 625.

¶ 113. The intent of one intervening in a fight, which resulted in a homicide, to assist the aggressor in vanquishing the person attacked need not be shown by his statements, but is inferable from his conduct.—People v. Carter, 96 Mich. 583.

§ 45. ——To do great bodily harm less than murder.

¶¶ 114, 115. The intent of a respondent to do great bodily harm less than the crime of murder may be inf
—People v. Miller,

§ 46. Admissibility,
As to corpus delic
post § 47.
As to malice, pren
post §§ 48, 49.
As to intent, see p
As to negligence i
§ 51.
As to justification
see post § 52.
As to aggravation
see post § 53.
Dying declarations,
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Curtis, 52 Mich.

¶ 118. Evidence is admissible on a trial for murder, of a search of and the finding of firearms by the police on the premises of the accused.—People v. Cona, 180 Mich. 641.

¶ 119. In a prosecution for murder, where the killing was by shooting, since a case must be made up by piecemeal, it is not error to admit in evidence an automatic pistol owned by defendant, although the fact that he owned it, and that it might have been used does not prove that defendant used it, or any deadly weapon, to kill deceased.—People v. Lahnala, 193 Mich. 144.

¶ 120. In a prosecution for murder, where the killing was by shooting, since a case must be made up piecemeal, it is not error to admit evidence that an automatic pistol owned by defendant was designed to fire such cartridges as were apparently used by the murderer, and that such cartridges could not be used in an ordinary revolver. —People v. Lahnala, 193 Mich. 144.

¶ 121. Upon a prosecution for a murder committed with a gun, a witness with whom respondent was familiar, was shown the gun-case belonging to the gun used, and was asked if it was respondent's gun-case. He said he did not know; he had never seen it at respondent's house, or in his possession, but he had seen a case that looked like it lying around a good while at the place where he himself worked, and that he had not known what became of it or whose it was until a few weeks before, when a certain person turned up. The person referred to testified that he was familiar with that kind of gun, and was allowed to explain its workings to the jury. The respondent himself said on cross-examination that he had had the gun and case about two months, and that they had been handed to him, but he refused to tell by whom. Held, that it could not be said that these facts were clearly irrelevant to the charge of murder.—People v. Wilson, 55 Mich. 506.

¶ 122. In connection with evidence of the mutilated condition of a human body found in a lake, testimony by medical witnesses that a substance found upon a log near by was that called "testicles," though whether of a human being or not the witnesses could not tell, was admissible.—People v. Barker, 60 Mich. 277.

¶ 123. Testimony of a witness, in a prosecution for murder, that he had found a certain paper with certain blood stains upon it at the house where the offense was committed on a certain Sunday next after discovery of the body on Friday, held properly admitted, and its weight was for the jury.—People v. Winney, 196 Mich. 347.

¶ 124. Testimony of a witness, in a criminal prosecution for murder, that he had discovered certain tracks in some of the victim's blood remaining on the floor of the room where she was killed about two months after the murder which he identified as those of the accused, held properly admitted and not too remote, in view of other testimony as to such marks two or three days after discovery of the body, where the premises had not been disturbed since discovery of the body up to discovery of the marks by the witness testifying.—People v. Winney, 196 Mich. 347.

¶ 125. In a prosecution for homicide committed in a riotous affray among neighbors and apparently in defense of a brother, all facts leading thereto and connected with it should be admitted, including the conduct of other participants besides respondent, and especially of those who provoked the assault. The dangerous character of the deceased and his disposition when drunk are also material; and so would be the fact that the person in whose behalf respondent interposed was afraid deceased would cut him as he had others.—People v. Curtis, 52 Mich. 616.

¶ 126. It is prejudicial error, on a trial for manslaughter by running down a person with an automobile, to admit evidence as to the average rate of speed of the car from a point a mile or more distant until speed was slackened just before the deceased was struck.—People v. Barnes, 182 Mich. 179.

¶ 127. Evidence of the speed of an automobile several blocks from the place where a pedestrian was struck by it and killed is not admissible on the trial of the driver for manslaughter.—People v. Barnes, 182 Mich. 179.

¶ 128. In a criminal prosecution against a physician for causing death by abortion, it is proper to permit a witness to testify that she saw the deceased at respondent's office on the day of the alleged operation.—People v. Fritch, 170 Mich. 258.

§ 47. ——As to cause of death or corpus delicti.

Evidence of nature of ensuing ailments as showing gravity of bodily harm inflicted, see post § 53.

Evidence of character of animal tissue found near scene of crime, see also ante ¶ 122.

Weight and sufficiency of proofs, see post § 62.

Other abortions as disproving accidental death, see Indictment, VIII, B.

Medical opinions as to causes and conditions, see Indictment, VIII, B.

¶ 129. On a trial for the murder of one of twin infants who were put in one crib at night in good health, and were found dead in the morning with similar marks of violence on each, testimony showing the death

of the other infant, and the appearance of its body, is properly admitted on the question whether the one for the killing of which the accused is held came to its death by violence; it being apparent, from the circumstances, that both came to their death from the same cause.—People v. Foley, 64 Mich. 148.

¶ 130. In the prosecution of a mother for the murder of her daughter by morphine it is competent to show that the stomach of the other child who died at the same time, also contained morphine, where the proofs indicated that the poisoning of both children was one transaction.—People v. Quimby, 134 Mich. 625.

¶ 131. Evidence of the character of the wounds upon the body of a person whose killing by respondent was a part of the same transaction which resulted in the death of another person, for whose murder he is tried, is admissible.—People v. Wright, 89 Mich. 70.

¶ 132. Under an information charging manslaughter by abortion it is proper to establish the corpus delicti not only by the post-mortem examination, but also by the medical history of her case consisting of the fact of the pregnancy of the deceased, her illness, her treatment, and by whom, and her condition generally up to the time of her death. —People v. Aikin, 66 Mich. 460.

¶ 133. In a prosecution for murder of a father who was killed at the same time and at the same place as the son, it is not error to admit evidence of the son's wounds.—People v. Sartori, 168 Mich. 308.

¶ 134. Where a respondent is charged with criminally assaulting his son in a barn, evidence as to the appearance of the barn, and of articles within it, and of the wounds on the son's head, is properly admitted to prove whether the respondent or a horse inflicted the injuries.—People v. Hennard, 162 Mich. 225.

¶ 135. In a proscution for murder where the theory of the people was that the accused took the body of the deceased in a buggy to a river and threw it in, to give the idea of a suicide, evidence of statements made at coroner's inquest, by the accused as to his lack of fear of dead bodies, and that as a student in a medical college he transported a dead body in a buggy so that people thought it was a living man, was relevant.—People v. Swartz, 118 Mich. 292.

¶ 136. A man was prosecuted for killing his wife by poison. Arsenic was found on a post-mortem examination. Held error to exclude evidence of transactions in the house, between the death and the burial, which bore on the use of antiseptics in embalming. —People v. Millard, 53 Mich. 63.

¶ 137. In a prose by arsenic poisoning she had been sick a ment, the circumsta of two extra physic are admissible.—Pe 63.

¶ 138. On a trial Comp. L. 1871, § which makes the at born child manslaug the child or its mo dence as to a pecu observed by a wi mother and changed fore she died was v. Olmstead, 30 Mi

§ 48. ——On motive
On intent, see post
Personal feelings a or deceased as malice, see post
Sufficiency of infe § 63.
Declarations and ad ing or motive,
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¶ 139. Evidence sibly made in jest deceased, is admiss may be construed i of subsequent even question of malice. Mich. 364.

¶ 140. Evidence t person attacked w under such circums belief that adulter that he followed t on the way was committed adultery followed the person of excitement and proper evidence, as act was committed i sion excited by th state of mind whi the homicide, had acter of manslaugh ple, 10 Mich. 212.

¶ 141. In a prose a doctor, on a charg by means of arseni of deceased whom had died under si that the viscera sh to arsenic, was pro ing motive or inten the existence of a MacGregor, 178 Mi

§ 49. ——Personal bearing on
As bearing on int

Admissibility of dying declarations in proof of previous threats, see post ¶¶ 178, 182, 184.

Meretricious relations of accused husband or wife as bearing on motive, see also Indictment, VIII, B.

¶ 142. Evidence that a wife's general disposition was bitter and vindictive is inadmissible in the prosecution of her husband for her murder, either generally or for the purpose of affecting her dying declaration against him.—People v. Simpson, 48 Mich. 474.

¶ 143. Where deceased had been absent from the neighborhood of the prisoner some eight or ten months preceding the alleged offense, it was held competent for the prosecution to show the state of feeling between the prisoner and deceased immediately preceding such absence.—Dillin v. People, 8 Mich. 357.

¶ 144. Defendant being charged with the murder of his wife, evidence that before the alleged murder he had been arrested on charge of a crime committed upon her is competent as tending to show hostile relations existing between them, which would bear upon the question of motive, and tend to prove malice.—Washburn v. People, 10 Mich. 372.

¶ 145. In a trial for homicide the previous relations of the prisoner with the deceased may be shown in explanation of conduct and motives.—Wellar v. People, 30 Mich. 16.

¶ 146. In the prosecution of a husband for the murder of his wife it was proper to show that for some time previously they had not lived peaceably together and that respondent had threatened to shoot or kill the deceased. But testimony as to alleged relations between the wife and third persons of questionable reputation are inadmissible where there is no pretense that the latter were guilty of the offense and they are not on trial.—People v. Simpson, 48 Mich. 474.

¶ 147. It is not clearly error, in a murder case, to admit evidence of ill-feeling between the accused and the victim, extending back two years before his death, though such a showing would be certainly remote.—People v. Bemis, 51 Mich. 422.

¶ 148. In a prosecution for the murder of an unmarried woman, the fact that deceased was a witness for respondent in divorce proceedings against him on the ground of cruelty may be shown as bearing upon the relations which existed between them, and as tending to support the claim that respondent was the author of the pregnancy of the deceased, and that this furnished the motive for the crime.—People v. Parmelee, 112 Mich. 291.

¶ 149. Where in a criminal prosecution for an assault with intent to do bodily harm less than the crime of murder, the undisputed evidence indicates that the complaining witness was in full retreat at the time defendant shot him, and no question of self-defense is involved, it is proper to refuse respondent permission to introduce evidence as to previous trouble between himself and the complaining witness, of acts and threats of the latter, and as to the reason for the conduct of respondent's wife and daughter in bringing the guns to defendant during the dispute.—People v. Durham, 170 Mich. 598.

¶ 150. Where no element of self-defense is involved in a criminal charge, independent affirmative evidence by the defense as to the acts and conduct of the party assaulted, prior to the commission of the offense, is admissible.—People v. Durham, 170 Mich. 598.

¶ 151. In a prosecution for assault with intent to murder a wife, it is error to permit her to testify that she married defendant under a threat, where the nature of the threat is not made clear and there is no evidence that it was made at a time and under circumstances having a bearing on the issue being tried.—People v. Rohl, 166 Mich. 315.

¶ 152. Respondent and the deceased were chums, and on friendly terms with a certain girl. On the trial of respondent for killing the deceased, held, that to show motive, testimony was admissible by the girl that a month before the death respondent had told her she would never speak to the deceased again if she knew the things he said about her.—People v. Droste, 160 Mich. 66.

¶ 153. In a prosecution for the assault of a wife with intent to murder, it is error to permit the state to show that respondent, being repulsed in an attempt to embrace his wife, said, "Damn you, I wish I had shot that cur (referring to a third person) in New York when I had an opportunity," such statement being introduced in evidence to show that defendant had threatened his wife.—People v. Rohl, 166 Mich. 315.

¶ 154. The relation of the parties may properly be shown where the theory of the prosecution in a murder trial was that the murder was committed through a conspiracy between defendant and the mother of the deceased.—People v. MacGregor, 178 Mich. 486.

§ 50. ——On intent.

¶ 155. In a prosecution for assault with intent to do great bodily harm less than the crime of murder, the people may show that the prior relations of the parties were unfriendly, and specific threats and acts of violence on respondent's part may be given in evidence.—People v. Deitz, 86 Mich. 419.

¶ 156. In a prosecution for assault with intent to do great bodily harm less than the crime of murder, the people may show, as bearing upon the question of intent, the violence of the assault.—People v. Sutherland, 104 Mich. 468.

¶ 157. In a prosecution for assault with intent to commit murder upon an officer serving process, the fact that the process was void is immaterial where previous threats and present attempt to commit murder are shown without proof of any attack by the officer.—People v. Bernard, 125 Mich. 550. Writ of error dismissed in 184 U. S. 697, 46 L. ed. 764, 22 Sup. Ct. Rep. 940.

¶ 158. On an issue of whether a death was caused by a criminal abortion, testimony that the accused had in her possession the instruments for producing abortion, and reported conversations extending over a period of four years prior to the alleged crime, in which the accused held herself out for the performance of such service for hire, were admissible as tending to show knowledge and intent.—People v. Sessions, 58 Mich. 594.

§ 51. ——On negligence in manslaughter.

Evidence as to speed at other times or places, see ante ¶¶ 126, 127.

Other acts and neglects to show negligence, see generally Indictment, VIII, B.

¶ 159. Evidence of comparisons between the use of coal and oil as fuel under steam boilers was not admissible in a prosecution for criminal negligence in leaving steam boilers unattended whereby a high steam pressure generated and an explosion resulting in death occurred; coal not having been used under the boilers in question.—People v. Thompson, 122 Mich. 411.

¶ 160. In a prosecution for manslaughter as the result of negligence in leaving boilers unattended, testimony that the respondent had previously been warned that danger would follow his absence from the boiler room, was competent.—People v. Thompson, 122 Mich. 411.

§ 52. ——On justification or excuse.

Evidence of threats to show malice, see ante § 49.

Sufficiency of proofs, see post § 67.

General repute of deceased as admissible evidence bearing on belief in danger of attack, see also Indictment, VIII, B.

Former acts of violence as bearing on fear and menace of attack, see Indictment, VIII, B.

¶ 161. The quarrelsome character of deceased is inadmissible where there is no claim of self-defense.—People v. Garbutt, 17 Mich. 9.

¶ 162. In a prosecution for assault with intent to do great bodily harm, the quarrelsome disposition, and r the person assaulted, i shown to have been kn People v. Kirk, 151 Mi

¶ 163. One who has self-defense, and is tri may show by others th deceased at the time of so violent as to alarm also show the behavio the way to the commis —People v. Lilly, 38

¶ 164. In a trial for defense is the justifica show the relative streng parties, and such othe not capable of any d opinion, by witnesses w them and capable of j also that the accused of his assailant, and t powerful man of a da had threatened him.—I Mich. 732.

¶ 165. Facts which case of homicide did wards are not admissil ing; but they may be ad other evidence tending done in defense of life Cook, 39 Mich. 236.

¶ 166. In a trial for tent to show that th made a threatening at ant, was a man of hig some disposition, and ant to be so at the ti Hurd v. People, 25 Mi

¶ 167. A respondent under the plea of self- decedent's reputation and the violence of his but also instances o spondent's knowledge tion, as warranting a sion of danger.—Peopl 87.

¶ 168. In a prosecu husband by his wife self-defense was filed, witnesses in rebuttal cution that the dec them that his wife w seemed to have an a was not living right, her marriage vows, he it tended to show th since it proved noth People v. Cutler, 19

¶ 169. An executio a pistol to take poss debtor resisted him v thereupon prosecuted intent to murder. F

titled to put in evidence the record of the proceedings in the case in which the execution issued for the purpose of showing that the sale was illegal; and to show also that before the levy the property had been sold to a third person for whom respondent was taking care of it.—People v. Dann, 53 Mich. 490.

¶ 170. Upon a trial for the murder of an officer attempting to arrest defendant, the warrant of arrest is admissible though held by the companion of the officer killed.—People v. Durfee, 62 Mich. 487.

¶ 171. A constable, acting outside of his county and company with a private citizen, sought to find out who had committed certain burglaries by stationing themselves at a certain point and stopping passersby. One man as to whom there was no probable cause for suspicion would not be stopped; and in escaping he fired on them, killing the private citizen. Held that, in trying him as for murder, proof of the burglaries was inadmissible.—People v. Burt, 51 Mich. 199.

¶ 172. On a prosecution for homicide committed in resisting an officer while making an arrest without warrant, evidence as to the details of the crime for which accused was being arrested, and of conversations between the officer and third persons prior to the attempted arrest, and leading up to such arrest, were admissible to show that a crime had been committed such as to justify an arrest without warrant.—People v. Blake, 157 Mich. 533.

§ 53. ——On aggravation or mitigation of assault.

See also ante ¶¶ 149, 150.

Ante mortem expressions of affection by victim as bearing on culpability of attack, see Indictment, VIII, B.

¶ 173. The party upon whom the assault was made, after detailing with great minuteness the assault and the result upon himself, was allowed to testify, against objection, that he had wounds upon his face, caused by being kicked by respondent; that they had been running ever since the assault; that, two or three weeks after the assault, an abscess formed, and the doctor lanced it, and quite a number of bones worked out. Held, that the testimony was competent as showing the aggravated character of the assault.—People v. Sutherland, 104 Mich. 468.

B. DYING DECLARATIONS.

§ 54. In general.

See also post ¶ 193.

Scope and subjects of the declaration, see post § 55.

Imminence and expectation of death, see post § 56.

Declarations of woman as to abortion on her, see post § 57.

Admissibility of declarations on behalf of accused, see post § 58.

Foundation proofs to let in dying declarations and evidence to rebut or explain declarations, see post §§ 59, 60.

[Note. Declarations not amounting to dying declarations may nevertheless be admissible as res gestæ, see Indictment, VIII. B.]

Order and time for proof of dying declarations, see Indictment, IX, B.

Erroneous exclusion as dying declaration cured by admission on other ground, see Indictment, XV.

¶ 174. The admissibility of a dying declaration is not dependent upon its having been taken immediately after the injury.—People v. Beverly, 108 Mich. 509.

¶ 175. It is not essential to the admissibility of a dying declaration that notice of an intention to take the same should have been given to the accused.—People v. Beverly, 108 Mich. 509.

¶ 176. It is no objection to the admission in evidence of a dying declaration that the "exigencies of the case" do not require it.—People v. Beverly, 108 Mich. 509.

§ 55. Scope and subjects of the declaration.

¶ 177. Dying declarations may properly include the entire circumstances attending the fatal occurrence. They may cover the facts to which the declarant could have testified as a witness. Their value depends on their intrinsic probability and the candor and truthfulness of the declarant as well as the fullness and fairness with which they are reported. When drawn out under suspicious circumstances or by doubtful means they will not be excluded, but will go to the jury for what they are worth. They are admitted from necessity only, the witness having passed away.—People v. Knapp, 26 Mich. 112.

¶ 178. The dying declarations of the deceased in a homicide trial are not admissible to show that defendant on previous occasions threatened to kill the deceased where such threats are not connected with the actual killing.—People v. Alexander, 161 Mich. 645.

¶ 179. In a trial for homicide, the dying declarations of the deceased are admissible to show the act of killing and anything connected with the res gestæ.—People v. Alexander, 161 Mich. 645.

¶ 180. On a trial for murder it is competent to show that while the deceased believed he was going to die he had an interview with the defendant, at which the shooting was talked over, and then and there acknowledged that he was to blame, and asked defendant to forgive him.—Hurd v. People, 25 Mich. 405.

¶ 181. Two women were walking together and one was fatally shot. In a prosecution for the murder the other testified that immediately after the shot was fired her companion exclaimed, "My God, Simpson, you have shot me," and then turned slowly and clasped the next to the top board in the fence close by. Another witness testified that he lived a block distant on the opposite side of the street, and was in the house when he heard the shot; that he ran to the place and found a woman leaning against the fence; that he went over as quick as he could and said to her, "Who shot you, madam?" and that she said it was John Simpson. Held, that these declarations of the injured person were admissible.—People v. Simpson, 48 Mich. 474.

¶ 182. Dying declarations may include statements as to the cause and circumstances of the homicide, to wit, previous threats by accused to shoot declarant if she left him, which she did, and of her refusal to return to him, whereupon he shot her.—People v. Beverly, 108 Mich. 509.

¶ 183. Dying declarations consisting of statements of mere opinions or conclusions of the deceased are not admissible in a homicide trial where such opinions or conclusions would not be admissible from the lips of a living witness.—People v. Alexander, 161 Mich. 645.

¶ 184. Dying declarations showing that the defendant husband assaulted the deceased wife on a previous occasion are not admissible in a homicide trial.—People v. Alexander, 161 Mich. 645.

¶ 185. Evidence that a wife, shot by her husband, in the interval of five days preceding her death made expressions of affection for her husband, was given by the attending physician. In the trial of the husband for homicide, held, the dying declarations of the wife as to trouble with her husband on previous occasions were inadmissible to rebut such evidence.—People v. Alexander, 161 Mich. 645.

§ 56. Imminence and expectation of death.

Sufficiency of foundation proofs, see post § 59.

¶ 186. A statement made by a person a few hours before he became aware that he was about to die, is not admissible as a dying declaration.—People v. Johnson, 186 Mich. 516.

¶ 187. To render a statement admissible as a dying declaration, the circumstances under which it was made must first be shown, from which it must appear that when made the declarant was under the conviction of approaching and inevitable death.—People v. Christmas, 181 Mich. 634.

¶ 188. A statement fore death when he entertained by the and he did not expe sible as a dying Christmas, 181 Mich.

¶ 189. On a trial ments of the deceased ing and while under belief of speedy dea important part of the with the shooting, ar Hurd v. People, 25 M

¶ 190. Dying decla even though others the person making th though death may some time.—People v.

§ 57. Declarations by her.

Declarations admissil admissions, see I

¶ 191. The reason larations is especiall abortion, where usu have knowledge of t ist and the person u is produced. So he manslaughter.—Peopl 388.

¶ 192. A statemen abortion case as a the deceased was vi hours before her dea that she was very ill ise her nothing as to all that medical skill cumstances, and wh ing her condition, st answer to his inqui produced the aborti strument.—People v.

¶ 193. Dying decla as evidence, must b ments as a witness the stand if living; "Ah, Aleck, what h die!" uttered by a v supposed to have b tion, was held not declaration of facts.— Mich. 431.

¶ 194. Upon a tri sulting from abortic ment by the decease ent had said or don related it, in regard etc., is inadmissible declaration, it is he 66 Mich. 460.

§ 58. Admissibility o See also ante ¶¶ 180,

¶ 195. A prisoner has the same right as the prosecution to rely upon the dying declarations of the person he is charged with killing.—People v. Knapp, 26 Mich. 112.

§ 59. Foundation proofs.
Necessity of first showing foundation, see also ante ¶ 187.
Necessity that death be imminent and apprehended by declarant, see ante § 56.

¶ 196. In a prosecution for murder the offer of dying declarations should be preceded by evidence that they were actually made in expectation of impending death; and this may be shown by the nature of the injury, by what the injured person said, or what physicians or attendants said in his hearing, by the evident state of his mind, etc. It is not essential that the injured person should have stated that they were made in that expectation, or that any person should have said in his presence that death must speedily follow.—People v. Simpson, 48 Mich. 474.

¶ 197. Evidence of the circumstances under which dying declarations are taken is admissible, in addition to the document, to show whether it was really taken when the declarant was under conviction of approaching and inevitable death, as evidence of this should usually be given in advance of proof of the declarations themselves.—People v. Knapp, 26 Mich. 112.

¶ 198. An antemortem statment taken down in writing by a justice of the peace in the forenoon about six hours after deceased was shot and after consulting with her physician is admissible as a dying declaration where in reply to the justice's question she said that she thought probably she must die but she hoped for the best; and where the statement contained a declaration of her belief that she would die from the wounds, basing such belief on her own feelings and the doctor's statement, and that in view of such belief the statement was made.—People v. Weaver, 108 Mich. 649.

¶ 199. Evidence that deceased, soon after being shot, told the doctor that she believed she could not live, and that he replied that her case was practically hopeless, though he had just said that while there was life there was hope, sustains the admission, as dying declarations, of her statements then made to the doctor relative to the shooting.—People v. Weaver, 108 Mich. 649.

¶ 200. The action of the trial court in admitting in evidence a dying declaration will not be reversed, on the ground that the deceased was under the influence of opiates at the time it was taken, and was not certain that she would die, where there was testimony fairly tending to show that the condition of the deceased was such as to render the statement admissible.—People v. Beverly, 108 Mich. 509.

¶ 201. Evidence of subsequent occurrences tending to show that a person was aware that he was in extremis when he made certain declarations, and containing a recital of a death-bed scene, held prejudicial to a person on trial for murder.—People v. Johnson, 186 Mich. 516.

§ 60. Rebuttal or explanation of declarations.
See also ante ¶ 185.
Bitterness of declarant's feelings as impairing weight of the declaration, see ante ¶ 142.

¶ 202. It cannot be shown for the purpose of affecting a wife's dying declaration that her disposition was bitter and vindictive.—People v. Simpson, 48 Mich. 474.

C. DEGREE AND SUFFICIENCY OF PROOF.

§ 61. In general.
Of the corpus delicti, see post § 62.
Of murder or manslaughter, see post §§ 63, 64.
Of assaults, see post §§ 65, 66.
Of justification or excuse, see post § 67.
Of participation, see post § 68.
Matters provable by dying declarations, see ante § 55.
Sufficiency of case for directed verdict, see post § 71.
General rules as to sufficiency of evidence of crimes, see Indictment, VIII, C.
Sufficiency on issue of insanity, see Indictment, VIII, C.
Commenting on evidence in argument to jury, see Indictment, IX, C.

¶ 203. On a trial for murder where there is no direct proof of the cause of death, if the death can be accounted for upon any reasonable theory other than that of the defendant's guilt, the jury should acquit.—People v. Stewart, 75 Mich. 21.

§ 62. Corpus delicti and cause of death.
Reasonable doubt as to cause of death, see ante § 61.
Necessity of proof connecting respondent's pistol with the wound, see also ante ¶ 117.
Admissibility to show whether wounds were caused by accused or other agent, see ante ¶ 134.

¶ 204. Corpus delicti of manslaughter by abortion may be established not only by postmortem examination, but by fact of decedent's pregnancy, illness, treatment, etc.—People v. Aikin, 66 Mich. 460.

¶ 205. On a trial for murder, it appeared that a young unmarried woman left her house to gather flowers in the woods. On her failure to return, her body was found

in the woods; and a bottle of laudanum was discovered near at hand. There was no poison in the stomach, but the other viscera were not tested for it. About the time she entered the woods, respondent was seen to enter from the opposite side; a cry was heard shortly afterwards; marks of violence were discovered upon the face and throat of the deceased, and the ground was indented and twigs broken under her head. Hair was found upon the ground, which matched the respondent's and some on twigs like her hair. The vial containing the poison had been seen in respondent's house. Two physicians who made a post-mortem examination, testified that ruptured blood vessels were found in the throat, that the windpipe was crushed, the lungs collapsed, the membranes of the brain congested, and that the nose was pressed to one side; that the symptoms were those of stranguiation, and that the injuries could not have been inflicted by the deceased herself. Held, that there was ample proof of the corpus delicti.—People v. Parmelee, 112 Mich. 291.

¶ 206. Murder by poisoning cannot be shown in a case where symptoms constitute the evidence, unless every other cause of death but poison is negatived; and to do this it must be shown that the combined symptoms and the absolutely certain facts with which they are associated are inconsistent with any other disorder.—People v. Millard, 53 Mich. 63.

¶ 207. In a case of slow poisoning it is a circumstance against the prosecution that physicians who had attended the victim and who testified as experts for the state had not acted, while in attendance, as if they definitely suspected anything wrong.—People v. Millard, 53 Mich. 63.

§ 63. Murder.

Facts warranting submission of first and second degrees, see also post §§ 75, 76.
Facts warranting withdrawal of certain degrees from jury, see post § 76.
Of corpus delicti and cause of death, see ante § 62.

¶ 208. Deliberation and premeditation may be inferred from the character of the weapon used, the wounds inflicted on vital parts, and the circumstances, acts and conduct of accused before and after the killing, and the incredibility of an exculpatory account thereof by him ascribing it to a stranger who enforced silence and flight by threatening the life of accused.—People v. Wolf, 95 Mich. 625.

¶ 209. The fact that between the first attack and the final shooting the person who did the killing armed himself had no tendency to show malice, when taken in connection with the attack and the accompanying threats and the following of accused into his own house where the shooting was done.—Hurd v. People, 25 Mich. 405.

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on the premises.—People v. Sauer, 143 Mich. 308.

§ 64. Manslaughter.

Facts warranting submission of manslaughter, see also post §§ 75, 76.

Facts warranting withdrawal of certain grades or degrees from jury, see post § 76.

Submission of manslaughter in affray as alternative to self-defense theory, see post ¶ 297.

¶ 214. Evidence reviewed and held sufficient to support a conviction of manslaughter in procuring an abortion, where there were circumstances of concealment and falsification, and proof of other abortions to show guilty knowledge and intent, as against a might have been an accidental abortion intheory educed from the circumstances that it duced from seasickness and its nausea and climatic changes.—People v. Seaman, 107 Mich. 348.

¶ 215. One who, after an assault on him, with several other persons, sought out his assailant who was killed in an ensuing encounter, is properly convicted of manslaughter, although it does not appear who struck the fatal blow, where the evidence shows that the respondent actively participated in all that occurred up to and including the fatal assault.—People v. Ponsford, 181 Mich. 659.

§ 65. Homicidal assaults.

¶ 216. A railway employee was sent with a party of men to repair a side track. A man, who claimed that they were coming upon his land, disputed the company's right to do what was proposed, threatened to undo whatever should be done, and in the course of an excited altercation drew a line on the ground where he said his boundary was, pushed the leader of the working party so that he staggered, and then struck him a single blow with a heavy stick and knocked him down. There was some testimony that the person assailed had raised a shovel as if to strike the assailant, but this was denied. The assailant acted in hot blood, but apparently supposed that in trying to prevent what was proposed he was defending his right. Held that, although the blow was unjustifiable, the evidence would not sustain a charge of assault with intent to kill and murder.—People v. Comstock, 49 Mich. 330.

¶ 217. In a prosecution for assault with intent to commit murder, a verdict of guilty is sustained by evidence that the defendant owner of a small river boat had threatened the life of officers attempting to serve process on the boat and that upon being informed of the officer's business he took up a revolver and shot the officer notwithstanding his testimony that the officer shot first and he shot in self-defense.—People v. Bernard, 125 Mich. 550. Writ of error dismissed in 184 U. S. 697, 46 L. ed. 764, 22 Sup. Ct. Rep. 940.

§ 66. Assault with intent to do great bodily harm less than murder.

¶ 218. In a prosecution for assault with intent to do great bodily harm less than the crime of murder, the testimony tended to show that respondent kicked the complaining witness, as he was falling from the effects of a blow administered by the respondent, fracturing one of his ribs and injuring his kidneys, and that the act of kicking was accompanied by the threat that respondent "would kick his G——d d——d liver out." Held sufficient, if believed, to warrant a conviction of the offense charged.—People v. Miller, 91 Mich. 639.

¶ 219. In a prosecution for an assault with intent to do great bodily harm less than the crime of murder, testimony tending to show that respondent entertained an ill-will towards the complaining witness, that on the occasion in question he struck her upon the head with a club, felling her to the ground, at the same time threatening to kill her, and that the blow produced a contused and lacerated wound, is sufficient to sustain a conviction of the offense charged.—People v. Conley, 106 Mich. 424.

¶ 220. Evidence that one struck another upon the head with an iron bar, with sufficient force to produce unconsciousness, justifies the finding of an intent to do great bodily harm less than the crime of murder, although the ulterior motive of the assault may have been robbery.—People v. Smith, 106 Mich. 431.

¶ 221. A conviction of assault with intent to do great bodily harm less than murder may be sustained where the accused, as a witness, admits that he drew a knife, knocked a person down, and kicked him several times on the head.—People v. Williams, 118 Mich. 692.

¶ 222. A conviction for assault with intent to do great bodily harm less than murder under an information for assault with intent to commit murder is sustained by proof of the requisite intent, where the assault was in respondent's house on one whom he supposed to be an intruder with whom he had had trouble and was made with an axe by striking in the face and cutting off part of the cheek and breaking the cheek bone, it appearing that all parties were Finns accustomed to enter each other's houses without knocking, and the claim being self-defense.—People v. Kalunki, 123 Mich. 110.

§ 67. Justification or excuse.

See also ante ¶ 81.

Shifting of burden on showing of self-defense, see ante § 43.

Facts warranting instructions, see post § 79.

¶ 223. Duress such as will excuse one for aiding and assisting in a murder is not made out by threats made three days before that his life will be taken unless he aids in committing the crime.—People v. Repke, 103 Mich. 459.

¶ 224. It seems the theory of self-defense is not supportable where respondent told deceased that, if he repeated an accusation of theft, he would kill him, and thereupon passed out of the room and procured a revolver, returning with the evident purpose of compelling deceased to withdraw the charge, and immediately afterwards shot him while he was stooping to recover a cigar which respondent had struck from his hand —even though respondent thought that deceased was making a movement to take a revolver from his pocket.—People v. Piper, 112 Mich. 644.

§ 68. Participation or implication in crime.

Inference as to intent of participator, see ante ¶ 113.

¶ 225. Testimony in a prosecution for murder that respondent heard his companions proposing to assault deceased, and went with them to see the fight in which the killing occurred, is insufficient to warrant a submission of the case to the jury.—People v. Fay, 70 Mich. 421.

VIII. TRIAL, INSTRUCTIONS, SENTENCE, AND PUNISHMENT.

§ 69. In general.

[Note. Nearly all of the questions of trial practice outside of the substance of the instructions are governed by rules and principles common to all crimes and not peculiar to homicide cases, see Indictment, IX.]

Time for prosecutions and limitations, see Indictment, II.

Jurisdiction and venue, see Indictment, III.

Arraignment and pleading to indictment, see Indictment, V.

Continuances and postponements of trials, see Indictment, VI.

Dismissal or nolle of indictment, see Indictment, VII.

Reception of proof, order in which to be offered, and practice on offers, see Indictment, IX, B.

¶ 226. Where two persons were implicated in a homicide, and one has been tried and found guilty of murder, it is error, upon the trial of the other, for the court and prosecuting attorney to repeatedly refer to the killing as "murder," since respondent has a right to the verdict of his jury upon the question of whether or not a murder had been committed, as well as whether he was the man who fired the fatal shot.—People v. Clark, 155 Mich. 647.

§ 70. Questions for court and jury.

See also post ¶ 257.

Directing verdict, see post § 71; and see also Indictment, IX, D.

Instructions, see post § 72 et seq.

Facts warranting charge to jury on grade or degree of crime, see post §§ 75, 76.

Facts warranting withdrawal of certain degrees from jury, see post § 76.

Facts warranting charge on justification or excuse, see post § 79.

Court and jury province in prosecutions in general, see Indictment, IX, D.

¶ 227. It is for the court to define the legal import of the term malice aforethought. —Maher v. People, 10 Mich. 212.

¶ 228. The question whether malice aforethought existed in a particular instance is one of fact for the jury.—Maher v. People, 10 Mich. 212.

¶ 229. The questions as to what is an adequate or reasonable provocation to reduce an offense from murder to manslaughter, and whether a reasonable time had elapsed for the passions to cool and reason to resume its control, are questions of fact for the jury. —Maher v. People, 10 Mich. 212.

¶ 230. Whether a homicide by shooting which the evidence tends to show was committed by the accused, a small man of nervous temperament, with a revolver which he procured from his room in his boarding house immediately after having been set upon and maltreated by the deceased, a fellow-boarder and a man of large size and great strength, was prompted by a wicked and malignant heart, and, if so, whether there was such deliberation as to constitute the offense murder in the first degree, or whether it was committed in the heat of passion caused by reasonable provocation, and before due time had elapsed for reason to resume control, so as to reduce the offense to manslaughter, are questions of fact for the jury.—People v. Holmes, 111 Mich. 364.

¶ 231. In a prosecution against an engineer for manslaughter through criminal negligence in leaving boilers unattended and causing explosion by an overpressure of steam, where experts for the prosecution testified that respondent's absence was not negligence and that he could have done nothing to avoid the catastrophe had he been in the engine room, and where witnesses for the prosecution testified that the explosion was caused by a very high pressure of steam, an issue of fact was raised for the jury.—People v. Thompson, 122 Mich. 411.

¶ 232. That an automobile was running in excess of the speed fixed by statute at the time a pedestrian was struck and killed, independent of other facts, is not sufficient to warrant a conviction for manslaughter; the question of the speed of the car, in con-

nection with other facts, as bearing upon the question whether the driver was guilty of gross negligence in running it should be left to the jury.—People v. Barnes, 182 Mich. 179.

¶ 233. Whether the conduct of the driver of an automobile was the proximate cause of the death of a pedestrian who was struck by the car, and was characterized by such a degree of culpable negligence as to amount to gross negligence, is a question for the jury.—People v. Barnes, 182 Mich. 179.

¶ 234. There was no issue for the jury as to the necessity of retreating or the possibility of avoiding the assault, and the only question for them to determine was whether respondent in good faith believed that a homicidal assault on him was imminent; where respondent was without fault suddenly attacked in the public highway by deceased with a loaded gun, and deceased, who had twice threatened to shoot respondent, advanced within three rods of him, threatening to kill him, and was raising his gun when he was shot by respondent.—People v. Macard, 73 Mich. 15.

§ 71. Directing verdict.

Instruction to convict of certain degree or to acquit, see post § 76.

In prosecutions generally, see Indictment, IX, D.

¶ 235. A father tried for murdering his child testified that some hours before the killing he bought a revolver for the purpose of shooting, the first time he crossed his path, a boarder of whom he was jealous, and that he accidentally shot and killed the child while attempting to shoot the boarder; but he did not testify that he intended to kill the boarder, and there was evidence that before the shooting an altercation took place between the two men. Held, that the testimony was not equivalent to a plea of guilty of murder, upon which the court might, from the testimony, determine the degree, but that respondent had a right to the jury's verdict upon that subject.—People v. Gordon, 100 Mich. 518.

¶ 236. A verdict will not be directed for the respondent who, after an assault on him, with several other persons, sought out his assailant, who was killed in an ensuing encounter, although it does not appear who struck the fatal blow, where the evidence shows that the respondent actively participated in all that occurred up to and including the fatal assault.—People v. Ponsford, 181 Mich. 659.

§ 72. Instructions.

On various elements and aspects of the crime, degrees and grades, assaults, and justification or excuse, see post §§ 73-81.

Defining grades and degrees and distinguishing murder and manslaughter, see post §§ 75, 76.

Failure to define crime, see also post ¶ 252.

General law of criminal instructions, see Indictment, IX, E.

Construction of the charge as a whole, see Indictment, IX, E, XVI.

Unduly emphasizing single facts and features, see Indictment, IX, E.

Charging on weight of evidence and assuming facts in charge, see Indictment, IX, E.

General charges on circumstantial evidence, see Indictment, IX, E.

As to character as evidentiary fact or defense, see Indictment, IX, E.

As to insanity or responsibility for crime, see Indictment, IX, E.

On aiding and abetting, principalship and accessories, see Indictment, IX, E.

Errors in charging cured by outcome of case, see Indictment, XV.

¶ 237. In a murder trial the court charged as follows: "The crime which you are now considering * * * was committed in the broad light of day * * * in bold and wicked defiance of all human and divine law. * * * So far as we know, on this April morning life was as sweet and precious to this poor wife and mother as it was to the prisoner. A more horrible and brutal death can scarcely be conceived. * * * We cannot restore life to this stricken woman; but we may do our share towards the guarding and the protecting of human life hereafter." Held, the charge was erroneous as tending to excite the jury against the defendant.—People v. Poole, 159 Mich. 350.

¶ 238. On defining manslaughter in his charge, the court said: "The general rule is that reason should, at the time of the act, be disturbed or obscured by passion, or an excitement of any cause, to an extent which might render ordinary men of fair, average disposition, liable to act rashly or without due deliberation or reflection, and from passion and lack of reason rather than from judgment." Held, the charge was fair to defendant.—People v. Droste, 160 Mich. 66.

¶ 239. Where an information for an attempt to kill and murder alleged that it had been made with a revolver loaded with powder and ball, and it was not expressly proved that the pistol was loaded with ball, though the prisoner's own statement assumed that it was, and all evidence bearing on this tended to prove it, it was not error to instruct the jury that to convict they must find that it contained a leaden bullet as charged.—Gale v. People, 26 Mich. 157.

¶ 240. On the trial of a respondent for the murder of his wife by poisoning, the prosecution was permitted to introduce testimony tending to show, that at the same time he was claimed to have been poisoning his wife, he was also administering poison to her sister, who was an inmate of his household. Held, that, if there was evidence in the

case that respondent had administered poison to his wife, said testimony was competent as bearing upon his motive or intent in doing so, but that it was error to instruct the jury that they might consider said testimony, for the purpose of establishing whether respondent in fact administered poison to his wife as charged.—People v. Thacker, 108 Mich. 652.

§ 73. ——As to corpus delicti and cause of death.

As to proof of defendant's being the assailant, see post § 80.

¶ 241. The refusal of an instruction that, if the jury believe that the deceased aborted from natural causes, or by reason of the ordinary sickness and vomiting, augmented by the sickness and vomiting of a sea voyage, together with nervous excitement, fatigue, lack of nourishment, and change of climate, respondent should be acquitted, is erroneous, where there is evidence in support of such theory.—People v. Seaman, 107 Mich. 348.

¶ 242. Where in a manslaughter case, the court in explaining the theories of the respective parties in the instructions, stated that the defense claimed that the injury resulting in death was caused by the deceased's head striking the uneven surface of a floor, while the people claimed that such injuries must have been inflicted by some instrument, it was competent to leave this question to the jury, although no witness testified to the manner in which the injuries were inflicted.—People v. Hossler, 135 Mich. 384.

§ 74. ——As to malice, premeditation and intent.

See also post ¶ 259.

Intent in assaults with intent to kill or to do great bodily harm, see post § 78.

As to heat of passion, see also ante ¶ 238.

Province of the court, see also ante ¶¶ 227, 228.

Defining malice in instructions, see Indictment, IX, E.

¶ 243. A definition given in a prosecution for murder of malice as including anger, hatred, revenge and any unlawful and unjustifiable motive, was held to be erroneous.—Nye v. People, 35 Mich. 16.

¶ 244. An instruction as to malice, being unnecessary to warrant a conviction for manslaughter, held to sufficiently cover a requested instruction on the same subject.—People v. McArron, 121 Mich. 1.

¶ 245. Where, without cooling time, one shoots a violent assailant, and there is nothing to show that his apparent fear of his assailant was a pretext to enable him to commit murder, it is error to mislead the jury with instructions as to cooling time not warranted by any facts in the case.—Brownell v. People, 38 Mich. 732.

¶ 246. It is error to leave a case of homicide to the jury on the theory that the accused had armed himself with the intention of killing the deceased on the first pretext or assault by him, and took advantage of an attack to do so, unless there is testimony legally bearing in that direction.—Brownell v. People, 38 Mich. 732.

¶ 247. In a prosecution for murder committed after a dispute between accused and his brother it was error to omit a requested instruction that the jury, in considering whether respondent or deceased was the aggressor, should consider the previous threats made by deceased, and the purchase and exhibition of a loaded revolver by him.—People v. Palmer, 96 Mich. 580.

¶ 248. In a manslaughter case, a charge that death resulting from an assault in the absence of any proof to the contrary, is presumed to be felonious, either murder or manslaughter, and that where the death is shown to have resulted from the use of a deadly weapon, in the absence of any proof to the contrary, the presumption is that the death was inflicted with malice aforethought, is a correct charge where the court has properly instructed the jury as to the burden upon the prosecution of proving beyond a reasonable doubt that the killing was not in self-defense.—People v. Collins, 166 Mich. 4.

§ 75. ——On grade or degree of crime.

As to included offenses, see post § 81.

Restriction to specific grade or degree and elimination of other grades or degrees, see post § 76.

¶ 249. Murder by poisoning is murder in the first degree, and a jury should be so charged where the information does not state its degree or the mode of its commission.—People v. Hall, 48 Mich. 482.

¶ 250. On a trial for murder, where the difficulty which resulted in the homicide originated from a quarrel between the deceased and a companion of the accused, it is error to charge that if the accused and his companion, or such companion alone, began the attack, the offense would be murder.—Nye v. People, 35 Mich. 16.

¶ 251. Where the injury, if inflicted by the defendant, was inflicted either by a blow from the fist or a kick, and the jury, if the question had been left to them, might properly have found from the evidence a verdict of manslaughter, it was held error to charge that if defendant committed the homicide it would be murder, and not manslaughter, unless it was committed under such extreme provocation as is recognized in the authorities as sufficient to reduce intentional and

voluntary homicide committed with a deadly weapon to that degree of crime.—Wellar v. People, 30 Mich. 16.

¶ 252. The court's failure, in prosecution for murder, technically to define the crime of manslaughter, is not error where respondent's theory that he was guilty of the latter offense was clearly placed before the jury with an instruction that if it was found to be true respondent was guilty of manslaughter.—People v. Harper, 83 Mich. 273.

¶ 253. An instruction, that the accused would be guilty of murder in the first degree, if he had time after the assault to form a conscious design of killing, is erroneous, in that it eliminates from the consideration of the jury the question presented by the evidence whether the crime might not have been committed under the influence of passion for which there was a reasonable provocation, in which case, even though there was an intention to kill, the crime would be only manslaughter.—People v. Holmes, 111 Mich. 364.

¶ 254. Two persons had an altercation in front of an interurban station and a fight was narrowly averted. The defendant went into the station to remove his coat preparatory to a fight in the country, stated he was going to fight, came out and immediately struck deceased with his fist knocking him down, causing unconsciousness, from which he never recovered. The deceased had called defendant a vile name, but the evidence was conflicting whether he raised his hand as if to strike the defendant. After the blow the defendant went back into the station and at his request was led out by the back door. Physicians testified that in their opinion the wound could not have been caused by a blow with a naked fist or by falling backward upon a cement sidewalk. Held, it was proper to instruct the jury upon the law applicable to murder in the second degree. —People v. Sauerbier, 173 Mich. 521.

¶ 255. Refusal of the court, in a criminal prosecution for murder, to eliminate first and second degree murder from the consideration of the jury held proper, where there was evidence tending to show previous threats by the accused to shoot the deceased and that the shooting was not in the accused's house, as claimed by her, but in the public highway some distance away.—People v. Cutler, 197 Mich. 6.

¶ 256. In a murder trial the evidence indicated that the defendant and deceased were alone in a church shed at the time of the commissison of the act; that there had been some rivalry over a girl; that defendant was intoxicated; and that angry disputes had been heard by those at a distance. Held, there was ground for the court to leave the case to the jury on the theory of manslaughter as well as murder.—People v. Droste, 160 Mich. 66.

¶ 257. The testimony on the part of the people in a prosecution for murder tended to show that on the day of the shooting respondent and decedent had some words of dispute in a saloon; that respondent left the saloon, decedent remaining there, and, after arming himself with a shot gun, returned to the saloon; that the decedent had in the meantime armed himself with a revolver. The respondent claimed that he had no murderous intent at any time. The court instructed the jury that if, after respondent entered the saloon, he became aware that decedent was there, and he then formed the intent to take his life, taking into account whatever may have been in his mind as to their past relations, their quarrels, or anything that he may have heard about decedent's having a pistol, and if he became aware that decedent was in the back part of the saloon, surrounded by his friends, if he then, even though but a moment before he fired the fatal shot, formed in his mind the purpose of taking decedent's life, and pursuant to that purpose he shot and killed him, that would constitute murder. Objection was made that there was no evidence to support such a theory, and that neither the prosecution nor the defense conducted the trial with reference to it. Held, that this court cannot tell what the argument was to the jury; that, if there was any testimony upon which to base the charge, it must be sustained; that there was evidence that, when respondent entered the saloon, he appeared in his usual manner, and that, when he raised the gun, his countenance changed; that whether this was because he saw decedent, or saw the pistol pointed at him, and whether it was necessary for him then to shoot in self-defense, were all questions for the jury, and made competent the charge complained of, which was given in connection with instructions covering respondent's theories.—People v. Palmer, 105 Mich. 568.

¶ 258. In a prosecution for murder, the court, after defining the different degrees of murder, and also manslaughter, and after stating to the jury that, where a crime was divided into degrees, they might acquit of the principal charge and convict of the lesser offense, and that in such a case they should first consider the matter of the higher crime, and then go through the different degrees, withdrew from their consideration the subject of murder in the first degree, the respondent having been acquitted of that offense on a former trial. Held, that the charge was not misleading and prejudicial in that the court first defined murder in the first degree, and instructed the jury that they should commence with the higher crime. —People v. Palmer, 105 Mich. 568.

¶ 259. On the point as to the frame of mind of a defendant in a murder trial which

would reduce the crime to manslaughter the court charged: "If you find that he was in a state of such excitement that his reason was dethroned, that he was driven along by an uncontrollable and irresistible impulse, so that he was no longer morally or legally accountable for his conduct, so that he did not realize his crime or what he was doing or where he was * * * then the defendant is guilty of no higher crime than manslaughter." Held, the instruction was erroneous.—People v. Poole, 159 Mich. 350.

¶ 260. In the case of a conviction for an assault to do great bodily harm less than murder, under an information charging assault with intent to commit murder, the refusal to charge that "there is no offense known as assault with intent to commit manslaughter" is not error, where the jury was instructed as to the essential elements constituting the crime for which the respondent was convicted.—People v. Kalunki, 123 Mich. 110.

¶ 261. In a manslaughter case, it is not error for the court to state in its charge what the claim of the prosecution is as to the conduct of the respondent in preparing and arming himself and in returning to kill the deceased, where the prosecution did put forth such claim and supported it with evidence.—People v. Collins, 166 Mich. 4.

§ 76. ——Restriction to specific grade or degree.

Refusal to restrict to manslaughter, see also ante ¶ 255.

¶ 262. Where, in a trial for murder, the testimony of the defendant and one of the witnesses for the prosecution tends to show that the crime may have been manslaughter, a charge that the verdict should be "guilty or not guilty of murder in the second degree" is erroneous.—People v. Hamilton, 76 Mich. 212.

¶ 263. An instruction to return a verdict of either murder in the first degree or not guilty is error where there is room to find that the killing, if any, was done in a sudden affray or in self-defense.—Baker v. People, 40 Mich. 411.

¶ 264. A request to instruct the jury that they could not convict respondent of murder in the first or second degree, but only of manslaughter, was properly refused where there was evidence tending to show murder.—People v. Wright, 89 Mich. 70.

¶ 265. Where there is no evidence upon which a verdict of murder in the second degree, or any lesser grade of the crime could rest, it is not error to charge that if defendants are guilty at all they are guilty of murder in the first degree.—People v. Fuhrmann, 103 Mich. 593.

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¶ 274. In a prosecution for murder in killing a constable who was acting under a writ of replevin, where the accused claimed that the gun was discharged accidentally, and while he not intentionally pointing the gun at the constable was engaged in the attempt to frighten the officer away, a charge that the pointing of a gun in the air is not an unlawful act, and respondent had the right to take the gun out in the field and point it in the air so long as he did not take it there for the purpose of obstructing or resisting the officer, and that the discharging of the gun in the air was not an unlawful act so long as he did not take the gun in the field to obstruct or resist the officer, and did not use it for that purpose, nor in a manner amounting to a reckless disregard of human life, sufficiently recognized the defendant's theory of his case.—People v. Sauer, 143 Mich. 308.

§ 78. ——On homicidal assault or intent to do great bodily harm.

On intent in actual killing, see ante § 74.
As to grade of the assault, see also ante § 75, ¶ 260.
On justification or excuse for the assault, see post § 79.

¶ 275. In a prosecution for an assault with intent to do great bodily harm less than the crime of murder, it is proper to refuse to charge that the jury must find a specific intent to assault a person who was injured; and an instruction that if respondent shot into a crowd with the intention of wounding any of them he might be convicted is proper.—People v. Raher, 92 Mich. 165.

¶ 276. A charge, it is not necessary for the prosecution to show the specific intent with which the act was done where a weapon was used such as would inflict great bodily harm, is not erroneous as dispensing with proof of intent to inflict great bodily harm; if the remainder of the charge shows that it was left to the jury to infer such intent from the character of weapon used.—People v. Jassino, 100 Mich. 536.

¶ 277. Where, in a prosecution for an assault with intent to do great bodily harm less than murder, it appears that the assault, which resulted in serious injury, was unprovoked and deliberate, an instruction that a man is presumed to intend the natural consequences of his own acts is proper.—People v. Resh, 107 Mich. 251.

¶ 278. An instruction in a prosecution under How. St. § 9122a, that the prosecution is bound to prove "not only the assault, but the intent as well; not only that the respondent struck the complaining witness, but that he so struck her and inflicted the injuries with intent to do great bodily harm, less than the crime of murder,"—is sufficiently specific on the question of intent, without indicating the distinction between the offense charged and assault with intent to murder.—People v. Ochotaki, 115 Mich. 601.

¶ 279. In an action for assault and battery with intent to do great bodily harm, the court sufficiently instructed the jury as to the intent necessary by charging, "It must be an intent to do a serious injury of an aggravated nature," and no error was committed in refusing the requested instructions as to the required intent.—People v. Mulvaney, 171 Mich. 272.

¶ 280. In a prosecution under an information charging assault with intent to kill and murder and assault with intent to do great bodily harm, an instruction taking from the jury the question of intent was held erroneous notwithstanding defendant testified that in shooting at the complaining witness he aimed to hit him, "and that shows what I intended to do."—People v. Howard, 179 Mich. 478.

¶ 281. In a prosecution for assault with intent to do great bodily harm less than murder a request to charge that although a pistol was intentionally fired by accused and that the presumption would be important it would not be conclusive, and that it should be supplemented by other evidence to avoid the reasonable doubt and prove the specific intent, was properly refused even where there was testimony that accused and all the others were drunk, where there was no request for a further specific charge on drunkenness to a degree destroying capacity of accused for the specific intent.—People v. Carter, 117 Mich. 576.

¶ 282. Where an alleged assault with intent to commit murder was committed with a revolver in a room containing eight or ten people, it is error, in defining express malice, for the court to use language open to the construction that discharging a gun amongst a multitude of people will afford the necessary implication of malice.—People v. Cismadija, 167 Mich. 210.

¶ 283. In a prosecution for an assault with intent to murder, an instruction stating that under the charge in the information if the person assaulted had died from the effects of the shots, and all the other ingredients of the crime were there, the death of the person would have been murder and not manslaughter, is erroneous where the assault occurred in a wordy dispute over a trivial matter, followed by a sudden affray in which respondent was violently assaulted by the complaining witness, and the greatest crime of which respondent could have been convicted under the circumstances would have been manslaughter.—People v. Cismadija, 167 Mich. 210.

¶ 284. In a prosecution for an assault with intent to commit murder, a definition of express malice should be pertinent to the facts involved.—People v. Cismadija, 167 Mich. 210.

¶ 285. Where an alleged assault with intent to kill occurred during a sudden affray following a dispute over a trivial matter, it is error to give a lengthy definition of express malice.—People v. Cismadija, 167 Mich. 210.

§ 79. ——On justification or excuse.

As to arming in preparation, see ante ¶ 246.
As to aggression in affray, see ante ¶ 247.

¶ 286. It is not error for the court in charging the jury as to the belief of respondent arising from his surroundings and circumstances at the time of the homicide which would justify it as self-defense in addition to the words "reasonable belief" and "honest belief" to use the expressions "reasonable cause to believe," "reasonable cause to apprehend," "reasonable cause to believe and did believe."—People v. Tubbs, 147 Mich. 1.

¶ 287. In a prosecution for assault with intent to kill, respondent requested an instruction that if respondent, under all the circumstances to which he testified, honestly believed he was in danger of his life or great bodily harm, and that his act was necessary, he was not guilty. Held, that the refusal was proper, as respondent did not have the right to act under the circumstances to which he testified, but under the facts as they appeared from all the testimony; and his belief as to whether he was in jeopardy must not only be honest, but must be reasonable.—People v. Meert, 157 Mich. 93.

¶ 288. In a prosecution for assault with intent to commit the crime of murder where the respondent claimed that the assaulted party took out a knife, opened it, and attempted to strike him with it, an instruction ignoring the rule that respondent had the right to act upon the circumstances as they reasonably appeared to him is erroneous, where it in effect withdrew from the consideration of the jury the defense of self-defense in case the jury should find that the person assaulted had no knife.—People v. Wright, 144 Mich. 586.

¶ 289. On a trial for murder a charge that, if defendant carelessly shot to frighten the victim away as he tried to enter a portion of the dwelling of defendant, when there was nothing to justify a fear of bodily harm, the shooting would not be justifiable as done in self-defense, is not error in connection with other charges limiting a conviction to manslaughter.—People v. Coughlin, 67 Mich. 466.

¶ 290. Where the defense to a charge of murder is that the act was committed in self-defense, the purpose to kill not being so much in issue as the necessity of killing for self-protection, an unqualified instruction to the jury that, if the defendant purposed to take life, the crime was murder, is erroneous.—Burden v. People, 26 Mich. 162.

¶ 291. In a prosecution for assault with intent to do great bodily harm, an instruction that if defendant's belief as to the necessity of force arose from want of courage and from cowardice unwarrantable under the circumstances, he would not be justified on the ground of self-defense, is erroneous. The inquiry is not as to respondent's courage or cowardice, but whether, under all the circumstances of the assault as it appeared to him, he honestly believed he was in danger of his life or great bodily harm, and that it was necessary to do what he did in order to save himself from such danger.—People v. Lennon, 71 Mich. 298.

¶ 292. In a prosecution for murder it appeared that respondent, when attacked, was talking in the highway with a neighbor, whose person and horse were the only objects behind which he could seek shelter, and that his house was near by. Held, that it was error to refuse to charge that if respondent, by attempting to reach his house, would be more endangered from his assailant's gun, he was not obliged to seek its shelter, and that he was not required to shield himself behind his neighbor's body or horse.—People v. Macard, 73 Mich. 15.

¶ 293. Where the question is whether the deceased or the accused was the aggressor, the jury should have been instructed that if deceased was quarrelsome, or had made threats against respondent, or entertained any vindictive feeling against him, or had a motive for assailing him, these facts were to be considered, and that, if respondent did not begin the affray, but stood in fear upon the defensive, and deceased, in an angry and violent manner attacked respondent, who, fearing an attack, took out his pocket-knife, and, backing away from deceased, endeavored to avoid a conflict and warning deceased, the deceased following and grappling with him in disregard of the warning, and respondent acting upon the belief—arising from all the circumstances as they appeared to him that he was in danger of his life or of great bodily harm, used the knife, then respondent should be acquitted.—People v. Harris, 95 Mich. 87.

¶ 294. A prosecution for murder should have gone to the jury on the theory of justifiable homicide, where accused, against whom no probable cause for arrest existed, had fired a gun in resisting arrest and killed a citizen who was endeavoring by stopping passers-by to detect the perpetrators of recent burglaries.—People v. Burt, 51 Mich. 199.

¶ 295. In a trial for assault with intent to do great bodily harm less than the crime of murder, where the court instructed in one paragraph that it was the duty of defendant to retreat if he could do so with safety, and in another paragraph that defendant had a right to act on the facts as they appeared to him, failure of the court to instruct that defendant's actions were to be judged in the light of the circumstances as they appeared to him, was not error.—People v. Robinson, 152 Mich. 41.

¶ 296. In a trial for assault with intent to do great bodily harm less than the crime of murder, where defendant's own testimony shows that he sought out his victim rather than that he was attempting to escape from him, failure to instruct that defendant's acts were to be judged in the light of the circumstances as they appeared to him, was not error.—People v. Robinson, 152 Mich. 41.

¶ 297. Two persons had an altercation in front of an interurban station, went down the street to fight and returned without fighting. The altercation continued and the defendant went into the waiting room to remove his coat preparatory to a fight in the country and stated that he intended to fight. On coming out of the station deceased called him a vile name and he struck deceased a blow resulting in death. Defendant testified that deceased appeared to be about to strike him and that he struck the blow on account of his fear, but such evidence was contradicted. Held, an instruction on self-defense stating the law as to the right of a person to resist an anticipated assault, detailing the facts and the evidence of the defendant, stating it was for the jury to determine whether the defendant honestly believed he was in danger of great bodily harm and that it was necessary to strike the blow, is not inappropriate as leaving the jury to infer that the defendant was at least guilty of manslaughter.—People v. Sauerbier, 173 Mich. 521.

¶ 298. Under a plea of self-defense in a prosecution for murder, and evidence in support of such plea, a charge that "if the person assailed honestly believes his or her life in danger or that he may suffer or that she may suffer serious bodily harm, he has a right to resist even to the taking of the life of his assailant. The person assailed is to be judged by the circumstances and conditions as they honestly appear to her at the time," and a charge that "if you find from the evidence that the defendant had reasonable cause to believe that the deceased was about to strike her with a knife in the vestibule of the house at the time and in the manner described by her, she was not bound to flee, but had a right to defend herself from such threatened attack," held to fairly safeguard the rights of the accused upon that phase of the case. —People v. Cutler, 197 Mich. 6.

§ 80. ——On degree and effect of proof.

See also ante ¶ 123.

General charges on burden of proof and reasonable doubt, see Indictment, IX, E.

Instructions on degree and effect of proof in general, see Indictment, IX, E.

¶ 299. An instruction in a trial for homicide that to warrant a conviction the circumstances should fully preclude all possibility that any other person could have committed the crime is properly refused.—People v. Foley, 64 Mich. 148.

¶ 300. If, in a prosecution for murder it has appeared that an axe with which the murder was committed was found in the snow with no tracks leading to it, that the person who committed the crime threw the axe, and that it could have been thrown from a path near where the murder was done; but there is evidence that the prisoner, a woman, could not have thrown it so far, it is error to refuse an instruction that if the axe was thrown so far as to satisfy the jury that respondent could not have thrown it, then the jury should be satisfied that she was not guilty, and to instruct the jury that the fact should be weighed and "would be a strong circumstance" against her being guilty.—People v. Peterson, 93 Mich. 27.

§ 81. ——On included offenses.

See also ante ¶ 260.

Charge as to included and lesser offenses in general, see Indictment, IX, E.

¶ 301. Where, in a prosecution for murder, there was evidence from which the jury might have found that respondent had no malice against deceased, but that he, after being attacked by deceased, fired the fatal shot in the heat of passion and in the excitement and confusion caused by the assault, an instruction should have been given defining the offense of manslaughter and instructing the jury that if warranted by the testimony it might convict of the lesser offense.—People v. Palmer, 96 Mich. 580.

¶ 302. In a prosecution under an information charging assault with intent to kill and murder and an assault with intent to do great bodily harm, refusal of a request to charge that the jury could convict on either of these counts and find defendant guilty of assault and battery or acquit, was held erroneous.—People v. Howard, 179 Mich. 478.

¶ 302a. Where an information for assault with intent to do great bodily harm less than the crime of murder, charges both an assault and an assault and battery, the crime of simple assault and battery is included, and it is reversible error for the trial court to charge the jury that defendant's acts could only be criminal on the highest charge, if at all.—People v. Durham, 170 Mich. 598.

§ 82. Verdict.

Directing verdict, see ante § 71.
Sufficiency of evidence to sustain verdict, see ante VII, C.
Criminal verdicts in general, see Indictment, IX, G.
Indictment for lesser degrees or offenses included within that charged, see ante §§ 41, 42.
Verdict for lesser crime as curing error pertaining to greater, see Indictment, XV.
Provisions as to ascertainment of degree, see Comp. L. 1915, § 15194.

¶ 303. A verdict of guilty of murder generally without specifying whether of the first or second degree, is erroneous.—Tully v. People, 6 Mich. 273.

¶ 304. A verdict of guilty of murder in the first degree is a compliance with How. St. § 9077, requiring that the jury ascertain the degree, though rendered pursuant to an instruction correct in law that if convicted at all accused must be found guilty in the first degree. Such a verdict is not equivalent to the court's having ascertained the degree.—People v. Repke, 103 Mich. 459.

¶ 305. Under section 11472, Comp. Laws 1897, the jury must, unless respondent is convicted by confession, ascertain in their verdict whether the murder was in the first or second degree; and the failure to fix the degree of the crime is fatal, although the charge was murder in the first degree, and the court instructed the jury that respondent was guilty of "murder in the first degree, or not guilty of the crime charged," and the verdict was "guilty as charged."—People v. Clark, 155 Mich. 647.

¶ 306. A verdict of guilty of an "assault with intent to kill" amounts to no more than a finding that respondent was guilty of a mere assault, which is a misdemeanor and not a felony.—Wilson v. People, 24 Mich. 410.

¶ 307. On an indictment for assault with intent to murder, a verdict of guilty of assault with intent to kill, that not being known as a crime, cannot be construed as a finding that respondent was guilty of anything more than an assault and battery.—Wright v. People, 33 Mich. 300.

§ 83. Sentence and punishment.

Verdicts and specification therein of the degree or grade of the crime, see ante § 82.
Sentence and judgment in criminal cases in general, see Indictment, XI.
Commitment for imprisonment, see Indictment, XII.
Errors cured by sentence and judgment, see Indictment, XV.
Sentences defective because insufficiently supported by indictment or information, see Indictment, XI, XVI.
Review of judgment and trial on writ of error or otherwise, see Indictment, XIV-XVII.
General law of punishment for crime, see Crimes, I, E.
Former acquittal or conviction as bar, see Crimes, I, D.
Certificate of commitment, description of crime or degree, see Arrest ¶ 110.
Statutory provisions as to punishments, see Comp. L. 1915, §§ 15192, 15193, 15201 et seq.
Punishment for attempt to murder by poisoning, drowning or strangling, see Comp. L. 1915, § 15204.
Punishment for assault with intent to murder, see Comp. L. 1915, § 15205.
Punishment for assault with weapons with intent to kill or maim in perpetration of robbery or attempted robbery, see Comp. L. 1915, §§ 15206, 15207.
Punishment for poisoning food, drink, medicine, or wells with intent to kill, see Comp. L. 1915, § 15218.
Punishment for assault with intent to do great bodily harm less than murder, see Comp. L. 1915, § 15227.

¶ 308. Where a jury does not find that a crime is in the first degree, it is error for the judge to punish it as if it were.—People v. Hall, 48 Mich. 482.

¶ 309. Entry of judgment in a murder case may properly be amended a month after it was made, to show that the verdict was for murder in the first degree, and to give the sentence correctly.—People v. Bemis, 51 Mich. 422.

¶ 310. Upon a conviction of murder in the second degree, the court may sentence accused to life imprisonment, and need not fix the maximum and minimum sentence.—People v. Blake, 157 Mich. 533.

HONESTY to HUNTING.

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Sufficiency of evidence to show delivery of antenuptial contract, see Execution of Instruments ¶ 275.
Validity of antenuptial contracts, see Comp. L. 1915, § 11488.

¶ 2. Where the parties entering into an antenuptial contract are of mature years and have a full understanding of the meaning of the instrument, the agreement, if based on a sufficient consideration, and in the absence of fraud is valid and enforceable and is not against public policy.—Hockenberry v. Donovan, 170 Mich. 370.

¶ 3. Marriage alone is a sufficient consideration to support a marriage settlement.—Hockenberry v. Donovan, 170 Mich. 370.

¶ 4. Where in an antenuptial contract there is a mutual agreement to waive all interest in the property of each other, a good consideration is afforded.—Hockenberry v. Donovan, 170 Mich. 370.

¶ 5. By a parol antenuptial contract, a husband agreed to make the wife beneficiary of a certain insurance policy, and the wife agreed to make a will in favor of the husband. The husband executed his part, and the wife offered to perform hers, but the husband declined to accept her offer on the ground of her alleged mental incompetency. The wife had not been adjudged insane, and the evidence tended to show that at the time of offering to make the will she was mentally competent. Held, the contract was binding on the husband, and the substitution of a beneficiary by him in the place of the wife was invalid.—Andrews v. Lavery, 159 Mich. 26.

¶ 6. In prenuptial contracts a wife barred herself from all participation in the estate of her prospective husband as his wife or widow, and from all interests which should or might be vested in her by virtue of the marriage, and further released all interest in his property, whether personal or real estate, statutory or dower. Held, the wife's contention could not be sustained that by these contracts only her dower and homestead rights were cut off.—Hockenberry v. Donovan, 170 Mich. 370.

¶ 7. An antenuptial agreement by which, in consideration of $5 and of love and affection, a prospective wife released all claims which she "as widow" might have in her husband's estate, "whether in right of dower, or as her distributive share in the personalty, or otherwise, under the laws of the state," was held insufficient to bar her from sharing in his personalty where, on the date of such agreement, he made a writing in which he stated that he intended to provide for her future consistent with his ability in a financial way, and where, though he afterwards conveyed to her a life-estate in his homestead, he made no provision for her support and left her nothing in his will.—In re Pulling's Estate, 93 Mich. 275.

§ 3. ——Evidence to establish.

¶ 8. In a bill by a widow to have determined the ownership of an insurance certificate taken out by her deceased husband in favor of his mother, the evidence is insufficient to establish an antenuptial agreement to transfer the certificate to the complainant, after the marriage, where the testimony of the witnesses is simply that the deceased made declarations of a purpose so to transfer it.—Franken v. Supreme Court Independent Order of Foresters, 152 Mich. 502.

¶ 9. Complainant prior to her marriage executed with her prospective husband two contracts releasing her dower and all interests in her husband's property. The first contract was drawn by a reputable attorney and was executed in the presence of a justice of the peace, who had no interest in the matter, one of them testifying that the husband told complainant that she must sign the contract or the marriage would not take place, and both of them testifying that the contract was read over and fully explained to complainant. The only evidence of fraud was that of complainant and her sister, whom complainant desired to inherit her property, and who was greatly interested in setting the contracts aside. Complainant and her sister were not examined in open court, but their depositions were taken at the hearing. The second contract was drawn and executed at the office of another reputable attorney who testified that complainant seemed to be fully aware of the effect of the same. Complainant was forty-five years old at the time of the marriage. Held, the trial court judge was justified by the evidence in finding that the contracts were not obtained from complainant by fraud.—Hockenberry v. Donovan, 170 Mich. 370.

¶ 10. In a bill brought to set aside a conveyance of land by a husband to his third wife two days before their wedding, and to nullify the substitution of her as beneficiary under his fraternal insurance certificates, made at the same time, held, that the testimony of a woman of doubtful character that defendant slowly poisoned the insured and "bossed" him about the house after their marriage, was not sufficient to establish undue influence as against the testimony of the scrivener and others that the husband knew what he was doing in mak-

ing the transfers.—Lutz v. Rohn, 167 Mich. 318; Spanier v. Same, Id.

¶ 11. A widow's claim made as an offset against her husband for services alleged to have been rendered before their marriage is not supported by her testimony after his death giving exact days and amounts without having kept any memoranda, and otherwise rendered improbable by reason of her not having ever asked him for payment, though he was able and she was without means, and by reason of his having advanced money for or to her afterwards and her having failed to assert the claim in other litigation where it would have been a proper offset.—Moore v. Smith, 103 Mich. 387.

¶ 12. On a bill by the widow of a decedent for a decree allowing her permission to file her election under the statute instead of under the will, on the ground that she had been fraudulently induced not to file her election under the statute until the expiration of the time limit, and where the defense was an antenuptial agreement under which the husband and wife mutually agreed not to claim any portion of the estate of the other, after the death of either one, evidence held sufficient to show that such antenuptial agreement was made and was understandingly made.—Lamb v. Lamb, 192 Mich. 466.

§ 4. Contracts and dealings with each other after marriage.

Separation agreements, see post §§ 185, 186.
Contract actions against each other, see post § 181.
Husband's contracts with third persons, see post III.
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Effect of postnuptial release to husband of wife's expectancy in his estate "by or under laws of" specified state, where he has proprety in other states, see Descent ¶ 51.
Effect on widow's allowance of postnuptial agreement wherein widow released all rights to husband's estate, see Estates of Decedents ¶ 350.
Effect of separation agreement releasing rights to husband's estate on widow's allowance, see Estates of Decedents ¶ 349.
Contract between wife and guardian of husband, see Comp. L. 1915, § 11467.

¶ 13. A husband and wife can contract with each other when the contract is not precluded by public policy.—Randall v. Randall, 37 Mich. 563.

¶ 14. At common law the husband as well as the wife was disabled from entering into a mutual contract. The same rule held in equity, except in regard to separate estates, and it applied in a measure to them.—Jenne v. Marble, 37 Mich. 319.

¶ 15. It has never been held in Michigan that husband and wife may contract with each other generally or make contracts enforceable at law that could not formerly have been enforced in equity, concerning her separate estate.—Jenne v. Marble, 37 Mich. 319.

¶ 16. A man leased to his wife certain farms, including the family homestead, for a rent that could not be apportioned, and sold her certain animals that were used on the homestead without so distinguishing them as to take them out of the homestead exemption. The lease contained clauses of eviction. The wife's contract to pay was executory, and she bound herself by her personal covenant. Held, that it could not be enforced by an action at the common law.—Jenne v. Marble, 37 Mich. 319.

II. PROPERTY RIGHTS BETWEEN THEM.

A. IN GENERAL.

§ 5. In general.

Title or interests in realty adverse to that of other spouse, see post § 6.
Ownership, possession and disposal of personalty, see post §§ 7-10.
Rights in personalty jointly owned, see post § 11.
Gifts and transfers to each other, see post § 12.
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Right of wife to conduct business without husband's consent, see post § 16.
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Beneficiaries in fraternal benefit policy, see Fraternal Associations, IV.
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Application of exemption statutes as between husband and wife, see Exemptions § 9.
Denial of equity to husband because of part in wrongdoing, see also Equity ¶ 17.

Widow's right to allowance out of estate, see Estates of Decedents, V, D.
Priority between wife and execution purchasers against husband holding legal title to wife's property, see Executions § 34.
Property rights of married woman when abandoned by her husband, see Comp. L. 1915, §§ 11451-11453.
Disability of one spouse living in bigamous relations to inherit from the other lawful spouse, see Comp. L. 1915, §§ 14618, 14619.

¶ 17. The common-law disabilities of the wife are not removed, so far as relates to her interest in the husband's property, by the statutes giving her full powers of control in respect to her own property.—Ring v. Burt, 17 Mich. 465.

¶ 18. In the enforcement of a wife's contracts with her husband in regard to her separate estate, it is not necessary in Michigan that she be represented by a trustee.—Randall v. Randall, 37 Mich. 563.

¶ 19. With respect to the husband not separated from the wife the marital dwelling in which the wife resides is not "the house of another." Our statutes for the protection of the rights of married women do not operate upon the family relations, or affect the marital unity, or take from the husband his marital rights, except as they relate to property, nor do they relieve him from responsibilities, except as they relate to the wife's contracts and debts.—Snyder v. People, 26 Mich. 106, per Cooley, J.

§ 6. Title or interest in realty adverse to that of other spouse.

Lien on realty of husband to secure enforcement of payment to wife in separate maintenance suit, see post § 194.
Proof of adverse possession by husband's grantees against wife, see Adverse Possession § 50.
Right of married woman to sell, convey or lease her real property after desertion by her husband, see Comp. L. 1915, § 11451.

¶ 20. A husband cannot acquire a tax title to land held by his wife under contract to purchase; such acquisition will be held to be for the wife and not to defeat the right under a prior mortgage held by a third person.—Simons v. Rood, 129 Mich. 345.

¶ 21. A married woman who is in possession with her husband of land in which the latter has a life estate, cannot acquire a tax title which she can assert adversely to the life tenant or the remainder-man.—Myers v. Myers, 186 Mich. 215.

§ 7. Ownership, possession and disposal of personalty.

Rights in wife's choses in action, see post § 8.
Wife's rights in exempt property, see post § 9.
Disposal of leasehold, see post § 10.
Rights in personalty jointly owned, see post § 11.
Commingling separate property with husband's property, see post § 46.
Right to rents, profits and issues of estate held by the entireties, see post § 29.
Power to make testamentary disposition of personalty, see Wills, I.
What law governs marital rights in personalty, see Conflict of Laws § 24.
Wife's rights in separate property, see Comp. L. 1915, § 11475.
Right of wife to dispose of personalty when abandoned by her husband, see Comp. L. 1915, § 11451.

¶ 22. A transfer or gift of personal property by a husband during his lifetime is not void as to his widow under Comp. L. 1897, §§ 9300, 9301, unless done with fraudulent intent to prevent its passing into his estate after his death.—Trabbic v. Trabbic, 142 Mich. 387.

¶ 23. A wife's assent to the disposal by her husband of his unexempt personalty during his lifetime is not essential, she having no vested interest during his life.—Trabbic v. Trabbic, 142 Mich. 387.

¶ 24. A wife cannot in leaving home on account of the husband's misconduct and ill-treatment take household goods of the homestead without the husband's consent.—Johnson v. Johnson, 125 Mich. 671.

¶ 25. Where a husband, in the absence of his wife, and without her knowledge or consent, takes, in his own name, securities for the loan of her money, he cannot, on the ground that during her life-time she had suffered them to stand in his name, and that they thereby became his property, defend against a bill brought by her administrator to compel the assignment and delivery.—Leland v. Whitaker, 23 Mich. 324.

¶ 26. Wearing apparel, purchased by a married woman with her husband's money or on his credit, belongs to him, and is recoverable by him from third persons.—Smith v. Abair, 87 Mich. 62.

§ 8. ——Rights in wife's choses in action.

Damages for personal injuries to wife as her separate property, see post § 39.

¶ 27. At common law all the wife's choses in action, if reduced to possession during the coverture, belonged to the husband, though on his death before recovery by him they survived to her.—Berger v. Jacobs, 21 Mich. 215.

§ 9. ——Wife's rights in exempt property.

¶ 28. A wife has special statutory rights in such household goods as would be exempt

from execution; and if her husband leaves her he cannot get possession of them by writ of replevin, even if they consist of books, a shotgun and a revolver.—Smith v. Smith, 52 Mich. 538.

¶ 29. If a pound-master shall unlawfully seize and convert an exempt animal belonging to the husband, the wife may sue in trover for the value.—Ingersoll v. Gage, 47 Mich. 121.

¶ 30. Where one who has sold to a husband goods that would be exempt as household property is subsequently garnished in respect thereof by the husband's creditors, and refuses to deliver them to the vendee, the vendee's wife may replevy them from him though the garnishment suit is still pending. —Hanselman v. Kegel, 60 Mich. 540.

§ 10. ——Disposal of leasehold.

¶ 31. A lessee can convey his interest as such without his wife's consent.—Tharp v. Allen, 46 Mich. 389.

§ 11. Rights in personalty jointly owned.

Fraud in securing joint bank account, see post ¶ 54.

Survivorship rights in bank joint account, see Banking § 6.

¶ 32. Where husband and wife have invested jointly, each paying half, and have taken securties in their joint names, the wife, on her husband's death, does not take the whole by right of survivorship; that right does not apply to personalty.—Wait v. Bovee, 35 Mich. 425.

§ 12. Gifts and transfers to each other.

Gifts of lands, see post II, D.

Conveyances to each other, see post II, D.

Statutory rights prevailing over gift by other spouse, see Gifts ¶ 95.

Transfers from one spouse to other with intent or effect to hinder or defraud creditors, see Fraudulent Conveyances §§ 47-49.

¶ 33. A wife may make a gift of her property to her husband.—Durfee v. McClurg, 6 Mich. 223; Penniman v. Perce, 9 Mich. 509; Jenne v. Marble, 37 Mich. 319.

¶ 34. The transfer of household goods by a husband to his wife is legal.—Goppelt v. Burgess, 132 Mich. 28.

¶ 35. Money advanced by a wife to her husband with the expectation that he should repay it, but without express agreement as to the time of repayment, will not be treated as a gift, unless under circumstances amounting to an estoppel.—Sykes v. City Sav. Bank, 115 Mich. 321.

¶ 36. A husband assigned to his wife a judgment recovered by him, but after her death he filed a claim against her estate for

of claims wherein it appears that the claim has been filed by the husband.—Barnes v. Moore's Estate, 86 Mich. 585.

§ 14. ——Consent, assignment or relinquishment by husband.

Husband's agreement that wife's earning shall be her separate property, see post § 41, ¶ 125.

¶ 43. A married woman is entitled to the benefits of a contract by which she furnished board and care to another, where all of the supplies were provided by her, and the arrangement was entered into and carried out with the husband's consent.—Slack v. Norton, 111 Mich. 213.

¶ 44. A claim for board and room of a third person belongs to the husband, in the absence of an assignment to the wife, where he furnishes the provisions for the family, although he tells her she can have what she earns.—In re Burnham's Estate, 199 Mich. 326.

¶ 45. A married woman may make a binding contract with her parents to give her personal services in caring for them, and her husband may testify that he consented to the same, and it is not necessary that the parents know that the husband has consented.—Ashley v. Smith's Estate, 152 Mich. 197.

¶ 46. In an action by a husband as executor of his wife's estate on a claim of the wife against an estate for board, room, etc., furnished decedent, an instruction, that it was the claim of plaintiff that plaintiff's wife was the owner of the claim by reason of an arrangement made between them, that the only evidence thereof was the evidence of the husband that he said to his wife that "whatever she earned was hers," and that such words could not be extended beyond what she earned, which might include washing, ironing and mending, but not board and lodging if the evidence showed that the husband as head of the family supplied them, and as there was no evidence showing what the wife earned, she could not recover, held improperly refused.—In re Burnham's Estate, 199 Mich. 326.

¶ 47. Where a family engaged in the bill-posting business have formed a corporation for the conduct thereof, the husband is not entitled to relief on the ground that he is entitled to the earnings of the wife in such capacity, where he has for years recognized the wife's right to earn and disburse money, doing business with her himself as he would with a stranger.—Pearll v. Pearll Advertising Co., 162 Mich. 439; Pearll v. Pearll, Id.

§ 15. ——Husband's agreement to pay for services.

Public policy as to agreement to pay wife for services, see Contracts § 64, ¶ 262.

¶ 48. An agreement whereby a husband is to pay his wife annually a certain sum for her services as housekeeper is contrary to public policy and invalid as against creditors.—Michigan Trust Co. v. Chapin, 106 Mich. 384.

§ 16. Right of wife to conduct business without husband's consent.

¶ 49. Where a husband has the ability and stands ready to support his wife she has no legal right to conduct against his will a business of her own.—Root v. Root, 164 Mich. 638.

§ 17. Rights of husband as "head of family."

Rights of husband on occupancy of separate property as "head of family," see post ¶¶ 141, 144.

Rights and liabilities of husband toward third persons, see post IV.

Presumption as to foreign law regulating marital property rights, see Evidence § 59.

¶ 50. Where a family engaged in the bill-posting business have formed a corporation for the conduct thereof, the husband on being ousted from control of the corporation by his wife, cannot secure relief upon the ground that as head of the family he is entitled to control or at least share in the community property where the bill is not framed upon such theory.—Pearll v. Pearll Advertising Co., 162 Mich. 439; Pearll v. Pearll, Id.

¶ 51. In case of a joint lease to husband and wife, which does not come within the rules applicable to tenants in common, the husband's common-law rights as head of the household are important; the wife cannot stipulate to give any one a home in her husband's household.—Nolan v. Nolan, 78 Mich. 17.

§ 18. Burden of proof, presumptions and evidence.

Sufficiency of evidence as to gift, see post § 19.

Presumption that wife is employing her services for husband, see ante ¶ 40.

General law of evidence, see Evidence.

Pleading contract by one spouse and proving agreement with both as variance, see Contracts § 301.

Evidence as to ownership of stock in husband's name assigned to wife but remaining in his possession, see Corporations ¶ 1041.

Sufficiency of evidence as to debts owing by husband to wife or vice versa, see also Garnishment § 80.

Sufficiency in garnishment of evidence as to husband's or wife's ownership of debt owing, see Garnishment ¶ 238.

Ownership of debt or property as jury question in garnishment, see Garnishment § 82.

¶ 52. When a husband claims that a gift of personalty has been made to him by his wife, the burden of proof is upon him to establish that fact.—Durfee v. McClurg, 6 Mich. 223; Penniman v. Perce, 9 Mich. 509; Jenne v. Marble, 37 Mich. 319.

¶ 53. The rule that, if one gives another money at his request, the law will imply a promise to repay, applies, where there are no circumstances tending to show a different understanding, to a husband who receives money from his wife.—Sykes v. City Sav. Bank, 115 Mich. 321.

¶ 54. Evidence held insufficient to show fraud and undue influence on the part of a wife in inducing her husband to make his bank deposits payable to either or to the survivor.—Powell v. Pennock, 198 Mich. 573.

§ 19. ——Sufficiency of evidence as to gift.

¶ 55. The question of the sufficiency of evidence to establish a gift of personalty from a wife to her husband discussed by a divided court.—Penniman v. Perce, 9 Mich. 509.

¶ 56. Gift or purchase of personalty from wife to husband must be established by some other evidence than that of use and possession by him permitted by her. So held in a suit between the wife's administrator and the husband.—White v. Zane, 10 Mich. 333.

¶ 57. Open and visible change of possession can hardly be required to establish the fact of a gift of personalty from a husband to his wife when they are living together.—Davis v. Zimmerman, 40 Mich. 24.

¶ 58. Where the rights of creditors are involved, all the facts bearing on an alleged change of ownership of personalty from husband to wife should be admitted in evidence.—Judge v. Vogel, 38 Mich. 569; Carew v. Mathews, 49 Mich. 302.

¶ 59. Where a woman claims personal property as a gift from her husband, the only question is whether she establishes her right by a fair preponderance of evidence. But it is proper to consider the circumstances of the relation and the facility with which fraud may be perpetrated under its protection.—Davis v. Zimmerman, 40 Mich. 24.

¶ 60. A gift by a husband to his wife of his interest in a piano is not established, so as to subject it to levy on execution by a creditor of the wife, by evidence that, upon abandoning his home, he left the instrument in her possession, and that she took it with her when she changed her place of residence, where it appears that the piano was purchased for the use of a daughter, under a contract providing that the title should remain in the vendor until payment of the purchase price, and that it was not fully paid for.—Dawson v. Lindsay, 111 Mich. 200.

¶ 61. A man gave a chattel mortgage under which the mortgagee claimed certain articles which the mortgagor's wife testified that her husband had given her before its date. Held, that her testimony that her husband gave her specified articles could not be treated as stating a conclusion of law only, but that it averred the act of giving, and in the absence of qualifying testimony would justify a finding that a gift was made.—Davis v. Zimmerman, 40 Mich. 24.

B. ENTIRETIES AND COTENANCIES.

§ 20. In general; creation by joint deed.

See also post ¶¶ 80, 81.

Deed not designating grantees as husband and wife, see post § 21.

Deed to self and spouse as joint grantees, see post § 22.

Deed from one spouse to other of undivided half interest, see post § 23.

Life estate as entirety, see post § 24.

Interest in purchase contract, see post § 25.

Nature and incidents of estate by entirety, see post § 26.

Survivorship as incident of estate, see post §§ 27, 28.

Right to rents, issues and profits, see post § 29.

Alienation or incumbrance, see post §§ 30-32.

Subjection for debts of either spouse, see post § 33.

Effect of divorce on estate, see post § 34.

Presumptions and evidence as to estate, see post § 35.

Estoppel to deny or question estate, see post § 36.

Separate property of wife, see post II, C.

Estate held by entirety as property claimable as homestead, see Homesteads ¶ 27.

Creation and nature of tenancies in common and joint tenancies, see Tenants in Common, I.

Estates by the curtesy, see Curtesy.

Construction of deed to husband and wife with respect to estates passed, see Deeds § 44.

Statutory rule as to construction of estates granted to husband and wife, construction as estate by entirety, see Comp. L. 1915, §§ 11562, 11563.

Capacity of married woman to bind herself jointly with husband as to entirety or lands acquired as survivor and as to issues thereof, see Pub. Acts 1917, No. 158.

¶ 62. To create an estate in entirety at common law, the unities of time, interest, and possession must be observed.—Pegg v. Pegg, 165 Mich. 228.

¶ 63. A husband and wife, under a joint deed to both, take as tenants by the entirety

and not as joint-tenants.—In re Appeal of Lewis, 85 Mich. 340; Naylor v. Minock, 96 Mich. 182.

¶ 64. Under a deed of land to husband and wife they do not take by moieties, but each is seized of the entirety (arguendo).—Midgley v. Walker, 101 Mich. 583.

¶ 65. Husband and wife, to whom lands are conveyed by the same deed, are not tenants in common, or strictly joint tenants.—Fisher v. Provin, 25 Mich. 347; Aetna Ins. Co. v. Resh, 40 Mich. 241; Manwaring v. Powell, 40 Mich. 371; Roediger v. Wayne County Drain Com'r, 40 Mich. 745; Jacobs v. Miller, 50 Mich. 119; Vinton v. Beamer, 55 Mich. 559.

¶ 66. The married woman's act (How. St. § 6295) did not repeal by implication How. St. §§ 5560, 5561, as being inconsistent therewith so as to cause husband and wife to take as tenants in common under a deed to both.—Dowling v. Salliotte, 83 Mich. 131.

¶ 67. The dictum in Dowling v. Salliotte, 83 Mich. 131, that estates by entireties do not exist under our statutes, is overruled.—Auditor-General v. Fisher, 84 Mich. 128.

¶ 68. Where a husband and wife give a deed to land belonging to the husband with a contract back from the grantee that when certain payments are made the grantee, in order that the wife making payments should be protected from the dissolute habits of the husband, shall give them a deed and they then shall hold by the entireties on compliance with the contract the parties would take the title as agreed and the entire property would go to the survivor, and where the wife survived, the fact that she took a quit-claim deed form the grantee does not affect her rights.—Robson v. Townley, 176 Mich. 581.

§ 21. ——Deed not designating grantees as husband and wife.

Estate of wife in land deeded to her and her husband and their "assigns," see Deeds ¶ 70.

¶ 69. Where two persons hold land under a contract running to them jointly, they being in fact husband and wife, even though not designated as such, their interest is an entirety, and the husband's signature to a petition for a local improvement will not count in securing the signatures of a majority of resident property-holders unless his wife also signs.—Auditor-General v. Fisher, 84 Mich. 128.

¶ 70. A deed to a man and woman who are in fact husband and wife though not stated to be such in the deed creates an estate which one upon the other's death takes as survivor.—Dowling v. Salliotte, 83 Mich. 131.

§ 22. ——Deed to self and spouse as joint grantees.

¶ 71. A deed in which the grantor names himself and wife as joint grantees with the right of survivorship, creates an estate in common and not an estate by the entirety.—Wright v. Knapp, 188 Mich. 656. (Brooke and McAlvay, JJ., dissenting.)

¶ 72. A deed from a husband to himself and wife creates a tenancy in common, and not an estate by entirety.—Michigan State Bank of Eaton Rapids v. Kern, 189 Mich. 467.

§ 23. Deed from one spouse to other of undivided half interest.

Conveyances to each other in general, see post II, D.

¶ 73. Where a husband grants an undivided one-half interest in land to his wife, the wife is a tenant in common despite the insertion in the deed between the granting and habendum clauses of a clause stating that the purpose of the deed is to grant an estate in entirety by which the survivor shall have all the land.—Pegg v. Pegg, 165 Mich. 228.

§ 24. Life estate as entirety.

General law of life estates, see Life Estates.

¶ 74. A life-estate granted to a man and his wife is an entirety in which both take the same and inseparable interests; neither can affect the other's rights by a separate transfer, and whatever will defeat the interests of one will defeat the interests of the other.—Vinton v. Beamer, 55 Mich. 559.

§ 25. Interest in purchase contract.

Nature of purchase contracts in general, see Vendor and Purchaser.

¶ 75. The interest of a husband and a wife in a land contract in which their names appear as vendees, is an entirety and not a tenancy in common.—Zeigen v. Roiser, 200 Mich. 328.

¶ 76. Under Comp. L. 1915, § 10036, providing that every summer resort corporation formed under the act shall be capable in law of owning, holding or purchasing and disposing of, in such manner as a majority of the stockholders shall direct, any real or personal property whatever, and section 10047, providing that the stock of every such corporation shall be deemed personal property and may be transferred as shall be prescribed in the act and by the by-laws of the corporation, and section 10053, providing that whenever any such corporation shall cause any of its land to be platted, it may, by its by-laws "provide the manner in which the lot or lots may be assigned, allotted or confirmed to its several stock-

holders, and the terms and conditions upon which the same shall be held" and that "any such lot or lots so assigned, allotted or confirmed to such stockholders shall be deemed and considered as appurtenant and attached to a certain share or shares of stock of capital stock in such corporation, which shall be designated at the time of such assignment, allotment or confirmation, and any assignment, transfer or other disposition of such capital stock shall be held to carry with it the right to such lot or lots," and that it shall be unlawful for any stockholder to transfer his interest in any lot separate from the share or shares of capital stock to which it is attached, where a stockholder received a warranty deed to lot containing the condition that the lot was appurtenant and attached to certain shares of the capital stock and that the lot or interest therein should not be sold detached from such shares contrary to the rules of the corporation, and entered into a contract for the sale of the lot and shares of stock with a man and his wife jointly, subject to the condition prescribed by the corporation, an interest in an estate by the entirety in real property was acquired by the contract purchasers.—In re Berry, 247 Fed. 700.

§ 26. Nature and incidents of estate by entirety.

Survivorship as incident of estate, see post §§ 27, 28.

Right to rents, profits and issues, see post § 29.

Power to make testamentary disposition of estate held by entirety, see Wills, I.

Tenant by entireties as "freeholder" to sign application for drain, see Drains ¶¶ 60, 61.

Whether dower attaches to lands held by the entirety, see Dower § 9.

¶ 77. The estate of husband and wife by the entireties is but one estate, and it is impossible to carve anything out of it during the joint lives, without affecting the interest of the wife.—Michigan Beef & Provision Co. v. Coll, 116 Mich. 261.

¶ 78. Whatever would defeat a husband's title under a grant made to himself and his wife jointly would defeat hers also, as they take by entireties (Comp. L. 1871, § 4112, How. St., § 5561).—Manwaring v. Powell, 40 Mich. 371.

¶ 79. An estate held by the entirety is not affected by the statute of partition.—Jacobs v. Miller, 50 Mich. 119.

§ 27. Survivorship as incident of estate.

See also ante ¶ 70.

Death of one tenant by entirety, and suit by survivor, see Abatement ¶ 7.

¶ 80. Where real estate is conveyed to a husband and wife, an estate in entirety is created, and upon the death of either, the title in fee is in the survivor.—Doane v. Feather's Estate, 119 Mich. 691.

¶ 81. Where land is conveyed in fee to husband and wife they do not take as tenants in common, and if one of them dies the whole title inures to the survivor. Nothing in our constitution and statutes relating to the rights of married woman would convert such an estate into a tenancy in common.—Fisher v. Provin, 25 Mich. 347; Aetna Ins. Co. v. Resh, 40 Mich. 241; Jacobs v. Miller, 50 Mich. 119.

¶ 82. A will made by a husband is ineffectual to vest in a third person any title to land held by him and his wife jointly.—Hubert v. Traeder, 139 Mich. 69,

§ 28. ——Survivor's right in mortgages.

¶ 83. The doctrine of survivorship, whereby on the death of husband or wife the other is vested with the whole estate previously held by the entireties, does not apply to mortgage securities with such strictness as to conveyances.—McLeod v. Free, 96 Mich. 57.

§ 29. Right to rents, issues and profits.

Rights concerning rents, profits and issues, see Comp. L. 1915, § 11475.

¶ 84. A crop raised on land that is owned by husband and wife by the entireties is similarly owned, and is not subject to levy and sale on an execution against the husband.—Dickey v. Converse, 117 Mich. 449.

¶ 85. The married women's act, Comp. L. 1897, § 8690 has no application to estates by entirety; and under common law a wife living apart from her husband has no right to a share of the crops growing on land held by her husband and herself in entirety.—Morrill v. Morrill, 138 Mich. 112.

¶ 86. A wife cannot make a binding verbal agreement with her husband that she shall have an equal share in the profits arising from land held by them in entirety as this would permit the changing of the legal effect of the deed by parol agreement.—Morrill v. Morrill, 138 Mich. 112.

§ 30. Alienation or incumbrance.

See also ante ¶ 77.

Release or transfer to each other, see post § 31.

Liability on contract to convey or incumber, see post § 32.

Effect of joinder in husband's deed, see post § 139.

Conveyances by wife to third persons, see post IV, D.

Mortgage for purchase price of land held by entirety as incident to the land contract surviving therewith to the wife, see Descent § 8, ¶ 12.

Capacity of married woman to bind herself jointly with husband to alien or incumber, see Pub. Acts 1917, No. 158.

¶ 87. Tenants by entirety, by acting jointly, may alienate the entire estate.—Demerse v. Mitchell, 187 Mich. 683.

¶ 88. An estate by the entirety can be alienated only by the joint act of both spouses.—Agar v. Streeter, 183 Mich. 600.

¶ 89. An estate by the entirety cannot be alienated by the independent act of the husband or wife.—Agar v. Streeter, 183 Mich. 600.

¶ 90. One tenant by the entirety has no interest separable from that of the other; he has nothing to convey or mortgage or to which he can attach a lien.—Bauer v. Long, 147 Mich. 351.

¶ 91. Where real estate is owned by the husband and wife as tenants by entirety, the wife's sole quit-claim deed conveys nothing.—Ernst v. Ernst, 178 Mich. 100.

¶ 92. Property held by husband and wife as tenants by the entireties cannot be conveyed, nor any interest therein, without the wife joining with the husband.—Zeigen v. Roiser, 200 Mich. 328.

¶ 93. A deed or mortgage of an estate by the entirety executed by one spouse only to a third person is a nullity, both before and after the death of the non-consenting spouse.—Agar v. Streeter, 183 Mich. 600.

¶ 94. A mortgage by husband and wife upon land held by them in entirety to secure a loan made the husband is valid.—Ehle v. Looker, 182 Mich. 248.

¶ 95. A deed by husband and wife of land held by the entirety as security for money loaned the husband alone is a mortgage as to both, and cannot be regarded as a mortgage as to one spouse and a deed as to the other.—Ehle v. Looker, 182 Mich. 248.

¶ 96. During their joint lives neither husband nor wife can so alien as to bind the other property as to which they are seized of the entirety.—Jacobs v. Miller, 50 Mich. 119.

¶ 97. A mortgage executed by the wife only, upon land which she and her husband own by the entirety, to secure her husband's debt, is void, although such debt was for necessaries furnished to the husband, an insane person.—Naylor v. Minock, 96 Mich. 182.

¶ 98. A mortgage by a wife of an estate by the entireties for her husband's debt, being inceptionally void, does not estop her or her heirs from asserting the interest afterwards acquired by her in the land on her husband's death.—Naylor v. Minock, 96 Mich. 182.

¶ 99. A mortgage executed by husband and wife upon land owned by them as tenants in the entirety, to secure a loan made to the husband alone, is valid; though she could not alone have bound it by her separate deed.—People's Building & Loan Ass'n v. Billings, 104 Mich. 186.

¶ 100. Wife's separate mortgage for husband's debt of land owned by both in the entirety is void and does not pass title afterwards acquired by her on husband's death.—Naylor v. Minock, 96 Mich. 182.

§ 31. ——Release or transfer to each other.

¶ 101. Husband and wife as tenants by entirety may release their interests to each other.—Demerse v. Mitchell, 187 Mich. 683.

§ 32. ——Liability on contract to convey or incumber.

¶ 102. A contract for the sale of a house and lot owned by a man and his wife jointly, and signed by the man alone, cannot be enforced against the wife.—Shipman v. Campbell, 79 Mich. 82.

¶ 103. Neither a husband nor wife can alone convey or incumber an estate vested in them by entirety, but such an instrument is not void to the extent that an action for damages for its breach does not lie.—Way v. Root, 174 Mich. 418.

¶ 104. A contract made by a husband is ineffectual to vest in a third person any title to land held by him and his wife jointly.—Hubert v. Traeder, 139 Mich. 69.

§ 33. Subjection for debts of either spouse.

Liability for lien for debt of one tenant only, see also ante ¶ 90.

Validity of mechanics' lien on land held by entirety where contract was not signed by husband, see Mechanics' Liens, IV.

Right of spouse to move for dissolution of attachment on homestead, see Attachment § 105.

Leviability of joint interests in lands, see Executions § 22.

¶ 105. Property held by husband and wife by entireties before or at the time the husband incurs a debt cannot be reached for the satisfaction of that debt.—Schliess v. Thayer, 170 Mich. 395.

¶ 106. Estates in entirety cannot be created at the expense of creditors and held in fraud of the latter's right.—Newlove v. Callaghan, 86 Mich. 297.

¶ 107. Where a husband and wife hold real estate by the entireties at the time of the making of a purchase and the incurring of indebtedness by the husband, a repre-

sentation made to the seller by the wife, at the time of the purchase, to the effect that the husband is the owner of the property, is not necessarily binding upon the husband so as to subject the property to a levy made to satisfy a judgment for such indebtedness.—Schliess v. Thayer, 170 Mich. 395.

¶ 108. An undivided one-half interest in lands held by a husband and wife by entireties may be subjected to a judgment against the husband, where moneys were applied by him to the purchase of the lands after the debt had been incurred, notwithstanding the lands were contracted for prior to such indebtedness; and, in the absence of a contrary showing, it will be presumed that one-half of the payments so made upon the contract was made by the husband.—Michigan Beef & Provision Co. v. Coll, 116 Mich. 261.

¶ 109. March 7, 1906, defendant incurred an indebtedness for an automobile purchased of complainant. Defendant and his wife had on February 18, 1906, made the last but one of forty-eight payments on the contract of sale for a certain lot, which by the terms of the contract was to be conveyed to defendant and his wife as tenants by the entireties. On March 21, 1906, the wife with her own money, received from an endowment insurance policy, made the last payment on the contract, at which date the deed to the lot was made to defendant and his wife. Complainant on December 31, 1906, recovered a judgment for the purchase price of the automobile against defendant. Held, the lot in question could not be subjected to a levy based on said judgment.—Schliess v. Thayer, 170 Mich. 395.

§ 34. Effect of divorce on estate.

Effect of divorce to dissolve estate by the entireties, see Divorce § 100.

Division, restitution and allotment of property on divorcing parties, see Divorce, X, B.

Power in divorce to sever and allot estate by the entireties, see Divorce § 137.

¶ 110. An estate by entirety under a joint deed to both a husband and wife is not affected by a decree of divorce.—In re Appeal of Lewis, 85 Mich. 340.

§ 35. Presumptions and evidence as to estate in general.

General law of evidence, see Evidence.

Parol evidence to show tenancy in common or tenancy by entirety, see Evidence § 185.

¶ 111. Where husband and wife buy land taking a conveyance to both jointly, the husband is presumed, in the absence of evidence to the contrary, to have paid half of the purchase-price.—Newlove v. Callaghan, 86 Mich. 297.

¶ 112. A wife joined with her husband in attacking proceedings for laying out a ditch. Held, that it must be presumed that their interest was the common-law tenure of husband and wife, and that she could not stand in court in any better position than her husband.—People ex rel. Roediger v. Drain Com'r, 40 Mich. 745.

¶ 113. Where a bill is filed by a wife to set aside deeds creating a joint estate in her and her husband on the ground of fraud and undue influence and an agreement to reconvey, and there is evidence showing that she has a divorced husband and desired to make it impossible for him to ever come into any of her property and that she had great confidence in her husband, trusting his discretion in all dealings relative to the property, granting him broad powers of attorney with respect thereto and making him her executor, such facts are sufficient to refute the allegations of the complainant.—Steketee v. Newkirk, 173 Mich. 222.

§ 36. Estoppel to deny or question estate.

See also ante ¶ 98.

General principles of estoppel, see Estoppel.

¶ 114. A divorced woman who had children married a man who, as it afterward appeared, had another wife living from whom he was not divorced. They lived together as man and wife and were so regarded by the public. Property belonging to an infant was sold to them under an order of the court of chancery which named the man and recited that he and "his wife" had offered a certain sum for the property, and further directed that the infant's guardian execute a conveyance to him and "his wife." A deed was executed accordingly in which the grantees were named and the woman's name followed by the words "his wife." The woman died and the man conveyed away the entire property. Held, that the woman's children by her first husband could not contradict the legal operation of the guardian's deed, by parol evidence that their mother was not the lawful wife of her second husband, nor could they insist that the deed therefore conveyed an estate in common in which they had a right of inheritance rather than an entirety.—Jacobs v. Miller, 50 Mich. 119.

¶ 115. Whether a conveyance to a bona fide purchaser would not be good when received from the survivor of two persons, who, in the deed to themselves, had been named and described as husband and wife, and who had been publicly married and lived in that relation, and had accepted the deed in that character even though not such, quære.—Jacobs v. Miller, 50 Mich. 119.

C. SEPARATE PROPERTY OF WIFE.

§ 37. In general.

What constitutes separate property, see post §§ 38-43.

Right to hold mortgage against husband's lands, see post § 44.
Rights of wife to deal with and dispose of her property, see post § 45.
Commingling with husband's property and estoppel to assert, see post § 46.
Right of husband to charge or incumber, see post §§ 47, 48.
Occupancy of wife's lands by husband, see post § 49.
Accounting between spouses respecting separate property, see post § 50.
Estoppel or laches to deny or asset separate property, see post § 51.
Presumptions and evidence as to ownership, see post § 52.
Questions of law and fact, see post § 53.
Actions concerning separate property, see post § 177.
Replevin against husband for separate property, see post § 182.
Right of wife to sue husband for her separate property, see post ¶ 610.
Necessity that wife's contract relate to her separate property, see post §§ 80, 81.
Contract rights and liabilities of wife respecting third persons, see post IV.
Wife's separate property as property claimable as homestead, see Homesteads § 18.
Estates by the curtesy, see Curtesy.
Liability of separate property for wife's debt, see Comp. L. 1915, § 11475.
Liability of separate property for wife's antenuptial contracts, see Comp. L. 1915, § 11475.
Liability of separate property for husband's debts, see Comp. L. 1915, § 11475.
Constitutional provisions, see Const. art. XVI, § 8.
Right of married woman to possession of her real property on divorce or imprisonment of husband, see Comp. L. 1915, § 11409.

¶ 116. In Michigan a man has no control over his wife's property.—White v. Zane, 10 Mich. 333; Tong v. Marvin, 15 Mich. 60; Agricultural Ins. Co. of Watertown, N. Y. v. Montague, 38 Mich. 548.

¶ 117. A wife living apart from her husband can on due demand replevy from him her individual goods.—White v. White, 58 Mich. 546.

¶ 118. Under the statutes the wife's personalty is not simply to "be and remain" hers during her life-time, but the husband's common-law interest therein is altogether excluded, even after her death.—Tong v. Marvin, 15 Mich. 60.

¶ 119. A legacy left to a married woman is liable to an attachment issued against her husband; but the attaching creditor must take it subject to her equity, which is to have the whole, or so much as the court of chancery may see fit, set apart to her for her support. [This was prior to the acts of 1844 and 1855.]—Westbrook v. Comstock, W. 314.

§ 38. What constitutes separate property.

Damages for personal injuries, see post § 39.
Debt due from her husband, see post § 40.
Earnings and proceeds of her business or trade, see post § 41.
Conveyance of real property to wife, see post § 42.
Improvements by husband on wife's land, see post § 43.
Presumptions and evidence as to ownership, see post § 52.
Interests and estates which may be charged, see post § 148.
Legal capacity and disabilities of wife generally, see post IV, A.
Estates held by the entireties, see ante II, B.
Definition of separate property, see Const. art. XVI, § 8.
Statutory definition, see Comp. L. 1915, §§ 11475, 11485.

¶ 120. Under the statute as it stood in 1846 (R. S. 1846, p. 340, § 25), and before the Married Women's Act of 1855, the separate estate owned by a woman on her marriage was kept and preserved to her as her separate property after the marriage; and the statute of 1855 goes still farther in the same direction; so that the right of a woman, married in 1852, in means which she has from time to time invested jointly with her husband in personal securities, was by these statutes kept separate and distinguished from those of her husband, precisely as if the like investments had been made in a similar manner by any other persons not married.—Wait v. Bovee, 35 Mich. 425.

¶ 121. The wife is not entitled to compensation from the husband's estate for personal property which she brought to him upon marriage, unless there was an antenuptial contract respecting it, securing it to her after marriage.—Cranson v. Cranson, 4 Mich. 230.

¶ 122. A wife may acquire property redeemed by judgment creditors from execution sale against her husband, and he takes no interest therein.—Taylor v. Boardman, 24 Mich. 287.

§ 39. ——Damages for personal injuries.

Rights in wife's choses in action in general, see ante § 8.
Actionable personal injury to wife, see post §§ 156-158.

¶ 123. Damages recovered for the wife's personal injury and suffering from an assault and battery committed upon herself constitute a part of her individual property, as would choses in action, or pecuniary claims, or rights accruing to her during the coverture.—Berger v. Jacobs, 21 Mich. 215.

§ 40. ——Debt due from her husband.

¶ 124. A debt from a husband to his wife is her separate property which she can as-

sign, sell, devise or transfer by gift.—Hunt v. Eaton, 55 Mich. 362.

§ 41. ——Earnings and proceeds of her business or trade.

Rights in wife's earnings generally, see ante §§ 13-15.

Right of wife to compensation for services furnished to third persons, see post § 125.

Right of married woman to her earnings, see Comp. L. 1915, § 11478.

¶ 125. A husband may agree that his wife's earnings shall be her separate property.—Dowling v. Dowling, 116 Mich. 346.

¶ 126. The Married Women's Acts of 1844 and 1855 do not empower a married woman to carry on, on credit, a general trade or business—like that of the purchase of wheat and the manufacture and sale of flour—so as to make the proceeds of the business her own.—Glover v. Alcott, 11 Mich. 470.

¶ 127. Where a lease is executed by a wife in the name of a husband who has abandoned her, crops raised under the lease are property of the wife and cannot be levied on by the husband's creditors.—Cody v. Phelps, 47 Mich. 431.

§ 42. ——Conveyances of real property to wife.

Warranty deed to wife as carrying subsequently acquired title to her, see Estoppel ¶ 38.

Right of trustee to convey to wife, see Comp. L. 1915, § 11486.

¶ 128. Where one who has refused to sell to the husband because he did not think it safe to trust him is willing to sell to the wife on credit, trusting to the property in her hands and to her honesty in making it available for his protection, and makes the sale to her in good faith, the title to the property will not pass, contrary to the intent of both parties, to the husband for the benefit of his creditors, who could neither be wronged by any sale to her, nor have any right to insist on a sale to the husband.—Rankin v. West, 25 Mich. 195.

¶ 129. Under Comp. L. 1897, § 8835, providing against resulting trusts in cases in which the consideration for the conveyance shall have been paid by a person other than the one to whom the conveyance is made, a husband is not entitled to relief where property purchased by him has been conveyed by his direction, to his wife.—Wipfler v. Wipfler, 153 Mich. 18.

¶ 130. Where a man and wife unite in conveying property, and the grantee gives back to each an individual mortgage thereon, the wife becomes absolute owner of her mortgage in her own right, and can dispose of it as she pleases and as if she were single.—Goodale v. Patterson, 51 Mich. 532.

¶ 131. A wife, without her husband's consent, had her name inserted as joint vendee with him in a land contract originally made to him alone, and thereafter she made payments on the same with money out of his business. Held, that the wife had no equities which she could enforce against the land.—Truski v. Streseveski, 60 Mich. 84.

§ 43. ——Improvements by husband on wife's land.

Agency of husband to make improvements on wife's lands, see post § 102.

Liability of wife for money borrowed for improvements on her land, see post ¶ 399.

Agency of husband for improvement on wife's realty, see post § 102.

Expenditures on real estate of other spouse, see Fraudulent Conveyances § 54.

¶ 132. A wife in seeking specific performance against a vendor of the land was allowed, in a particular case, the benefit of improvements made by her husband upon the land included in her purchase contract.—Murphy v. Stever, 47 Mich. 522.

§ 44. Right to hold mortgage against husband's lands.

Capacity of wife to receive, hold and enforce security generally, see post § 84.

¶ 133. A married woman can acquire a mortgage against her husband and on his land as freely as she can take any other existing security; and as it is not her obligation she can foreclose it, even though she joined in it to release her right of dower.—Youmans v. Loxley, 56 Mich. 197.

§ 45. Rights of wife to deal with and dispose of her property.

Conveyances and mortgages of separate property, see post IV, D.

Alienation and incumbrance of estates held by the entireties, see ante §§ 30-32.

Right to dispose of separate property, see Const. art. XVI, § 8.

Power of wife to dispose of her separate property, see Comp. L. 1915, § 11475.

Right to use or dispose of her earnings, see Comp. L. 1915, § 11478.

Right of wife to deal with and dispose of her separate property when abandoned by her husband, see Comp. L. 1915, §§ 11451-11453.

Right to deal with and dispose of separate property, see Comp. L. 1915, § 11485.

¶ 134. Business carried on by a wife in her own name for the purpose of keeping property purchased by her from the reach of her husband's creditors is neither in law nor in fact a fraud upon the creditors, if the property is hers.—Rankin v. West, 25 Mich. 195.

¶ 135. Persons obeying a wife's directions in removing her separate personal property

from the possession of her husband are not liable to an action by the husband for so doing.—Starkweather v. Smith, 6 Mich. 377.

¶ 136. A married woman may file a bill to enjoin the sale of her lands upon an execution against her husband, though the husband occupy the lands jointly with her as a home.—Hill v. Bowman, 35 Mich. 191; Patterson v. Fish, 35 Mich. 209.

§ 46. Commingling with husband's property; estoppel to assert.

Estoppel to deny separate property, see post § 51.

General principles of estoppel, see Estoppel.

¶ 137. If a married woman willingly allows her separate personal property to be so mixed and mingled with that of her husband as not to be distinguishable, or acquiesces in its being so mingled, such property, as to the husband's creditors, is to be treated as relinquished to the husband.—Glover v. Alcott, 11 Mich. 470.

§ 47. Right of husband to charge or incumber.

Reimbursement for payment of her debt or loan, see post § 48.

Right of husband to bring actions concerning separate property, see post § 177.

Leviability of separate interests in lands, see Executions § 22.

Liability of separate property for husband's debts, see Const. art. XVI, § 8.

Liability of separate property for husband's debts, see Comp. L. 1915, § 11485.

Liability of separate property for husband's debts, see Comp. L. 1915, § 11475.

¶ 138. A husband cannot incumber his wife's separate estate without her consent.—Harvey v. Galloway, 48 Mich. 531.

§ 48. ——Reimbursement for payment of her debt or loan.

¶ 139. A husband can recover against his wife's estate money paid in discharge of a note executed by both, where the money was borrowed by her on her own account and for her own use and benefit.—Feather v. Feather's Estate, 116 Mich. 384.

§ 49. Occupancy of wife's lands by husband.

¶ 140. Though the wife has the exclusive title, the husband has a legal right to occupy jointly with her the family homestead.—Henry v. Gregory, 29 Mich. 68.

¶ 141. So long as husband and wife occupy together her lands he is not to be considered as there by sufferance merely, but by right, as head of the family.—Snyder v. People, 26 Mich. 106.

¶ 142. Where husband and wife occupy together the wife's lands, or lands colorably hers, the continuance of her right and possession includes the right that he may occupy with her.—Hudson v. Van Fossen, 26 Mich. 68.

¶ 143. Land owned by a wife, but occupied not only by herself but by her husband and family as a homestead, is in the husband's tenancy so long as it is so occupied, as distinctly as if leased to him.—Rowe v. Kellogg, 54 Mich. 206.

¶ 144. A husband in joint possession with his wife of land belonging to her, but used as the family homestead, has, as head of the family, such an interest in the land as entitles him to complain of any unlawful interference with it; and if he is defendant in a proceeding in which an attachment has been levied on such land as his own, his interest therein is sufficient to entitle him to move for a dissolution of the attachment.—Rowe v. Kellogg, 54 Mich. 206.

¶ 145. After separation from her husband a wife may bring ejectment against him to recover from him the possession of her separate lands occupied by him as his homestead.—Buckingham v. Buckingham, 81 Mich. 89.

§ 50. Accounting between spouses respecting separate property.

Replevin against husband for separate property, see post § 182.

Right of wife to sue husband for her separate property, see post ¶ 610.

Actions concerning separate property, see post § 177.

Ordering restitution of wife's property on granting divorce, see Divorce § 141.

Joining divorce bill and bill for accounting of marital rights, see also Equity § 73.

¶ 146. A supplemental bill filed in a divorce suit is not a proper proceeding to bring about an accounting between the husband and wife, as such, for the wife's separate property.—Peck v. Peck, 66 Mich. 586.

§ 51. Estoppel or laches to deny separate property.

Estoppel to assert, see ante § 46.

General principles of estoppel, see Estoppel.

Want of knowledge on wife's part as preventing estoppel to claim separate property, see Estoppel ¶ 78.

Estoppel of wife to claim separate rights, necessity of misleading acts and reliance thereon, see Estoppel ¶ 102.

¶ 147. After forty years' acquiescence by a husband and wife in a title to land conveyed by her father to her, equity will not interfere on the husband's claim that the father had contracted to deed to him, and that he should have the title; the husband's equities not being clear and certain.—Morgan v. Morgan, 58 Mich. 612.

¶ 148. Complainant in a bill to reform a deed, who claimed that his deceased wife had improperly taken title in her sole name to the property in question, for which he furnished the purchase money, instead of

taking title in the joint names of herself and complainant, was denied relief, where it appeared that complainant lived happily with his wife for 11 years after the erection of a house upon the lot; that he had permitted his wife to deal with and mortgage the property as her own; that he had spoken of it as hers, and that he had denied the right of his creditors to take it in payment of his debts.—Lowry v. Lowry, 135 Mich. 305.

§ 52. Presumptions and evidence as to ownership.

Actions concerning separate property, see post § 177.

Replevin against husband for separate property, see post § 182.

General law of evidence, see Evidence.

Cross-examination of witness as to financial conditions and resources to rebut or explain claim of separate property, see Examination of Witnesses § 48.

¶ 149. There is no presumption that a wife has no separate property.—Ross v. Ross, 47 Mich. 185.

¶ 150. The mere fact that a husband has given a chattel mortgage on his wife's property does not tend to show that he owned it, if there is no evidence of his wife's consent or knowledge therein, or that it was given for her.—Gavigan v. Scott, 51 Mich. 373.

¶ 151. Any finding as to what portion of a bank account in the name of a wife belongs to a husband and what belongs to his wife would be based upon mere conjecture, where the wife prior to her marriage had been engaged in business on her own account and during her married life deposited her own money and that received by her as agent for her husband in such account.—McNamara v. Langguth, 198 Mich. 776.

¶ 152. The question of the ownership of farming products, stock and tools, on a farm owned by the wife and occupied by the family as a homestead, and carried on by the husband, is not to be determined by presumptions or inferences as to whether the husband occuped as tenant, and hence as principal, or as servant of his wife, but upon the facts.—Hill v. Chambers, 30 Mich. 422.

¶ 153. Plaintiff testified that she loaned money to defendant; that, her husband being ill, he deeded the farm to her, reserving a life estate; that she managed the same; that the bank account stood in her husband's name, but that she drew upon it from time to time; and that from this money she made the loan to the defendant. Held, there was evidence to go to the jury that the money loaned was the plaintiff's.—Leonard v. Piggott, 152 Mich. 436.

¶ 154. In an action involving the ownership of a certificate of deposit standing in a

D. CONVEYANCES TO EACH OTHER.

§ 54. In general.
Necessity and sufficiency of consideration, see post §§ 55, 56.
Fraud, overreaching or illegality in transfers, see post §§ 57, 58.
Burden of proof, presumptions and evidence, see post §§ 59, 60.
Deed from one spouse to other of undivided half interest, see ante § 23.
Alienation of estates by the entireties, see ante §§ 30-32.
Conveyance to wife pursuant to separation agreement, see post ¶ 625.
Gifts and transfers of personalty to each other, see ante § 12.
Capacity to receive real estate directly and without intervention of third person as trustee, see post § 83, ¶ 258.
Conveyances by husband to wife of homestead property, see Homesteads § 43.
Sufficiency of continuing occupancy of premises as notice of transfer in lieu of recordation, see Notice and Record of Title.
Release to or contract with husband to bar dower, see Dower §§ 16, 17.
Conditions in deed to wife that parties should dwell in harmony, see Deeds ¶¶ 323, 324.
Estate of wife under deed from husband on condition of life support by wife, see Deeds ¶ 114.
Laches barring complaint of fraud, see Fraud § 82.
Effect on validity of deed from wife to husband of intent that it be effective only after grantor's death, see Execution of Instruments ¶ 130.

¶ 161. Prior to the statute of 1855 (How. St. § 6295), a deed made directly from husband to wife was not a valid conveyance.—Ransom v. Ransom, 30 Mich. 328; Loomis v. Brush, 36 Mich. 40.

¶ 162. An ordinary quit-claim deed from husband to wife, executed and delivered prior to the Married Women's Act of 1855, is of no more validity as an actual conveyance in equity than at law; and a deed void in law when made is not validated as a conveyance by the subsequent laws enabling married women to take and enjoy property as if sole. Such a deed on its face is not only legally void but presumptively voluntary, and contains nothing to indicate that it was given for any meritorious purpose.—Loomis v. Brush, 36 Mich. 40.

¶ 163. While courts will under peculiar circumstances carry out a purpose which has failed in consequence of a wife's incapacity to accept a deed from her husband, the case must be plain and the equity manifest; there must be a clear right arising out of matters independent of the deed.—Loomis v. Brush, 36 Mich. 40.

¶ 164. A deed of lands may now be made by a husband directly to his wife without the intervention of any third person.—Jenne v. Marble, 37 Mich. 319; but see People v. Horton, 4 Mich. 67.

§ 55. Necessity and sufficiency of consideration.
Wife's services as housekeeper, see post § 56.
Resuming marital relation as consideration, see also post § 58.
Surrender or release of rights as consideration in general, see Contracts § 114.
Considerations for contracts and conveyances between spouses, see Contracts, V.
Transfers to other spouse with effect or intent to hinder or defraud creditors, see Fraudulent Conveyances, I, D.

¶ 165. A wife's release of her dower and homestead interests, and her undertaking to support herself, are a valid consideration for a deed from her husband to herself.—Randall v. Randall, 37 Mich. 563.

¶ 166. A purchaser of land was in debt to his wife to an amount exceeding the purchase money, and as she desired security he returned his deed to the grantor and had another executed directly to her. She afterward wished to buy the land outright, and gave up to her husband the evidences of his debt. Held that, as between them, the transaction could be upheld as a sale. The cancelling of the debt was a complete payment of consideration.—First Nat. Bank v. McAllister, 46 Mich. 397.

§ 56. ——Wife's services as housekeeper.
Husband's rights to wife's services, see ante §§ 13, 14.

¶ 167. An agreement whereby a husband is to pay to his wife annually a certain sum for her services as housekeeper cannot, as against creditors, support a conveyance to her.—Michigan Trust Co. v. Chapin, 106 Mich. 384.

§ 57. Fraud, overreaching or illegality in transfers.
Evidence of fraud and coercion, see post § 60.
Presumption of fraud, see post ¶ 175.
Transfers on consideration of resuming cohabitation, see post § 58.
Transfers from one spouse to other with intent or effect to hinder or defraud creditors, see Fraudulent Conveyances §§ 47-49.
Placing title in name of spouse to defraud creditors, see Fraudulent Conveyances § 55.

¶ 168. Where a husband, who was in poor health and was required to go to another climate, where he engaged in business, and was deceived by his wife, who stayed at his former home, into the belief that she would continue the marital relation with him at the time he made a conveyance to

her of his interest in property owned jointly by them, and she intended to procure a divorce and did procure, one such conduct upon the part of the wife constituted a fraud on the husband from which relief may be granted in equity.—Judd v. Judd, 192 Mich. 198. (Stone, C. J., and Brooke and Ostrander, JJ., dissenting.)

¶ 169. On a bill by a husband for the cancellation of conveyances made by him to his wife of his interest in property owned jointly, before the granting of a divorce in favor of the wife, for an injunction restraining her from disposing of the property, and for an accounting, where fraud is alleged against her and no disposition of the property was made in the divorce suit, held that complainant was not guilty of laches in waiting and suing separately,—Judd v. Judd, 192 Mich. 198. (Stone, C. J., and Brooke and Ostrander, JJ., dissenting.)

§ 58. ——Transfers on consideration of resuming cohabitation.

Rescission and cancellation of transfers on repetition of offense and breach of agreement, see Rescission, II.

¶ 170. An agreement by which in consideration of the resumption of marital relations after they had separated because of the wife's adultery, she deeded realty to him through a trustee to be applied in a certain manner, and providing that if she should again be guilty of such misconduct he should be released from all obligations under it, cannot be said to be unconscionable, at least where the husband signifies his willingness to waive the provision for a forfeiture of the interest of the wife.—Duffy v. White, 115 Mich. 264.

¶ 171. An agreement between a husband and wife, who have separated because of the adultery of the latter, providing for a resumption of marital relations in consideration of a conveyance of land by the wife to the husband, to be held in trust for the wife and their minor child, with a provision that, if she is subsequently guilty of flagrant misbehavior or desertion, the husband shall be immediately released from all obligations and from all liability to her under the agreement, is not void as against public policy, where the circumstances under which it was made justify the restriction of the term "flagrant misbehavior or desertion" to such as would be ground for divorce.—Duffy v. White, 115 Mich. 264.

§ 59. Burden of proof, presumptions and evidence.

Evidence of fraud or coercion, see post § 60.

¶ 172. When a husband claims that a gift of lands has been made to him by his wife, the burden of proof is upon him to establish that fact.—Wales v. Newbould, 9 Mich. 45.

allow to stand to her prejudice.—Witbeck v. Witbeck, 25 Mich. 439.

¶ 180. Where a deed was obtained by a husband from his wife after he had shown a disposition to dominate her every act, when she was nervous following the death of her father and her former husband, and after many quarrels relating to the property, it must be set aside when the evidence as to his actions shows that it was obtained by coercion exercised as a result of the marital relationship and that it was not the free act of the wife.—Southwick v. Southwick, 175 Mich. 608.

¶ 181. On a bill by a husband for cancellation of conveyances made by him to his wife of his interest in property owned jointly before the granting of a divorce in favor of the wife, for an injunction restraining her from disposing of the property, and for an accounting, evidence held sufficient to show that complainant was deceived by defendant's statements made at the time of the conveyance into the belief that she intended to continue the marital relation, and that defendant did not intend to continue the marital relation any longer than was necessary to serve her purpose.—Judd v. Judd, 92 Mich. 198. (Stone, C. J., and Brooke and Ostrander, JJ., dissenting.)

¶ 182. Undue influence by wife in obtaining deed from her husband in pursuance of oral ante-nuptial agreement was held not made out by a showing that she merely induced him to do as he promised.—Manke v. Manke, 75 Mich. 435.

¶ 183. Fraud is not shown by the facts that a husband feeling financially embarrassed conveyed his entire estate to his wife, who thereafter wrongfully deprived him of any share in it and drove him from her house.—Benore v. Benore, 198 Mich. 113.

¶ 184. Undue influence by a wife on her aged husband to make the deed in question by which she obtained a fee, is not shown by evidence that he had previously (six years before) made will giving her only a life estate, where he thereafter suffered sickness through which the wife had carefully nursed him and his daughters by a former wife were all married and living apart from him, and there was proof of declarations by him that he had given them all he intended to give.—Hodges v. Cook, 93 Mich. 577.

III. CONTRACT RIGHTS AND LIABILITIES OF HUSBAND TOWARD THIRD PERSONS.

§ 61. In general.

Liability for wife's support and necessaries, see post §§ 62, 63.

Agency of wife for husband, see post § 64.

Liability on wife's contracts, see post §§ 65, 66.

Liability for money loaned wife without his knowledge, see post § 67.

Liability for antenuptial debts of wife, see post § 68.

Estoppel to hold husband for wife's debts, see post § 69.

Right to furnish services of wife to third person, see post § 70.

Presumptions and evidence, see post §§ 71, 72.

Rights of husband as "head of family," see ante § 17.

Right of husband to reimbursement for payment of wife's debt or loan, see ante § 48.

Right of husband to sue with reference to wife's separate property, see post § 177.

Right of husband to charge or incumber wife's separate property, see ante § 47.

Right of husband to occupy lands of wife, see ante § 49.

Rights of husband in occupancy of separate property as "head of family," see ante ¶¶ 141, 144.

Liability on assigned or transferred debt due his wife, see ante ¶ 124.

Subjection of estate held by entireties for husband's debt, see ante § 33.

Right to recover for loss of wife's baggage, see Carriers § 255.

Sufficiency of husband's sole conveyance to pass title free from dower right of nonresident wife, see Dower § 5.

Threats against husband or wife as duress on other, see Duress.

Estate passed by husband's security deed, wife joining, see also Deeds ¶ 96.

Right of husband to waive exemption without consent of wife, see Exemptions ¶ 33.

Contract between wife and guardian of husband, see Comp. L. 1915, § 11467.

§ 62. Liability for wife's support and necessaries.

Husband's duty to support wife, see also ante ¶ 39.

Husband's liability for necessaries furnished wife after divorce to whom alimony prescribed by court has been paid, see post ¶ 618.

Expenses of wife's last sickness and funeral, see post § 63.

Implied contracts by implication of law, see Implied Contracts, II.

¶ 185. The husband is still liable as at common law for the support of his wife.—Howe v. North, 69 Mich. 272.

¶ 186. The obligation rests on the husband to pay for the board of himself, his wife and imbecile son.—Howe v. North, 69 Mich. 272.

¶ 187. A husband who makes sufficient provision for the support of a wife who is separated from him without her fault, or who makes provision that she accepts, is not

bound by her contracts for necessaries.—Crittenden v. Schermerhorn, 39 Mich. 661.

¶ 188. A creditor for necessaries furnished to the wife can only sue the husband in her right, and can be in no better position to complain of him than she is.—Crittenden v. Schermerhorn, 39 Mich. 661.

¶ 189. Where a husband has left his wife with her parents, with whom they had been boarding, and the father-in-law claims compensation for her board for the period after the son-in-law left, the husband is not liable therefor, where his leaving was caused by his wife's misconduct, of which the father-in-law had knowledge.—Middlebrook v. Slocum, 152 Mich. 286.

§ 63. ——Expenses of wife's last sickness and funeral.

¶ 190. A husband is primarily legally liable for the ordinary funeral expenses of his wife.—Stone v. Tyack, 164 Mich. 550.

¶ 191. Suit to recover the expenses of the burial of a wife may be instituted against the husband without making demand.—Stone v. Tyack, 164 Mich. 550.

¶ 192. A husband is presumptively liable for the expenses of his wife's last sickness and funeral, even though she leaves property.—Sears v. Giddey, 41 Mich. 590; Galloway v. McPherson's Estate, 67 Mich. 546.

¶ 193. The fact that there was an adult son of a woman recently deceased who accompanied the husband when the order was given to the undertaker for her funeral does not of itself change the liability of the husband.—Sears v. Giddey, 41 Mich. 590.

¶ 194. The liability of a husband for the funeral expenses of his wife who dies in an insane asylum is not altered by the fact that at the time of his wife's death they were living apart.—Stone v. Tyack, 164 Mich. 550.

¶ 195. Public necessity demands burial of a deceased wife, and when such burial is not furnished by those legally liable, it may be furnished by strangers, and the value thereof recovered from the person liable therefor.—Stone v. Tyack, 164 Mich. 550.

¶ 196. After defendant's wife was consigned to a public insane asylum, defendant never visited her and made no arrangement with the asylum authorities to be notified in case of her death. Plaintiff, her stepfather, being in ignorance of defendant's whereabouts, upon the death of the wife notified defendant's brother. Defendant did not learn of the death until a week after it occurred. Plaintiff paid the funeral expenses. Held, defendant was liable to plaintiff for said expenses in a suit in assumpsit.—Stone v. Tyack, 164 Mich. 550.

§ 64. Agency of wife for husband.

Agency of husband for wife, see post IV, B.

Agency of wife to make admissions binding husband, see Evidence §§ 424, 425.

¶ 197. A married woman may be an agent or attorney for her husband.—Showman v. Lee, 79 Mich. 653.

¶ 198. The wife is still presumptively her husband's agent to provide for the household.—Snyder v. People, 26 Mich. 106.

¶ 199. It seems that the wife, in the absence of the husband, is his agent for the purpose of exercising the usual and ordinary control over his property, unless it be expressly shown that he has constituted some other person his agent for that purpose. She has a right to enter and remain in her husband's house if she does so without breach of the peace.—People v. Horton, 4 Mich. 67.

¶ 200. A wife's statement in her husband's presence that her daughter, his stepdaughter, living in the family, shall be paid for her work, will not bind him as by acquiescence, unless he knows that the work is continued in reliance thereon.—Harris v. Smith, 79 Mich. 54.

¶ 201. Where the assignee of an invalid lease has abandoned his family, and a new lease is given to his wife, running in his name, but signed by the wife by attaching her mark to his name, he is not bound by her act and does not become a party to the lease.—Cody v. Phelps, 47 Mich. 431.

¶ 202. Plaintiff loaned money to a wife, and asked the wife to have her husband sign the note with her. The wife disappeared, and later returned with a signature represented by her to be that of her husband. Held, in a suit against the husband on the note, that no agency of the wife by estoppel could be made out against the husband, since plaintiff did not rely on the agency of the wife, but on the supposed genuineness of the husband's signature.—Jewett v. Bryant, 159 Mich. 345.

§ 65. Liability on wife's contracts.

Necessity for notice withdrawing his credit, see post § 66.

Liability on contracts for necessaries where husband makes suitable provision for his wife, see also ante ¶ 187.

Liability of husband's estate for wife's debt, see Estates of Decedents ¶¶ 447, 462.

Validity of parol promise of one spouse to pay the other's debt, see Frauds, Statute of § 26.

Liability of husband on wife's contracts, relating to her sole property, see Comp. L. 1915, § 11487.

¶ 203. The law does not authorize a wife acting as her husband's agent to bind him

by her contracts except for necessaries.—Harris v. Smith, 79 Mich. 54.

¶ 204. A wife's sole contract to support her father in her family, while living with her husband, if valid at all, cannot, upon her death, bind her husband against his will.—Bourget v. Monroe, 58 Mich. 563.

¶ 205. Where a merchant enters into an express written contract with a married woman for the sale of goods in which she does not attempt to bind her husband, the merchant cannot afterwards say that the goods were sold upon the husband's credit.—H. Leonard & Sons v. Stowe, 166 Mich. 681.

¶ 206. A tradesman supplies goods to the wife at his peril when the husband is guilty of no neglect of duty in the premises, and when, consequently, there can be no necessity for her buying on his credit at all.—Clark v. Cox, 32 Mich. 204.

¶ 207. A husband who suitably supplies his wife with necessaries, or money to buy them with, is not liable on any presumption of authority in her for goods, even though they are of the quality of necessaries, that she buys on his credit, without his knowledge or consent, from one with whom he has had no previous dealings.—Clark v. Cox, 32 Mich. 204.

¶ 208. In determining what is a reasonable expenditure of money for one's family, the income, or the capacity to earn or produce one, is as important a subject of inquiry as the amount of property possessed.—Clark v. Cox, 32 Mich. 204.

§ 66. ——Necessity for notice withdrawing his credit.

¶ 209. Notice to the public not to give credit to a wife on her husband's account is only necessary where he has permitted her to trade upon his credit.—Smith v. Smith, 73 Mich. 445.

§ 67. Liability for money loaned wife without his knowledge.

¶ 210. A party who loans money to the wife, knowing it to be for her private use, and concealing the fact at her request from her husband, cannot recover the money loaned of the husband; a wife cannot borrow money on her husband's credit.—Franklin v. Foster, 20 Mich. 75.

§ 68. Liability for antenuptial debts of wife.

Rights and liabilities under antenuptial contracts, see ante § 2.

¶ 211. The common law rule that a husband is liable for the ante-nuptial contracts of his wife, has been abrogated by Const. 1850, art. XVI, § 5, providing that the separate property of married women shall be her own and not be liable for the husband's debts, and the Married Women's Act of 1855 (Comp. L. 1897, § 8693), providing that the husband cannot be sued upon any contract made by his wife in relation to her sole property.—Smith v. Martin, 124 Mich. 84.

§ 69. Estoppel to hold husband for wife's debts.

General principles of estoppel, see Estoppel.

¶ 212. The fact that a merchant charges goods upon his books to the wife will not in itself estop him from claiming that they were sold upon the credit of the husband.—H. Leonard & Sons v. Stowe, 166 Mich. 681.

§ 70. Right to furnish services of wife to third person.

Right to services of wife generally, see ante §§ 13-15.

Right of husband to sue in his own name for wife's services, see post ¶¶ 595, 596.

Right of wife to compensation for services furnished third persons, see post § 125.

¶ 213. A husband has a right to enter into a contract to furnish the labor and services of his wife to a third person.—Harrington v. Gies, 45 Mich. 374.

§ 71. Presumptions and evidence.

Evidence as to liability for necessaries, see post § 72.

¶ 214. Evidence held insufficient to show that the wife of a marine engineer absent on the Great Lakes 10 months of the year, who received various sums of money from him from his wages during his absence, acted as his agent in creating a bank account in her own name and in purchasing a home in her own name from the proceeds of such bank account.—McNamara v. Langguth, 198 Mich. 776.

¶ 215. The fact that a husband has on a number of occasions, to avoid trouble and scandal, paid notes to which his wife had signed his name, does not go to establish a general authority in the wife to sign notes as his agent, where, as in the case in question, there is no evidence that the husband received the money secured thereby.—Jewett v. Bryant, 159 Mich. 345.

¶ 216. In an action against a husband for support furnished his wife, it is error to allow cross-examination of the husband as to having sustained illicit relations with a woman many years before his marriage.—Travis v. Stevens, 127 Mich. 687.

¶ 217. In an action against the husband for clothing sold on credit to a wife, testimony that the husband had gone to the merchant and instructed him not to give his wife credit and that afterward he told the merchant "the matter had been fixed up" and that "it was all right" is sufficient to

go to the jury on the question of the wife's authority to bind the husband.—Taylor-Woolfenden Co. v. Atkinson, 127 Mich. 633.

§ 72. ——Evidence as to liability for necessaries.

¶ 218. In a suit to recover of the husband for goods sold to his wife on his credit, evidence that the wife made other purchases in his name from other dealers at about the same time was held immaterial, though its admission could not have injured the plaintiff, where they could not have recovered anyway, on the evidence.—Clark v. Cox, 32 Mich. 204.

¶ 219. In an action involving a married woman's authority to bind her husband by purchases made in his name without his knowledge or express assent, evidence of the style of living and expenditure in the circles to which he introduces her, and where he expects her to find her intimates and associates, is pertinent.—Clark v. Cox, 32 Mich 204.

¶ 220. In an action to recover against a husband for a suit of clothes alleged to have been purchased by the wife, the only evidence as to the question whether said purchase was one for necessaries indicated that the goods in question were not such. Held, the verdict was properly directed against plaintiff.—Hickey v. Lundy, 168 Mich. 336.

¶ 221. In an action against a husband for clothing purchased by his wife, the defendant's wife had no power to bind him for purchases of similar goods as necessaries where the uncontroverted evidence is that the defendant gave her $1,180 for clothing for herself and children in the 18 months during which the purchase was made, that she had a weekly allowance which was often overpaid; that he had always had trouble about her running bills; and that his income did not exceed $5,000 per annum.—Taylor-Woolfenden Co. v. Atkinson, 127 Mich. 633.

¶ 222. In an action by an aunt against the former husband of her niece, from whom the niece had secured a divorce on the ground of extreme cruelty, to recover for necessaries furnished the niece pending the divorce proceedings, two letters were produced, written, as the evidence tended to show, by the plaintiff, one to her niece, concluding as follows: "This is from your aunt Jennie who clothed and fed you and your daughter, and did what your father and mother would not do, so you could put away your husband, and get an old man, because he had more money"; and the other to the defendant, urging him to sue the second husband for damages, the niece having remarried, and promising to furnish the necessary witnesses. Held, that said letters might well be interpreted as supporting defendant's contention, that the niece left defendant without justifica
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IV. CONTRACT
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Common law disability of spouses to contract with each other, see ante ¶¶ 14, 15.
Construction of constitutional provision relating to rights of married women, see Constitutional Law § 6, ¶ 21.
Law governing married woman's contracts, see Conflict of Laws § 37.
Power of wife of attorney to act as notary public in cause in which husband is professionally engaged, see Notary Public.
Possession under lease lacking wife's signature as basis for adverse possession against lessor, see Adverse Possession ¶ 107.
Statutory abrogation of disability of married woman to contract jointly with husband respecting lands held as entirety or as survivor, see Pub. Acts 1917, No. 158.
Liability of wife on contracts relating to her sole property, see Comp. L. 1915, § 11487.
Powers of wife on divorce from bed and board, see Comp. L. 1915, § 11474.
Condemnation of property of wife for public use, see Comp. L. 1915, § 11468.
Power of wife to insure life of her husband, see Comp. L. 1915, §§ 11489, 11490.

¶ 223. Since the statute of 1855, a married woman has the same power, in all respects, over her property that she should have if unmarried.—Starkweather v. Smith, 6 Mich. 377.

¶ 224. A wife may now contract, buy and sell independently of her husband.—People v. Horton, 4 Mich. 67; Jenne v. Marble, 37 Mich. 319.

¶ 225. The Married Women's Act was intended to enlarge, not to contract, the rights of married women, and was not meant to deprive them of the right, either acting alone or jointly with others, of protecting their interests in property, either real or personal.—Gillespie v. Beecher, 94 Mich. 374.

¶ 226. The common-law disabilities resting upon married women are removed by Comp. L. 1857, p. 966, How. St., § 6295 only so far as they operate unjustly and oppressively. The design is to protect the wife in the enjoyment and disposal of her property for the benefit of herself and her family; and the statute, though it is to be liberally construed, cannot be extended by construction to cases not embraced by its language or within its design.—De Vries v. Conklin, 22 Mich. 255.

§ 74. Coverture as personal privilege.

Power to admit liability, see post § 89.
Estoppel to assert disability, see post § 90.
Equitable relief from default or failure to plead incapacity, see post § 91.

¶ 227. A married woman's contracts are only voidable at her election, and the defense of coverture is a personal privilege, which neither codefendants nor strangers can interpose for her.—Showman v. Lee, 79 Mich. 658.

§ 75. Power to contract.

Necessity and sufficiency of consideration, see post §§ 76-79.
Relation of contract to wife's separate property, see post §§ 80, 81.
Power of married woman to alien or incumber as tenant holding by the entireties, see ante §§ 30-32.
Cross-examination as to terms of contract with married woman, see Examination of Witnesses, II, and especially § 50.
Statutory abrogation of disability of married woman to contract jointly with husband respecting lands held as entirety or as survivor, see Pub. Acts 1917, No. 158.
Power of married woman coming from another state or country without husband to contract, see Comp. L. 1915, § 11470.
Power to contract when husband sentenced to imprisonment, see Comp. L. 1915, §§ 11462, 11463.
Proceedings in probate court to authorize married woman to contract after desertion by her husband, see Comp. L. 1915, § 11454.

¶ 228. The general rule of the common law is that a married woman cannot, during her coverture, make a binding contract.—Palmer v. Oakley, 2 D. 433; Brown v. Fifield, 4 Mich. 322.

¶ 229. In Michigan married women have no general capacity to make contracts, their common law disabilities being only partially removed by the married woman's act.—Edwards v. McEnhill, 51 Mich. 160.

¶ 230. A married woman's power to contract is statutory, and cannot be extended beyond the constitutional and statutory limits.—Holmes v. Bronson, 43 Mich. 562.

¶ 231. A married woman, possessing property of her own, may enter into a contract with a third person for domestic services.—Fox v. Schumann, 191 Mich. 331.

¶ 232. Under our statutes, contracts of sale by a married woman are to be treated as if made by a feme sole.—Durfee v. McClurg, 6 Mich. 223.

§ 76. Necessity and sufficiency of consideration to wife.

Conveyance or transfer of property as consideration, see post § 77.
Future property of wife as consideration, see post § 78.
Abstaining from litigation affecting wife's property, see post § 79.
Burden of proof and presumptions as to consideration moving to wife, see post § 93.
Sufficiency of consideration to wife for conveyance, see post § 134.

Other notes as consideration for note of married woman, see Contracts ¶ 452.
Personal liability of wife of mortgagor who joined in note and mortgage solely to waive dower rights, see Foreclosure ¶ 701.

¶ 233. A wife is not liable on notes signed by her while married unless the consideration goes to her.—Pomeroy v. Everett, 195 Mich. 147.

¶ 234. Consideration must be shown to make out a cause of action against a married woman under coverture, when sued upon her promissory note, whether negotiable or not.—Buhler v. Jennings, 49 Mich. 538; Holmes v. Bronson, 43 Mich. 562.

¶ 235. A married woman cannot be held liable upon her note without connecting her with the consideration as she has no general power to make notes or other contracts. —Schlatterer v. Nickodemus, 51 Mich. 626.

¶ 236. A married woman is not liable on a promissory note which she signed with her husband, if no consideration passed to her from the party to whom the note was given. A consideration as between herself and her husband is not enough.—Reed v. Buys, 44 Mich. 80.

¶ 237. An extension of time on a husband's debt is not sufficient consideration to impose liability upon a married woman who joins with her husband in a note for the debt.—West v. Laraway, 28 Mich. 464.

¶ 238. Defendant, who wished to obtain a loan for carrying on her husband's business, made a promissory note for the amount required, due in one year, and secured the same by a chattel mortgage upon her separate property. Upon its appearing that the payee, plaintiff's agent, would be unable to discount the one-year note, defendant's husband gave his three-months' note, and the money was obtained on this note upon plaintiff's indorsement. Defendant's note and mortgage were delivered to plaintiff as security. Thereafter defendant gave her note in renewal of the one on which the loan had been secured, and the security in plaintiff's hands was canceled. Held, that defendant, by mortgaging her separate property to secure the indebtedness, became liable for the debt, and was therefore liable on the renewal note.—Marx v. Bellel, 114 Mich. 631.

§ 77. ——Conveyance or transfer of property as consideration.

¶ 239. A wife did not obtain such an interest in land deeded to herself and her husband, as to make her separate property liable upon a note signed by her with her husband in the acquiring of the property.—Doane v. Feather's Estate, 119 Mich. 691.

¶ 240. Where the plaintiff contracted to sell land to a man and his wife, and subsequently, on the she and her h tracted to sell wards securing interest in the the plaintiff joi to a third pers of purchase wa sideration, and r —Rogers v. Eat

§ 78. ——Future tion.

¶ 241. A ma pay must be bas tion and may r quired by or i tract.—Johnson

¶ 242. A cont wife and a thir is to set out a by the former, other, and is to for a term of ye wife, although s to the land.—E 235.

§ 79. ——Abstai wife's pr

¶ 243. An a prosecuting a de or property is a where it was n with a married one on her beh assurances to h signed a joint proceedings wo tate of her fat was held as su make out any separate prope Mich. 464.

¶ 244. A not woman for the same amount a prevent the pa to collect the s to her by her on the claim th tary and in fra by a sufficient binding on her Stoughton, 112

§ 80. Relation property
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Relation of cont erty as que ¶ 299.

Competent evidence to show relation of contract to separate property, see also post ¶ 288.
Power to contract with reference to her earnings, see Comp. L. 1915, § 11478.
Liability of wife on contracts relating to her sole property, see Comp. L. 1915, § 11487.

¶ 245. A married woman has no general capacity to contract, and can only make such contracts as relate to her own property, and become personally liable only on account of her own matters.—West v. Laraway, 28 Mich. 464; Kitchell v. Mudgett, 37 Mich. 81; Jenne v. Marble, 37 Mich. 319; Edwards v. McEnhill, 51 Mich. 160; Schlatterer v. Nickodemus, 51 Mich. 626; Howe v. North, 69 Mich. 272.

¶ 246. A married woman cannot make a mere personal obligation not connected with nor charging her separate property.—De Vries v. Conklin, 22 Mich. 255; Jenne v. Marble, 37 Mich. 319.

¶ 247. The statute does not empower a married woman to make contracts generally, but only in respect to her own property.—Artman v. Ferguson, 73 Mich. 146; Case Threshing Machine Co. v. Mitchell, 74 Mich. 679.

¶ 248. A married woman can make no obligation except on account of her own property.—Detroit Lumber Co. v. Cleff, 164 Mich. 276.

¶ 249. A married woman's contract except with reference to separate property is void.—Judd v. Judd, 187 Mich. 612.

¶ 250. A feme covert may contract and bind herself in relation to her separate property and estate already possessed, or referring to it.—Menard v. Campbell, 180 Mich. 583.

¶ 251. A married woman cannot be personally liable on an executory promise unless it concerns her separate estate; and her note given for any other consideration is void.—Kenton Ins. Co. v. McClellan, 43 Mich. 564.

¶ 252. A married woman's promise to pay must be based on a property consideration and relate to property already possessed by her, or to be acquired by or in consideration of the contract.—Johnson v. Sutherland, 39 Mich. 579.

¶ 253. Whether a married woman's power to contract for property is limited to cases relating to her sole property, quære.—Tillman v. Shackleton, 15 Mich. 447.

¶ 254. Where the plaintiff contracted to sell land to a man and his wife, and subsequently, on the latter's representation that she and her husband had separated, contracted to sell the land to her, she afterwards securing a release of her husband's interest in the property, and later she and the plaintiff joined in a contract to convey to a third person, held, that her contract of purchase was based on a sufficient consideration, and related to her separate estate.—Rogers v. Eaton, 181 Mich. 620.

§ 81. ——Incidental or indirect benefits to her property or interests.

¶ 255. The subscription of a married woman to a fund for the purpose of securing the location of a business block in the vicinity of property owned by her is not within the power to contract conferred by the married woman's act (How. St., § 6295), although her property is incidentally benefited by the improvement.—Detroit Chamber of Commerce v. Goodman, 110 Mich. 498.

¶ 256. A married woman's power to make contracts depends, under Comp. L. 1871, § 4803, How. St. § 6295, upon whether the contract deals with her individual estate; it cannot be supported by possible incidental benefits such as she might receive as one of a corporation from a contract made in its behalf.—Russel v. People's Savings Bank, 39 Mich. 671.

§ 82. Liability to assignees and bona fide holders of contracts.

Estoppel to assert disability, see ante § 90.
Liability on negotiable note, see also ante ¶ 234.
Liability to bona fide holders of negotiable instruments generally, see Negotiable Instruments, XIII.

¶ 257. A married woman's contracts, whether negotiable or not, are no better in the hands of a bona fide holder than in those of the first holder.—Johnson v. Sutherland, 39 Mich. 579; Holmes v. Bronson, 43 Mich. 562; Waterbury v. Andrews, 67 Mich. 281.

§ 83. Capacity to receive and hold real property.

Right of wife to purchase at sale by husband's assignee, see Assignments for Creditors § 22.
Right of wife of mortgagor who was party to mortgage to release her dower to buy property from foreclosure purchaser, see Foreclosure ¶ 575.

¶ 258. A wife may now by statute hold property in her own name, and a deed of real estate may be made directly to her without the intervention of a third person as trustee.—People v. Horton, 4 Mich. 67.

§ 84. Capacity to receive, hold and enforce security.

Capacity to receive conveyance from husband, see ante § 54.
Right to hold mortgage against husband's land, see ante § 44.

¶ 259. A married woman who, being possessed of separate estate, indorses notes to get security for the maker's debt to her, and takes from him a mortgage securing both her debt and the indorsed notes, is open to objection from neither the mortgagor nor attaching creditors of his to her holding the mortgage as security for her indorsements. —Showman v. Lee, 79 Mich. 653.

§ 85. Capacity to act as agent or trustee.

General law of agency, see Agency.

Powers of trustees generally, see Trusts.

¶ 260. A married woman may be an agent for a stranger or a third person.—Showman v. Lee, 79 Mich. 653.

¶ 261. A married woman may be a trustee. —Showman v. Lee, 79 Mich. 653.

§ 86. Authority to give bonds.

¶ 262. At common law the bond of a feme covert is void.—Palmer v. Oakley, 2 D. 433.

¶ 263. A married woman may now give a bond as guardian if the appointment puts property under her control.—Goss v. Stone, 63 Mich. 319.

¶ 264. A married woman may be principal on her own bond as a liquor-dealer.—Amperse v. Kalamazoo Common Council, 59 Mich. 78.

¶ 265. A married woman filing a bond as a dealer in intoxicating liquors is entitled to same rights under the law as any other person filing such a bond.—Amperse v. Kalamazoo Common Council, 59 Mich. 78.

§ 87. Power to enter into arbitrations.

Law of arbitration in general, see Arbitration.

Award on submission by husband and wife as binding him though void as to her, see Arbitration ¶ 60.

¶ 266. Comp. L. 1897, § 10924, governing arbitrations and excepting married women from the persons who may enter into arbitrations thereunder, has no application to a common law arbitration.—Hoste v. Dalton, 137 Mich. 522.

¶ 267. Under Comp. L. 1897, § 8690, giving a married woman complete power to contract with relation to her own property, she may enter into a common law arbitration with reference thereto.—Hoste v. Dalton, 137 Mich. 522.

§ 88. Rights and status when husband abandons family.

Right to bring separate maintenance suit, see post VII.

Criminal liability of deserting husband, see post § 196.

Wife's rights in personalty on premises of husband after separation, see Comp. L. 1915, § 11475.

¶ 273. In an action against a married woman on a promissory note given by her, the defense that the money was not borrowed for the use of her separate estate is not available where the plaintiff loaned it to the defendant personally for use in building a house upon a lot bought with her money and in the belief that the lot was deeded to the defendant alone instead of to her and her husband.—June v. Labadie, 138 Mich. 52.

§ 91. Equitable relief from default or failure to plead incapacity.

¶ 274. When a married woman is sued upon a contract which in fact she had no capacity to make, if she raises no objection, but, though duly served, suffers the case to go to judgment against her, she cannot be relieved in equity.—Wilson v. Coolidge, 42 Mich. 112.

§ 92. Burden of proof and presumptions.

As to consideration moving to wife, see post § 93.

¶ 275. The common-law disabilities of a married woman being only partially removed by our statutes, one who relies upon a wife's contract must show affirmatively that it relates to her separate property.—Fechheimer v. Peirce, 70 Mich. 440; Speier v. Opfer, 73 Mich. 35.

¶ 276. A married woman cannot be held on her contract without affirmative proof that it is her own and within her powers.—West v. Laraway, 28 Mich. 464.

¶ 277. One who relies upon a contract made by a married woman must show the facts in order that it may appear whether she had capacity to make it. So held where the contract relied on was one of partnership between herself and her husband.—Edwards v. McEnhill, 51 Mich. 160.

¶ 278. An Indiana married woman cannot, by pleading disqualification to contract, evade payment of notes given by her for goods purchased in Michigan, without showing that the laws of Indiana do so disqualify her.—Wheeler v. Constantine, 39 Mich. 62.

§ 93. ——As to consideration moving to wife.

Necessity and sufficiency of consideration, see ante §§ 76-79.

¶ 279. In an action on promissory note given by a married woman, the burden of proof rests upon the plaintiff to show that the consideration passed to her.—Judd v. Judd, 187 Mich. 612.

¶ 280. Where, in a suit against one of the makers of a promissory note, it appears the defendant is a married woman, the burden is upon plaintiff to show that the consideraton for the note passed to her.—Fisk v. Mills, 104 Mich. 433.

¶ 281. There is no presumption of consideration from the signing of a note by a married woman; it must be proved.—Fechheimer v. Peirce, 70 Mich. 440.

¶ 282. It must be presumed that a wife is not liable on notes signed by her and her husband while she is married.—Pomeroy v. Everett, 195 Mich. 147.

¶ 283. A woman buying goods suitable for ordinary family use, at the store whose proprietor knows she is married and living with her husband, is presumed to be buying on her husband's account and for the use of the family, and is not individually liable.—Powers v. Russell, 26 Mich. 179.

¶ 284. A married woman may be personally liable upon her indorsement of paper due to herself, upon an affirmative showing that it was directly for the advantage of her own estate.—Russel v. People's Savings Bank, 39 Mich. 671.

¶ 285. Where a married woman has put her name below her husband's on a note which does not appear to concern her separate estate, and so that she may be either a codebtor or his surety, proof of the signature does not make out a prima facie liability aganst her, especially if it is an open question whether she did not sign as surety. So, also, with assignments signed by her for collateral in his behalf, without consideration moving to her, and without regard to her own estate.—Mutual Ben. Life Ins. Co. v. Wayne County Sav. Bank, 68 Mich. 116.

§ 94. Admissibility and sufficiency of evidence.

Res gestæ of possession or claim of right of wife, see Evidence ¶ 2368.

¶ 286. In an action against a married woman to charge her individually for goods purchased, it is competent for her to show any fact tending to prove that the goods were purchased for or on account of her husband.—Powers v. Russell, 26 Mich. 179.

¶ 287. On an issue as to whether a note for borrowed money signed by a wife, since deceased, and her husband was for a loan to him or for a loan to her on which he was only a surety, testimony of persons who had worked upon a farm owned by such married woman that she paid them their wages, is admissible as bearing upon the question whether the farm was conducted in her interests or her husband's and thus to show for whom the money was borrowed.—Feather v. Feather's Estate, 116 Mich. 384.

¶ 288. On the question whether notes were those pertaining to a wife's separate business and estate, it was proper to show the origin of the business and of an account with plaintiff bank and a change therein from the husband's name, accompanied by a transfer to her of his farm, the continuation of the

business through his agency for her, her frequent response to notifications of overdrafts made on the account in connection with the business and her custom of referring the bank to her husband in such matters, the notes in suit being claimed to be notes given to cover overdrafts among other items.—First Commercial Bank v. Newton, 117 Mich. 433.

¶ 289. In an action against a husband and wife on a note signed by the wife and indorsed by her husband, the defense being that it was given for the husband's benefit, evidence as to their business relations and the amount and extent of business carried on by each, is admissible.—National Lumberman's Bank v. Miller, 131 Mich. 564.

¶ 290. Where, in an action against a married woman for the price of goods, it is material to show that credit was not extended to the husband but to the wife, plaintiff may be allowed to answer the questions whether, prior to the sale, he had tried to collect a long standing claim against defendant's husband, whether the claim which he had tried to collect of the husband was litigated and taken to the supreme court, and whether he would not have charged the goods to the husband if requested to do so by the wife.—Hirschfield v. Waldron, 83 Mich. 116.

¶ 291. A married woman sued on a note given for liquor sold to her may, if plaintiff claims that she owns a saloon and that he sold her the liquor on her credit, give evidence that the saloon was her husband's; for in such case she could not have bound herself to pay for the liquor, unless she led defendant to believe the business was hers, that the sale was to her, and on the strength of it credit was given to her.—Chamberlain v. Murrin, 92 Mich. 361.

¶ 292. A married woman can make no obligation except on account of her separate property, and any one seeking to hold her must make out an affirmative case.—Fechheimer v. Peirce, 70 Mich. 440.

¶ 293. Undisputed testimony that a married woman received the full amount of the face of notes signed by her sufficiently establishes the fact of consideration.—Crampton v. Newton's Estate, 132 Mich. 149.

¶ 294. The fact that goods were charged to a wife upon the books of a merchant is not conclusive evidence that they were sold on her credit alone.—Taylor-Woolfenden Co. v. Atkinson, 127 Mich. 633.

¶ 295. In a suit upon a promissory note signed by husband and wife, it appeared that part of the consideration for the note was money paid to the husband by the payee by request, as the payee claimed of the wife. The testimony failed to show that the wife stated to the payee at the time he advanced the money to her husband that it was for the benefit of her separate estate, and it conclusively appeared from the evidence that it was not. Held, that a judgment against the wife for the amount of the note cannot be sustained.—Fisk v. Mills, 104 Mich. 438.

¶ 296. Where a married woman, upon receiving a deed from her husband of his farm, told a laborer on the farm that she had a deed of the place and wished him to continue to work as formerly, and that she would pay him, to which he made no reply but continued to work, she giving directions about the farm and at one time making a payment to the laborer, held, that no formal termination of the contract between the laborer and the husband was necessary, and that a finding that a contract existed between the laborer and the wife in relation to the latter's separate estate was justified.—Mosher v. Kittle, 101 Mich. 345.

¶ 297. In an action against a married woman for work done, held, that the evidence entitled plaintiff to go to the jury upon his contention that defendant employed him to do the work upon articles which she owned or claimed to own.—Lempke v. Felcher, 115 Mich. 37.

¶ 298. In the matter of a claim against the estate of a wife, upon a note signed by her and her husband, testimony that the husband was told that claimant would let the wife have the money if she signed the note; that the husband was the general agent of the wife in all her business; that she handled all the money and paid the help upon the farm; that it was her farm upon which the husband and wife lived and that the business was transacted from there, all had a tendency to show what was done with the money borrowed, and that it was for the use of the wife.—Webb v. Feather's Estate, 119 Mich. 473.

§ 95. Questions of law and fact and instructions.

¶ 299. Whether a married woman's promissory note, which recited that it was given for value received by her since she became the sole owner of a stock of groceries formerly belonging to her deceased son, had reference to her separate estate, is a question for the jury, upon evidence that the note was in payment of rent for the store building leased to her husband by the name of the son, and that she had purchased the goods and was in possession when the note was given, and had owned the stock for a long time.—Sherrod v. Costigan, 111 Mich. 644.

¶ 300. In an action on a promissory note, wherein defendant, a married woman, introduced no evidence, plaintiff's testimony that he originally held the husband's note for the same amount; that the latter transferred to the defendant all of his property; that defendant learned of it and, charging both with the fraud, she thereupon promised, in

consideration of plaintiff's forbearing to attack the transfer as fraudulent, to pay the debt; that a new note was then executed by the defendant and her husband; and that such note had been kept alive by renewals for nineteen years, was sufficient to go to the jury upon the question whether defendant's promise was in fact made upon such consideration, though the husband testified that there was some consideration for the transfer to his wife.—Whelpley v. Stoughton, 112 Mich. 594.

¶ 301. Where plaintiff in an action against a wife upon a note testified that the husband made statements in the presence of the wife that the money was desired to charge her separate property which was contradicted by both the husband and the wife, the question as to whether or not the statement was made, was for the jury.—Vosburg v. Brown, 119 Mich. 697.

¶ 302. In an action to hold a wife upon a note signed by her and her husband, testimony that a statement made by the husband in the presence of the wife, to the effect that if the latter took the money she could pay up her mortgage, raised the question for the jury as to whether the money was borrowed for the wife's separate estate.—Vosburg v. Brown, 119 Mich. 697.

¶ 303. Evidence that a wife applied for a loan on her own note without security, stating that she did not like to ask her husband for his indorsement, but that she secured his indorsement on being told that the loan would not likely be accepted without it, is sufficient to raise a question for the jury whether the loan was for her individual estate.—National Lumberman's Bank v. Miller, 131 Mich. 564.

¶ 304. Where a husband and wife jointly sue for a breach of warranty of sale and the evidence is conflicting whether the purchase was joint and whether the wife signing a note, given in payment, intended to sign as a surety or joint maker, and question as to whether the purchase was joint is for the jury.—Eaton v. Hope, 177 Mich. 411.

¶ 305. In an action by the administrator of an estate against a husband and wife on promissory notes given to decedent, and in which it was claimed that no consideration passed to the wife, where it appeared that the wife filed a claim against the deceased in the probate court setting forth that she furnished a home and certain services to decedent pursuant to an agreement whereby such note would be canceled and become the property of claimant for the furnishing of a home to deceased, and in the jurat to the claim she made oath that the deceased was indebted to her in the amount set forth over and above all legal set-offs, and it further appeared that the wife in a conversation with the administrator after the death of deceased spoke of the liability as though it it were a joint matter, held that it was question for the jury as to whether the wife received consideration for such notes herself.—Pomeroy v. Everett, 195 Mich. 147. (Ostrander, J., dissenting.)

¶ 306. Where a wife denies having any interest in a transaction, alleged to be a joint purchase of land, except the interest usually taken by a wife in her husband's affairs, and she is charged with having a pecuniary interest in an action for the price it may be error for the court to refuse to instruct the jury to give the marital relation due weight in considering the question.—Lazenby v. Omo, 50 Mich. 52.

¶ 307. A grocer sued a widow for an unpaid balance of an account for family groceries, the items of which were charged in a pass-book marked with the name of her husband. The plaintiff introduced testimony tending to show that defendant owned a separate estate; that the goods were procured and sold on her individual credit, and that she had repeatedly promised payment. Defendant disputed this, and the court instructed the jury that if it was so, plaintiff was entitled to recover; otherwise not. Held, that the question involved was a question of fact; that the evidence was relevant, and that defendant could not complain of the instruction.—Paul v. Roberts, 50 Mich. 611.

¶ 308. An instruction of the court on an issue as to the liability of the estate of a married woman, deceased, upon a joint and several bond issued by herself and her husband, that if the jury were satisfied that deceased borrowed the money, and that it was used for the benefit of her estate, then the plaintiff was entitled to recover, notwithstanding that deceased was a married woman, and that she and her husband signed the bond; but that, if she and her husband jointly borrowed the money, their verdict must be for the defendant, was correct and in harmony with earlier decisions of this court.—Wilson v. Estate of Wilson, 80 Mich. 472.

¶ 309. A request for an instruction that a married woman sued for the price of goods could not be held unless she told plaintiff to charge them to her individually is covered by an instruction that she would be bound if she told plaintiff to charge them to her.—Hirschfield v. Waldron, 83 Mich. 116.

¶ 310. In an action against a married woman on a note for goods a charge, that, if the store was sold to her and the plaintiff sold goods to her on her credit, "it makes no difference" whether her husband owned the store or they owned it together, is misleading; since if they owned it together she could not bind herself and if he owned it she could not bind herself, unless in either case she had so represented the facts that the plaintiff would have been warranted in

supposing that she was owner and purchaser for such business as a sole trader. It is also misleading as indicating that it all depended on whom credit was extended to.—Chamberlain v. Murrin, 92 Mich. 361.

¶ 311. In an action against a wife to charge her separate estate upon a note, an instruction stating that if the jury found that the money was loaned to the wife on representations made by her husband in her presence that she desired the money to make a payment on a mortgage on her separate property and that plaintiff relied on this representation then it was immaterial whether the money was applied for the benefit of the wife's separate estate or not, was not error. —Vosburg v. Brown, 119 Mich. 697.

¶ 312. In an action against a married woman for the value of house furnishings, in which evidence of a proceeding against plaintiff's husband approximating the amount of the claim in question against the wife, was introduced, and where there was convincing evidence as in the nature of an admission that the husband was the original debtor, an instruction submitting to the jury the question whether the claim involved in the suit against the husband was the same as that involved in the suit against the wife, was reversible error.—Beard v. Hoffman, 133 Mich. 624.

¶ 313. Plaintiff furnished certain furniture and saloon fixtures to defendant's husband who had leased a building and taken out a saloon license in his own name. The goods were charged to him and several statements of the account were made out in his name. There was no testimony from which it could be fairly inferred that the credit was extended to defendant or that the work was done for her. The husband gave his wife a chattel mortgage on the property in the saloon and later a bill of sale. Both testified that these were given for money loaned the husband by his wife. It was shown that in a suit the year before the husband swore that his wife was owner and lessee of the premises. Held that verdict should have been directed for defendant.—Hoffman v. Goldsmith, 131 Mich. 293.

B. AGENCY OF HUSBAND FOR WIFE.

§ 96. In general; existence of agency and necessity for authorization.

Limitations and scope of agency, see post § 97.
Authority respecting particular acts and doings, see post §§ 98-101.
Improvements and expenditures on wife's realty, see post § 102.
Wife as undisclosed principal, see post § 103.
Notice to or knowledge of husband to affect wife, see post § 104.
Adoption and ratification, see post § 105.
Liability for husband's debts in course of his agency, see post § 106.
Liability for husl wrongful acts,
Estoppel to deny (§ 108.
Burden of proof a: § 109.
Admissibility and s post § 110.
Questions of law s see post § 111.
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¶ 314. A woman her husband's cons he is interested, a edge of her claims a will not be bound for, made without her husband and t gan, 50 Mich. 77.

¶ 315. Where a a firm deals with h of it, for the excha bill held by her husband is in no agent; and her rigl cisely what those of be.—Moore v. Foot

§ 97. Limitations an

Nature of contract or for sale, see

¶ 316. A married agent any powers w herself. and her age as to her separate p with such agents powers.—Holmes v.

¶ 317. The fact wife's agent procur by himself and his ever, for his sole b right against the v to know the law as to the wife un rowed for the bene or she has made re her from setting u Spencer, 87 Mich.

¶ 318. Where, in a wife acts for h tion, what her hus as her agent becom Solomon, 97 Mich.

§ 98. Authority re doings.

To carry on busin
To execute negoti tracts relating § 100.

To deal with wife's trust property, see post § 101.
Power or authority of husband to convey lands held by the entirety, see ante II, B.
Disability of husband to contract for release of dower right without wife's consent, see Dower § 21.

¶ 319. A. received from his wife a power of attorney to sell and convey land, and, on the same day on which it was recorded, he conveyed the land to B., who immediately reconveyed to A. Subsequently A. conveyed to C. Held, that the transaction between A. and B. was void on its face, and that a grantee from A.'s wife could recover in ejectment against C.—McKay v. Williams, 67 Mich. 547.

§ 99. ——To carry on business.

Right of married woman to carry on business in general, see post §§ 121-123.

¶ 320. The husband may act as his wife's agent in her business.—Rankin v. West, 25 Mich. 195.

¶ 321. A married woman may constitute her husband her agent to carry on business for her in her name.—First Commercial Bank v. Newton, 117 Mich. 433.

¶ 322. A wife is bound by such statements of her husband as he has made in the course of a business conducted in her name but wholly by him.—Leland v. Collver, 34 Mich. 418.

§ 100. ——To execute negotiable instruments and contracts relating to her business.

Law of execution of instruments in general, see Execution of Instruments.

¶ 323. A married woman is liable on promissory notes executed by her husband in her name by her authority in a matter relating to her separate business which she is carrying on in her own name.—First Commercial Bank v. Newton, 117 Mich. 433.

§ 101 ——To deal with wife's trust properties.

¶ 324. The agreements of the husband of a cestui que trust with the trustees are not binding upon the wife.—Schwarz v. Wendell, W. 267.

§ 102. Improvements and expenditures on wife's realty.

Husband's improvement on wife's land as her separate property, see ante § 43.
Liability of wife for money borrowed for improvements on her land, see post ¶ 399.
Improvements on property owned jointly with husband after husband's death, see post ¶ 387.

¶ 325. A married woman is not personally responsible, and her land is not bound, for improvements and expenditures made on it by her husband, where no credit has been given to her and he has contracted on her behalf.—Morrison v. Berry, 42 Mich. 389; Detroit Lumber Co. v. Cleff, 164 Mich. 276.

¶ 326. A married woman is not liable for the cost of improvements put into her own house, where the work is done in reliance on the responsibility for her husband and by his directions.—Holmes v. Bronson, 43 Mich. 562.

¶ 327. Where a husband has contracted on his own responsibility for work to be done on his wife's house, and the other party to the contract, knowing it to be hers and that she has been consulted and has given directions as to the work, has dealt with the husband as sole contractor and not as her agent, such party cannot recover against the wife for the work.—Newcomb v. Andrews, 41 Mich. 518.

¶ 328. A wife who has taken from her husband a deed of land previously leased by him is liable for work done and materials furnished thereafter by the lessee at the request of her husband acting as her agent.—Luebe v. Thorpe, 94 Mich. 268.

§ 103. Wife as undisclosed principal.

General doctrine of undisclosed principal, see Agency, II, F.

¶ 329. Where the plaintiff sold goods to a hotel keeper, thinking he was the owner, when in fact he was acting as agent for his wife, the plaintiff may abandon his claim against the agent, and sue the undisclosed principal.—Schweyer v. Jones, 152 Mich. 241.

¶ 330. A wife is liable for building material furnished at the order of and at the credit of her husband to be used upon a building being erected upon her land with her full knowledge and consent and without a showing of an intended gift by the husband to her, it is like any other case of undisclosed principal.—Popp v. Connery, 138 Mich. 84.

§ 104. Notice to or knowledge of husband to affect wife.

¶ 331. Where notice of an assignment of a mortgage upon his wife's land is given to her husband who has transacted all of her business relating to the mortgage, such notice is notice to her.—Cox v. Cayan, 117 Mich. 599.

¶ 332. In the course of a business conducted in a wife's name but wholly by her husband, notice to him is notice to her.—Leland v. Collver, 34 Mich. 418.

¶ 333. Notice to the husband of a woman whose tenant is sued in ejectment is not notice to her.—Powers v. Scholtens, 79 Mich. 299.

¶ 334. Knowledge of a husband, if proved, that he was taking title in himself to his wife's land by reconveyance upon payment of a loan secured by deed to such land, in which both husband and wife joined, is not chargeable to his wife; where, in an action to reform such deed, it appears she was ignorant of such conveyance of title to him; since he was acting in his own interests, and adversely to her, and the doctrine that imputes knowledge of agent to his principal does not apply.—Huot v. Reeder Brothers Shoe Co., 140 Mich. 162.

§ 105. Adoption and ratification.

Adoption and ratification in general, see Agency, II, C.

Acquiescence of wife in husband's agreement with broker, see Brokers ¶ 201.

¶ 335. If a married woman freely and fully acknowledges as her free act and deed a mortgage to which her name was penned by her husband with her assent, she accepts the signature as her own and is bound by the mortgage.—Johnson v. Van Velsor, 43 Mich. 208.

¶ 336. Where a husband sues upon his contract to furnish his own services and those of his wife, the wife's evidence in support of his demand sufficiently ratifies such contract.—Harrington v. Gies, 45 Mich. 374.

¶ 337. A husband sold an undivided half of a steam-mill belonging to his wife, and by the contract of sale a partnership arrangement in regard to the use of the mill was made between the vendee and the husband. Held, that the wife could not affirm the sale without affirming the partnership agreement, and that such affirmance must be treated, as far as equities accrued to the vendee under the arrangement, as a previous assent to her husband's dealing as he did, and that she would be bound by his acts.—Widner v. Olmstead, 14 Mich. 124.

¶ 338. The pledging of her credit by a married woman for house furnishings of a house occupied by her and her husband, made when she was present in plaintiff's store, was only operative as to purchases made at that time and thereafter, and did not extend to a prior purchase made by the husband.—Beard v. Hoffman, 133 Mich. 624.

§ 106. Liability for husband's debts in course of his agency.

Liability for husband's debts in general, see post § 116.

Liability of husband's debts, see Const. art. XVI, § 8.

¶ 339. Where an insolvent debtor, as a means of supporting his family, devotes his time to carrying on a business owned by his wife, the accumulations, as against his creditors, belong to the wife, especially when she puts her private fortune and her own labor into the business; and she has the right to turn her interest over to her children, should she choose to do so.—Shelden v. Shattuck, 108 Mich. 344.

¶ 340. Where a married woman was owner of a flouring-mill, and her husband, assuming to be her agent, carried on in the mill the business of buying and manufacturing wheat, and selling flour, mill feed, etc., as well as doing custom grinding—the business amounting to from $50,000 to $100,000 a year, and being done mostly on capital borrowed on the credit of the business—it was held that the property acquired in the business was not protected by this statute from being liable to the debts and obligations of her husband.—Glover v. Alcott, 11 Mich. 470.

¶ 341. Where a note was executed by a husband in his wife's name by her authority and in his own for a debt upon which she was personally liable it is not necessary under the statutes (How. St. §§ 6298, 7352) to sue him before suing her.—First Commercial Bank v. Newton, 117 Mich. 433.

§ 107. Liability for husband's unauthorized and wrongful acts.

¶ 342. Where a mortgagee of household goods has wrongfully sold them, his wife is not rendered jointly liable with him by his taking in part payment a note held against her and by his consulting her as to which of the goods he shall let the payee have.—Iler v. Baker, 82 Mich. 226.

§ 108. Estoppel to deny or assert agency.

Estoppel or bar of contract rights in general, see post § 129.

Estoppel to assert disability, see ante § 90.

General principles of estoppel, see Estoppel.

Title of wife in succession to husband as title affected by his earlier grant in which she joined, see Estoppel ¶ 61.

Estoppel by silence and nonclaim to assert right in property sold by husband as his own, see also Estoppel ¶ 134.

¶ 343. A married woman may be estopped by the acts of her husband in dealing with her property as his own with her knowledge and acquiescence.—Case v. Erwin, 18 Mich. 434.

¶ 344. Where a wife, as a holder of stock in a limited partnership, presented to her by her husband, permits him for a period of years to manage the business, she is estopped to set up in a bill for accounting that he acted without her authority.—Mack v. Engel, 165 Mich. 540.

¶ 345. Where a man and wife acquired title by adverse possession to land occupied by them as a homestead, the fact that the husband only subsequently contracted for the purchase of the premises from the owner of the record title, does not, after the former's death, estop his widow and heirs

from asserting the title previously adversely acquired.—Carlson v. Wisconsin Land & Lumber Co., 186 Mich. 212.

§ 109. Burden of proof and presumptions.

Presumption of agency of husband for wife, see also Agency ¶ 37.

Presumption as to husband's authority to assent to condition under which dedication by wife was accepted, see Dedication ¶ 97.

¶ 346. A wife is not liable for bills contracted by the husband for the repair of her automobile where it is not affirmatively shown that she authorized the husband to contract on her account.—Armstrong v. Backus, 196 Mich. 735.

¶ 347. There can be no presumption of a husband's authority to act for his wife.—Fechheimer v. Peirce, 70 Mich. 440.

¶ 348. There can be no presumption of a husband's authority to act for his wife, and a person seeking to hold her for acts done by another must show affirmatively full authority to bind her.—Detroit Lumber Co. v. Cleff, 164 Mich. 276.

¶ 349. A presumption that a husband who ordered a fixture for realty owned by his wife, made the purchase not for himself but for her, and that she ratified the transaction, arises from the fact that on the note given for the purchase money his name followed by the word "surety" was written below his wife's signature.—Ensign v. Dunn, 181 Mich. 456.

¶ 350. A husband's authority to borrow money for his wife upon their joint note cannot be presumed from his having acted for her in other matters of business.—Three Rivers National Bank v. Gilchrist, 83 Mich. 253.

¶ 351. A wife, by allowing her husband to pay a part of his indebtedness with her money, does not thereby raise such a presumption of authority as to make herself liable to pay the rest of the debt.—O'Donnell v. Bray, 99 Mich. 534.

¶ 352. Where negotiations for the sale of land owned by husband and wife are carried on by the husband, and the wife, in consummation thereof, joins with her husband in a deed of the land to the proposed purchaser, which he refuses to accept, and they file a bill to enforce the specific performance of the contract, the necessary authority on the part of the husband to carry on the negotiations in behalf of his wife will be presumed, in the absence of proof to the contrary.—Newberry v. Slafter, 98 Mich. 468.

§ 110. Admissibility and sufficiency of evidence.

Agency of husband to make admissions binding wife, see Evidence §§ 424, 425.

¶ 353. A husband's authority to borrow money for his wife upon their joint note cannot be shown by his declarations.—Three Rivers National Bank v. Gilchrist, 83 Mich. 253.

¶ 354. Evidence that a husband buying an automobile told the seller he intended to give it to his wife, does not establish that the husband was acting as agent for his wife, although the receipted statement of sale treated the price as due from her, and she, to the seller's knowledge, knew of the transaction, where payment was to be made in shares of stock by the husband.—Gero v. Abbott, 157 Mich. 573. (McAlvay, Moore and Brooke, JJ., dissenting.)

¶ 355. In a suit for goods sold there was evidence that the goods were charged to defendant and payments on account were made by her. Defendant herself testified that she selected and received the goods, and made statements tending to show that she purchased them. On examination by her attorney she contradicted her direct testimony, stating that she never knew the goods were not charged to her husband. Held, the court was in error in directing a verdict for defendant upon the ground that the evidence showed the goods were bought by the husband and that there was no evidence that they were purchased by defendant.—W. A. Sturgeon & Co. v. Van Studdiford, 165 Mich. 309.

¶ 356. A wife, to whom her husband had assigned a non-negotiable note, at his request, and without consideration, guaranteed the payment of the note to bearer, and delivered it to her husband, to be used by him in the payment of his own debts. The husband discounted the note at a bank, upon the representation that his wife was pecuniarily responsible and that he desired to use the proceeds of the note for his own purposes. He paid a draft and an account which the bank held against him for collection, and used the remainder of the money, except $100, which he deposited with the bank to his wife's credit, in the payment of his debts. Held, in a suit by the bank upon the guaranty of payment, that if any inference of agency could be drawn from the possession of the note by the husband, it was repelled by his proposed application of the proceeds, made known to the bank officers before the discount; and that the bank cannot say that the note was discounted for the wife's benefit.—First Nat. Bank v. Hanscom, 104 Mich. 67.

¶ 357. In a proceeding to foreclose a mortgage where the defendants allege, supported by the evidence, that they turned over to the complainant's husband the promissory note of the third party in payment of the mortgage and it is shown that the husband acted for the complainant in acquiring the mortgage it may be assumed that the payment

to the husband was effective notwithstanding adverse testimony to the effect that the husband purchased the note for cash and that he had no authority to act for his wife.—Korf v. Korf, 125 Mich. 259.

¶ 358. Testimony tending to show that a husband purchased certain chairs for use on a boat owned by his wife, and that the latter, after the purchase, promised to either return or pay for the chairs, was sufficient to sustain a judgment against the wife.—Foster Charles & Ewen Co. v. Fletcher, 119 Mich. 353.

¶ 359. Where a married woman made an unconditional assignment of a mortgage to a third person and delivered it to her husband, who delivered it over to such third party, and took from the latter a receipt stating that it was received of the husband as collateral security for a debt owing by the husband to the assignee, the court refused to hold from these facts that the assignment was intended by the wife as security only.—Durfee v. McClurg, 6 Mich. 223.

¶ 360. Evidence that the husband was given unlimited authority to act for his wife in all transactions of a partnership in which she was a partner is held sufficient to show that he acted for her in trading certain materials belonging to the partnership for other materials furnished by the defendant so as to show payment and defeat an action by the partnership for the materials furnished the defendant.—People, for Use of Roberts v. Lappin, 129 Mich. 172.

¶ 361. Complainant's husband having made an arrangement of the debt secured by the assignment, and agreed with defendant that the latter should have and retain an absolute title to the mortgage, it was held that this arrangement was binding upon complainant, and that she could not require defendant to re-assign to her the mortgage.—Durfee v. McClurg, 6 Mich. 223.

¶ 362. Where the findings of fact in a suit on a note showed that defendant, a married woman, was engaged in business for herself; that her husband had bought a safe on credit and had not paid for it and offered to return it to the vendors, with a proposition that his wife would, if they chose to sell it to her, give her note for an amount and at a time specified, which was the note in suit; that the vendors accepted this proposition, and the note was sent accordingly; and that the husband acted in the matter only as agent for his wife, and with her authority,—and it being further found, though nominally as findings of law, that the vendors owned the safe and sold it to defendant in her own right and on her sole credit, and accepted this note in payment, the objection that the facts found do not support the judgment for plaintiffs is held not well taken.—Gillam v. Boynton, 36 Mich. 236.

¶ 368. Plaintiff lumber company for several years had dealings with defendant's husband in selling lumber to him. Plaintiff sold the lumber in question to the husband, relied on his credit, and filed a claim therefor in bankruptcy against him. The husband used the lumber to erect buildings on the defendant's land, with her knowledge, but she paid no attention to the details of the matter. Held, the court was in error in directing a verdict for plaintiff for the price of the lumber, since it was a question for the jury whether the husband was acting as defendant's agent.—Detroit Lumber Co. v. Cleff, 164 Mich. 276.

¶ 369. Where there is evidence that the plaintiff sold goods to a hotel keeper, thinking he was the owner, when in fact he was acting as agent for his wife, it is a question for the jury whether the wife was an undisclosed principal of whom plaintiff may recover, and a request to direct a verdict for defendant is properly denied.—Schweyer v. Jones, 152 Mich. 241.

¶ 370. Whether both husband and wife agreed to be liable, or whether the husband was acting as agent for his wife, was a question for the jury, in assumpsit against both husband and wife, for lumber sold, where plaintiff claimed that although the lumber was originally sold to the husband, after the first car load was shipped, and when he was in a condition to recover it back, a new arrangement was made, which authorized him to extend the credit to both husband and wife, and that he in fact so extended it; and where such new arrangement was denied by defendants.—Reelman v. Grosfend, 140 Mich. 681.

¶ 371. An instruction that the jury may find a married woman liable for goods ordered by her husband, upon the ground of ratification, and upon the ground that she remained silent knowing that the goods were being furnished upon her credit, is proper, although there is no positive testimony of such knowledge, where the inference that defendant had such knowledge might properly be drawn from the testimony.—Lindsley v. Smith, 150 Mich. 543.

¶ 372. A statement made by a husband in the presence of the wife that the money in question was desired to make a payment on a mortgage on her separate estate, was equivalent to her making a like statement and therefore an instruction in which the court was uncertain as to which made the statement, but left it to the jury to say, was not error.—Vosburg v. Brown, 119 Mich. 697.

¶ 373. In an action for the price of lumber sold and delivered to a married woman, defended on the ground that her husband, who ordered the lumber as her agent and had it charged to her account, was not her agent, and was not authorized to act for her, a verdict is properly directed for plaintiff where the evidence shows that defendant had previously stated to plaintiff that she intended to purchase lumber from him if she decided to build a new house, that she did build such new house, that her husband ordered the lumber for her, that it was sold on her credit, and that she herself made a payment on account of such lumber.—Lindsley v. Smith, 150 Mich. 543.

¶ 374. It was error for the court, in assumpsit against both husband and wife, for the price of building material, where it appeared that the plaintiff first extended credit to the husband, and where it was claimed by plaintiff and denied by defendants, that by a new arrangement subsequently made, credit was extended to both husband and wife, to charge that if the wife was the owner of the real estate on which the building was to be erected out of such material, and that the husband owned no real estate, except one lot of small value, and that he conducted the business in relation to all the property owned by his wife, with her knowledge and consent, and that they planned together to put such building on her property, and that her husband contracted with plaintiffs for the material for such building, with her knowledge and consent, that then she would be liable for the unpaid balance due on such material, and that it was immaterial whether the bill was charged to her husband, and the correspondence connected therewith was directed to him.—Reelman v. Grosfend, 140 Mich. 681.

C. PARTICULAR CONTRACTS AND DEALINGS.

§ 112. Contracts for family support and household expenses.

For attendance of physicians and nurses, see post § 113.

Contract for domestic services, see also ante ¶ 231.

Liability of husband on wife's contracts, see ante § 65.

Family necessaries and household expenses as charges on separate property, see post § 146.

Husband and wife as partners, see post § 123.

Implied contracts arising from family relationship, see Implied Contracts.

Implied contract from duty imposed by law, see Implied Contracts, II.

¶ 375. A married woman's contract during coverture to pay for the board of herself, husband and imbecile son is not binding upon her.—Howe v. North, 69 Mich. 272.

¶ 376. A married woman who is the actual head of the family for business purposes is liable for clothing bought by her for a minor son, if she is the only person to whom credit was given in the transaction.—Fafeyta v. McGoldrick, 79 Mich. 360.

¶ 377. A married woman is liable on a promissory note given by her in payment of clothing purchased by her for a minor son and charged to her by her direction.—First Commercial Bank v. Newton, 117 Mich. 433.

¶ 378. A married woman is liable for the price of clothing bought by her for her minor son and charged to her by her direction, she agreeing to pay for the same.—Hirschfield v. Waldron, 83 Mich. 116.

¶ 379. A married woman has no power to make a contract to pay for the board of her adult sister and her children, since such contract does not relate to her separate estate, nor benefit it, and she is under no legal obligation to thus care for her sister.—June v. Labadie, 132 Mich. 135.

¶ 380. A married woman cannot be held liable to a domestic servant for services rendered in a house and about a farm the title to which is in the husband, although she, having the management and control of the property, herself employed the servant.—Kirt v. Kropp, 110 Mich. 51.

§ 113. ——For attendance of physicians and nurses.

Wife's last sickness as charge on her separate property, see post § 147.

¶ 381. A married woman is liable for medical services rendered at her request for herself and for her minor daughter by a former marriage, who is living with her, which services have been charged to her, and for which she has agreed to pay.—Goodman v. Shipley, 105 Mich. 439.

¶ 382. A married woman whose husband has deserted her may make a binding contract for medical services.—Carstens v. Hanselman, 61 Mich. 426.

¶ 383. The promise of a married woman to pay for medical services rendered to her husband is not binding, it not being a contract relating to or benefiting her separate estate. Buck v. Haynes' Estate, 75 Mich. 397.

¶ 384. A husband deeded to his wife the house and lot where they lived and made to her a bill of sale of the personal property about the premises and agreed to pay her $100 a year during her life. At the same time she released all her dower rights and all claim to the property he had or might thereafter acquire. In a claim against the wife's estate for services as nurse. Held that she was competent to make a valid contract for such services though her husband lived with her.—Barber v. Eberle's Estate, 131 Mich. 317.

§ 114. Debts for property or services furnished.

For attorney's services, see post § 115.

¶ 385. A married woman is liable for goods purchased and for services performed

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Validity of parol promise of one spouse to pay the other's debt, see Frauds, Statute of § 26.
Liability of separate property for husband's debts, see Const. art. XVI, § 8; Comp. L. 1915, §§ 11475, 11485.

¶ 390. A note given by a feme covert for the debt of her husband is void.—Ensign v. Dunn, 181 Mich. 456.

¶ 391. Plaintiff made a loan to defendant's husband and refused to take his note indorsed by defendant, but took her note with the husband as surety, knowing that the loan was for the husband's sole use. Held, that he could not recover against her. —Fechheimer v. Peirce, 70 Mich. 440.

¶ 392. Where a married woman, in consideration of a conveyance of land to her mother by her husband's creditor, agrees to pay her husband's debt, the agreement is binding and valid.—Hamilton v. Parent, 152 Mich. 587.

¶ 393. The fact that a wife has put money or goods into her husband's business will not prevent a levy of execution thereon against her husband.—Carew v. Mathews, 49 Mich. 302.

§ 117. Wife as joint debtor with her husband.

See also ante ¶¶ 236, 237.
Liability as his surety or indorser, see post §§ 118, 119.
Liability of husband for improvements on land owned jointly with husband, see post § 120.
Necessity of joinder in action on contracts in joint names, see also Contracts § 278.
Construction of contracts of husband and wife with others as joint or several, see also Contracts § 169.
Sufficiency of evidence as to joint undertaking by spouses, see also Contracts § 324.

¶ 394. A married woman is not personally liable on a promissory note signed by herself and husband where the sole consideration is his debt.—De Vries v. Conklin, 22 Mich. 255; Ross v. Walker, 31 Mich. 120; Barnes v. Brown, 32 Mich. 146; Johnson v. Johnson's Estate, 66 Mich. 525; Holland v. Maus, 69 Mich. 180.

¶ 395. A note given by a husband and wife for a loan made for the husband's sole benefit is void as against her in the absence of representations by her that it was for her benefit.—Schmidt v. Spencer, 87 Mich. 121; Fechheimer v. Peirce, 70 Mich. 440; Johnson v. Johnson's Estate, 66 Mich. 525; Holland v. Maus, 69 Mich. 180.

¶ 396. The mere fact that a wife is the legal owner of a farm, upon which she resides with her husband and family, and which she allows him to use as a means of obtaining a livelihood for himself and family, will not make her liable upon their promissory note given to an employee, who hired to the husband, and worked upon said farm, and upon another piece of land owned by another party but worked by the husband, for the balance due the employee for such labor. —O'Donnell v. Bray, 99 Mich. 534.

¶ 397. A married woman may become a joint debtor with her husband upon a proper consideration.—Post v. Shafer, 63 Mich. 85.

¶ 398. A wife is liable on a note given by herself and her husband to the extent that the consideration was for the benefit of her individual estate.—National Lumbermen's Bank v. Miller, 131 Mich. 564.

¶ 399. Recovery may be had against a married woman upon a joint and several bond executed by herself and husband for money borrowed by her and used in building a house upon her land.—Wilson v. Wilson's Estate, 80 Mich. 472.

¶ 400. Recovery of money paid upon an invalid contract for the sale of land belonging to a husband and wife jointly, signed by the husband alone, cannot be had against him and his wife jointly, though the payments were made by notes payable to the wife's order and indorsed by her; but it must be had against the husband alone.—Shipman v Campbell, 79 Mich. 82.

§ 118. Liability as surety, indorser, or accommodation party.

See also ante ¶¶ 270, 284.
Illegality of principal's agreement as defense, see post § 119.
Recovery of money paid under void contract for sale of land where payment notes were made to wife's order and indorsed by her, see ante ¶ 400.
Burden of proof as to liability as surety, see also ante ¶ 285.
Evidence admissible to show liability as surety, see ante ¶¶ 287, 289.
General law of suretyship, see Suretyship.
Indorsers and transferor's liability on negotiable instruments in general, see Negotiable Instruments, VII.
Accommodation signatures and liability thereon generally, see Negotiable Instruments, XI.
Release of married woman who cannot be held as affecting right to judgment against others on joint obligation, see Release.

¶ 401. A married woman cannot bind herself by a mere personal promise jointly with her husband or as his surety.—De Vries v. Conklin, 22 Mich. 255; Jenne v. Marble, 37 Mich. 319.

¶ 402. A married woman is not liable upon a note which she signed as surety merely.—Henriques v. Ypsilanti Sav. Bank, 84 Mich. 168.

¶ 403. A married woman's contract of suretyship will not bind her unless made on behalf of her sole property, and should appear to have been so made, and upon a sufficient consideration for that purpose.—West v. Laraway, 28 Mich. 464; Kitchell v. Mudgett, 37 Mich. 81; Russel v. People's Sav. Bank, 39 Mich. 671; Howe v. North, 69 Mich. 272.

¶ 404. Where a wife signs a note with her husband to obtain money to put into his business, wherein she has no interest save as his creditor, she is only a surety, and the note is void as to her.—Littlefield v. Dingwall, 71 Mich. 223.

¶ 405. A married woman is not bound by a promissory note which she signs jointly with her husband for the amount of a judgment that has been rendered against them both, if it only appears that she signed it because he asked her to, and without knowing the use to be made of it. This only makes her a surety for her husband, and does not connect her with the consideration in such a way as to reach her sole property.—Schlatterer v. Nickodemus, 51 Mich. 626.

¶ 406. An objection to the validity of a judgment rendered against a husband and wife upon a promissory note signed by both, that the wife joined in the execution of the note as surety merely, is untenable, where it appears that the consideration for the note passed to the wife.—Shaw v. Fortine, 98 Mich. 254.

¶ 407. While a wife as incident to her power to contract may borrow money on her own account, she cannot bind herself by borrowing nominally for herself but in fact for her husband so that she stands as surety for him.—Feather v. Feather's Estate, 116 Mich. 384.

¶ 408. A married woman is not liable upon a note given by her and her husband for the price of a horse bought by them jointly, as it would make her surety for him at least to the extent of one-half of the amount.—Caldwell v. Jones, 115 Mich. 129.

¶ 409. A married woman is not liable upon her promissory note given simply to secure a debt of her husband.—Emery v. Lord, 26 Mich. 431; Waterbury v. Andrews, 67 Mich. 281.

¶ 410. A married woman is not personally liable upon her indorsement of a note due to her when the indorsement is given to secure the debt of a corporation in which she holds stock.—Russel v. People's Savings Bank, 39 Mich. 671.

¶ 411. A wife must be regarded as surety for a corporation of which she was a stockholder, and not her husband's surety, all being residents of Alabama, and she having given her note secure corporation at the sug and having put the since it was lawful f a surety under § 449 bama, providing that capacity to contract s cept as otherwise p § 4497, providing th wife may contract w contracts into which ject to the rules of l and between persons tial relations, but h rectly or indirectly, her husband."—City Atwood, 197 Mich. 1

§ 119. ——Illegality o as defense.

¶ 412. The right of from liability upon he bargain upon which i her knowledge, contai legalities and fraud i paired by the fact th one of the principals of that relation, may the relief granted he less than they would arated from her husba —Denison v. Gibson,

§ 120. Liability of wif land owned j

Wife as joint debtor ante § 117.

Improvements on prop husband after hu ¶ 387.

¶ 413. A married w the joint contract of l pay for improvement them jointly.—Speier

¶ 414. A married w her contract for impro owned by herself a Crowe, 74 Mich. 99.

§ 121. Right to carry name.

Membership in firm, IIusband and wife as

Right of wife to give in husband's ho

Authority of husband behalf of his wi

Liability of bank as wife deposited in see Garnishment

¶ 415. A married business in her own make herself liable erty on credit.—Ra 195.

¶ 416. A married woman can, with her husband's consent, personally conduct any lawful business, including that of selling whisky, and can keep the profits.—Amperse v. Kalamazoo Common Council, 59 Mich. 78.

§ 122. ——Membership in firm.

¶ 417. A married woman may become a member of a firm in which her husband is not interested and can thus bind her separate property to the same extent that any other party can.—Vail v. Winterstein, 94 Mich. 230.

§ 123. ——Husband and wife as partners.

General law of partnership, see Partnership.
Dissolution of partnership by marriage of persons composing partnership, see Partnership, VII.

¶ 418. A husband and wife cannot enter into a contract of partnership between themselves, and thus render themselves jointly liable for the contracts of the firm sought to be established.—Artman v. Ferguson, 73 Mich. 146.

¶ 419. Husband and wife are not necessarily constituted partners by an agreement whereby they lease certain hotel property and buy certain furniture and fixtures.—Wineman v. Phillips, 93 Mich. 223.

¶ 420. The husband and wife cannot become by contract between themselves, copartners in trade, in such a sense that the wife can be made responsible for the firm debts; but where husband and wife are partners, it is entirely competent for the wife to pledge her separate property for the payment of a debt of the firm for which the husband alone is responsible.—Hackley Nat. Bank v. Jeannot, 143 Mich. 454.

¶ 421. A married woman who has engaged in trade as her husband's partner may bind her interest in the property of the two by joining with the husband in a chattel mortgage on the firm property to secure a firm debt.—Hackley Nat. Bank v. Jeannot, 143 Mich. 454.

§ 124. Rights against husband's firm or business associates.

Action of wife against husband's firm, see post ¶ 611.

¶ 422. The fact that the member of a partnership who makes part payments upon a note is the husband of the owner and holder of the note will not prevent the operation of such part payment to show the recognition or assumption of the note by the firm.—Osborn v. Osborn, 36 Mich. 48.

§ 125. Right to compensation for services furnished third persons.

Presumptions and evidence, see post § 126.
Right of husband to furnish services of wife to third persons, see ante § 70.
Earnings for her services as her separate property, see ante § 41.

¶ 423. A wife can hire out, with her husband's consent, and can sue for, recover and keep her earnings.—Benson v. Morgan, 50 Mich. 77.

¶ 424. Where a married woman keeps a boarding-house with the consent of her husband, and controls the entire business, contracts of purchase made by her in reference to such business must be considered as contracts in relation to her sole property, and therefore binding upon her.—Tillman v. Shackleton, 15 Mich. 447.

¶ 425. A wife can recover compensation for services in taking care of her father-in-law, living in the family, if he understands and assents to the arrangement, and if her husband gives up to her his own right to her time and services.—Mason v. Dunbar, 43 Mich. 407.

¶ 426. Where a wife is working with her husband, in order for her to be entitled to recover for her wages, it is not enough that the husband has given the wife her services, but the one dealing with her must know of the relation between them.—Heral v. McCabe, 171 Mich. 530.

¶ 427. The fact that a wife assists her husband in making out his claim against an estate for board, room, repair of clothing, etc., which is not presented to the commissioners, does not estop her from presenting a claim for her own personal services and earnings.—In re Burnham's Estate, 199 Mich. 326.

§ 126. ——Presumptions and evidence.

General principles of evidence, see Evidence.

¶ 428. Where a married woman sued an estate on a claim whereby it was alleged she was to receive pay for having nursed, cared for, furnished groceries to, and kept house for the decedent, and there was testimony to support the finding of an arrangement to pay for the services, understood and assented to by decedent, claimant, and her husband, evidence to show that there was an arrangement with her husband that the compensation was to be her sole property was admissible as against the objection that such an arrangement must be shown to have been brought home to the decedent and to have been assented to.—In re Barclay's Estate, 146 Mich. 650.

¶ 429. Where it appears, in an action against a priest of a Catholic Church for services in washing the linens of the church, that he asked the plaintiff's husband whether plaintiff would do the washing, to which the husband answered that she would, the priest having had no conversation with the plaintiff and no price being named, the

priest having no personal interest in the matter, it being his practice to report the amount as incident to the expenses of the church, which the plaintiff and her husband knew, there is no evidence that the priest understood that he was dealing with the plaintiff or was to pay her for her services, and he is not liable.—Heral v. McCabe, 171 Mich. 580.

¶ 430. Evidence of a husband that he has no claim whatever to his wife's services and makes no claim whatever is insufficient, in an action by the wife against the estate of her father to recover for services rendered to her parent, to show that at the time the services were rendered the husband had relinquished all right to his wife's services.—In re Scully's Estate, 199 Mich. 181.

§ 127. Rights under joint lease.

¶ 431. One who has made a joint lease of land to husband and wife and has put them jointly in possession is estopped from denying the wife's separate right to join in a suit against him for damages sustained by his unlawfully disturbing them in their possession.—Gillespie v. Beecher, 94 Mich. 374.

§ 128. Effect of husband's fraud on wife's contract rights.

¶ 432. A wife holding a lawful and just claim against a firm of which her husband is a member is not precluded from recovering upon it because of any incidental wrong that may result to one of the other members of the firm in consequence of an alleged fraud of her husband to which she was in nowise a party; there is no rule of law compelling a wife to assume the consequences of her husband's frauds or to guarantee his good conduct.—Moore v. Foote, 34 Mich. 448.

§ 129. Estoppel or bar of right.

Estoppel to deny agency of husband, see ante § 108.

General principles of estoppel, see Estoppel.

Estoppel to assert husband's or wife's title as superior to levy against other, see Executions § 121.

¶ 433. A judgment in favor of a husband on a non-negotiable due bill belonging to his wife is no bar to her action; nor would she be estopped by the mere fact that she was called as a witness for him in his suit.—Blackwood v. Brown, 32 Mich. 104.

D. CONVEYANCES, TRANSFERS, AND CHARGES ON SEPARATE PROPERTY.

§ 130. In general.

Requisites for and execution, see post §§ 131-133.

Sufficiency of consideration to wife, see post § 134.

Assignment of insurance payable to wife, see post § 135.

Married woman's
representative
Power and right to
138.
Effect of joinder i
§ 139.
Effect of joinder i
post § 140.
Liability on cove
§§ 141-143.
Charges on separat
148.
Alienation of esta
see ante §§
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tion, see ante §
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terest, see Ho
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§§ 54-56.
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see Comp. L.
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¶ 434. Const. art
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4 Mich. 322.

¶ 435. A marri
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§ 131. Requisites,

Necessity for an
see post § 1
Defects and objec
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other, see Ex
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¶ 436. A deed executed by husband and wife of land owned by her need not designate the extent of her interest.—Heinmiller v. Hatheway, 60 Mich. 391.

¶ 437. A wife does not convey her dower rights by a deed which she had signed and acknowledged in blank several months before the present transaction where it was used after she had refused to sign a deed properly filled in with the description of the land in question.—Maynard v. Davis, 127 Mich. 571.

§ 132. ——Necessity for and effect of husband's joinder.

Construction of deeds joined in by husband and wife, see Deeds § 42.

Necessity for joinder of husband in deed of married woman coming from another state or country without him, see Comp. L. 1915, §§ 11471-11472.

Deed by married woman after desertion of her husband, see Comp. L. 1915, § 11455.

¶ 438. At common law, and until the statute of 1855, a deed executed by a married woman without her husband joining with her was void.—Goff v. Thompson, H. 60; Palmer v. Oakley, 2 D. 433.

¶ 439. In case of a conveyance by a married woman under the Act of 1855 it is not essential that the husband join in or assent to the deed, notwithstanding she was owner of the land at the time the statute was passed.—Farr v. Sherman, 11 Mich. 33.

¶ 440. The husband's joining in his wife's deed of land which she owns in fee but which both occupy as a homestead is not necessary.—Buckingham v. Buckingham, 81 Mich. 89.

¶ 441. Where a wife joins her husband in a deed of the fee of land of which she is, in whole or part, the sole owner, she conveys all of her interest therein.—Clow v. Plummer, 85 Mich. 550.

§ 133. ——Defects and objections, and estoppel to question validity.

¶ 442. The defenses of undue influence and coercion, set up by a married woman against a mortgage given on her own property to secure her husband's debt, were held not sustained where it appeared that she gave it with reluctance and after much persuasion by her husband, and at first declined to acknowledge it, but finally made an acknowledgment in the usual form and afterwards admitted the validity of the security. —Watson v. Thurber, 11 Mich. 457.

¶ 443. A married woman can be estopped by her deliberate conduct as well as any one else to deny the validity of a mortgage because of formal defects in its acknowledgment.—Norton v. Nichols, 35 Mich. 148.

¶ 444. Where a husband, after obtaining his wife's consent to mortgage her property to secure the purchase price of goods bought by him, presented to her and obtained the execution of a mortgage covering, in addition to such purchase-price, an old indebtedness of his of which she was not informed, though he made no false representations, the mortgage was held void as to the prior indebtedness, but valid as to the residue.—Smith v. Osborn, 33 Mich. 410.

§ 134. Sufficiency of consideration to wife.

Sufficiency of consideration to wife generally, see ante §§ 76-79.

Necessity of wife's consent on alienation or transfer of exempt property, see Exemptions § 45.

¶ 445. A woman's conveyance of her property in payment of her husband's debt is based on a sufficient consideration.—Lewis v. Doyle, 182 Mich. 141.

¶ 446. A woman's conveyance of her property in payment of or as security for her husband's debts is supported by a sufficient consideration and is binding on her.—Ehle v. Looker, 182 Mich. 248.

¶ 447. A conveyance by a married woman in payment of her husband's debt is supported by a sufficient consideration, and is valid.—Le May v. Wickert, 98 Mich. 628; Kieldsen v. Blodgett, 113 Mich. 655.

¶ 448. Defendant Miller and his wife owned, separately, each four lots. Mrs. Miller was in jail for failure to pay a fine of two hundred dollars. She told her husband that if he would raise two hundred dollars to pay her fine she would deed him absolutely her four lots. Miller went to one Cronks and borrowed $270, deeding him his four lots, and out of the money paid the said fine. In order to save expense, Miller had his wife deed her four lots directly to Cronks. He paid her nothing for this conveyance. Cronks gave back a land contract to defendant Miller on all eight of the lots, which called for a conveyance of the lots upon payment by defendant of the $270. Complainant purchased of Mrs. Miller two of the four lots belonging to her, and brought a bill to redeem. Held, that, although at the time of making her deed to Cronks, Mrs. Miller supposed she was entirely devested of ownership of her four lots, her oral contract with her husband was void under Comp. Laws 1897, § 9509, and the legal title remained in her.—Ferry v. Miller, 164 Mich. 429.

§ 135. Assignment of insurance payable to wife.

Statutory provision relative to insurance on life of husband for benefit of wife, see Pub. Acts 1917, No. 256, §§ 24, 25, amending Comp. L. 1915, §§ 11489, 11490.

¶ 449. A wife's assignment of her interest in an insurance policy upon her husband's life does not bind her if procured without her intelligent assent for purposes which have nothing to do with her separate estate.—Mutual Ben. Life Ins. Co. v. Wayne County Sav. Bank, 68 Mich. 116.

§ 136. Married woman's conveyances as guardian, representative or trustee.

Sales of trust property generally, see Trusts, VI, D.

Conveyances by representatives in general, see Estates of Decedents, VII.

General law of guardianship, see Guardianship.

Power of married woman to make conveyance in capacity of guardian without husband joining in deed, see Guardianship ¶ 170.

¶ 450. Husband need not join in wife's conveyance of ward's land sold by her as guardian.—Palmer v. Oakley, 2 D. 433.

§ 137. Power and right to mortgage.

Effect of husband's joinder, see post § 138.

Effect of joinder in husband's mortgage, see post § 140.

Mortgages of estates held by the entireties, see ante II, B.

Power and right of married woman to alien or incumber estate held by the entireties, see ante §§ 30-32.

Power of married woman to mortgage entirety to secure husband's debt or for his benefit, see also ante ¶¶ 99, 100.

Mortgage invalid as to wife but valid as to husband's nonexempt chattels, see Chattel Mortgages § 9.

Mortgage by husband of wife's chattels, estoppel of wife, see Chattel Mortgages § 52, ¶ 224.

Necessity for joinder of wife in execution of chattel mortgage, see Jud. Act, chap. XXIII, § 43, subd. 9; Comp. L. 1915, § 12858, subd. 9.

¶ 451. A married woman is at liberty to create express liens on her property for any lawful purpose; she can mortgage it to secure another person's debt, even if her note therefor be not binding.—Damon v. Deeves, 57 Mich. 247.

¶ 452. A married woman may mortgage her property to secure her husband's or another person's debt.—Watson v. Thurber, 11 Mich. 457; Damon v. Deeves, 57 Mich. 247.

¶ 453. A mortgage given by a wife upon her real estate to secure the unpaid purchase-price of personalty, title to which is vested in herself and husband jointly, is valid.—Wineman v. Phillips, 93 Mich. 223.

¶ 454. A married woman may now mortgage her lands for the debt of her husband.—Watson v. Thurber, 11 Mich. 457.

¶ 455. A mortgag
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§ 138. ——Effect of

¶ 459. A mortgage
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Mich. 537.

§ 139. Effect of joind

Necessity of joinde
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¶ 460. No purpos
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Agar v. Streeter, 1

§ 140. Effect of join

Effect of joinder
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¶ 461. The perso
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Kitchell v. Mudget

¶ 462. A wife c
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Gantz v. Toles, 40

¶ 468. A wife who, to bar her dower, joins in the execution of a mortgage securing her husband's debt, is not liable for the debt or upon any covenant in the mortgage.—J. I. Case Threshing Machine Co. v. Mitchell, 74 Mich. 679.

¶ 464. A man and his wife conveyed certain lands in consideration of the payment, by the grantees, of the husband's debts. The grantees gave back a written agreement to the wife that the lands should be reconveyed to her alone on repayment of their advances. This agreement purported to make the wife covenant to pay the advances, but she did not sign it. The transaction was conceded to be a mortgage. Held, that under Comp. L. 1871, § 4208, How. St. § 5656, declaring that no mortgage shall be construed as implying a covenant for the payment of the sum secured thereby, the wife could not be held personally liable for any deficiency on foreclosure sale.—Howe v. Lemon, 37 Mich. 164.

¶ 465. A wife who has a mortgage on her husband's property does not, by joining in a subsequent mortgage thereon, subject her own mortgage interest to the lien of the later mortgage.—Kitchell v. Mudgett, 37 Mich. 81.

§ 141. Liability on covenants for title.

Where joinder was to bar dower or homestead and not to pass separate estate, see post § 142.

Presumptions and evidence, see post § 143.

Wife as unnecessary defendant in action on husband's covenant for title, see Covenants for Title § 23.

¶ 466. When the wife joins with her husband in conveying the fee of land of which she is, in whole or in part, the sole owner, she conveys all of her interest therein, though she can only be held liable upon her covenants in such deed to the extent of her sole property conveyed.—Heinmiller v. Hatheway, 60 Mich. 391.

¶ 467. A wife who joins with her husband in a warranty deed of his land, the sole consideration for which is the conveyance to her of other land, is jointly liable with him for a breach of the covenants in said deed.—Arthur v. Caverly, 98 Mich. 82.

¶ 468. A married woman joining with her husband in the execution of a warranty deed conveying the latter's property, is liable on the covenants where she obtains all the consideration.—Menard v. Campbell, 180 Mich. 583.

¶ 469. If it appears that the sole consideration for a deed executed by husband and wife was to be and was actually received by the latter, the covenants of the deed will be treated as joint.—Agar v. Streeter, 183 Mich. 600.

§ 142. ——Where joinder was to bar dower or homestead and not to pass separate estate.

Nonliability of wife on covenants in deed signed to bar dower or marital rights, see Covenants for Title § 12.

¶ 470. Any covenant on the wife's part in a deed for the conveyance of land that is not her individual property, and in which deed she joins only to release her contingent rights of dower, etc., is void as to her, leaving it the husband's sole covenant; and she is not personally liable on a covenant in her husband's deed.—Hovey v. Smith, 22 Mich. 170; Kitchell v. Mudgett, 37 Mich. 81; Carley v. Fox, 38 Mich. 387.

¶ 471. Covenants in a married woman's deed which have no connection with any separate property owned by her are not binding upon her.—Langdon v. Clayson, 75 Mich. 204.

¶ 472. Where a married woman joins in the execution with her husband of a conveyance of his land, the covenants although joint in form, are not binding upon her.—Agar v. Streeter, 183 Mich. 600.

¶ 473. A wife, though she joins in her husband's deed, is not liable on a covenant of warranty therein, and need not be joined as defendant in an action for breach thereof.—Webb v. Holt, 113 Mich. 338.

¶ 474. A widow, who by will of the husband has an estate in fee in real property, is not liable on a covenant of warranty in a deed executed during the lifetime of the husband, and which she signed only for the purpose of barring her dower.—White v. Grand Rapids & I. Ry. Co., 190 Mich. 1.

§ 143. ——Presumptions and evidence.

General law of evidence, see Evidence.

¶ 475. In order to bind a married woman jointly with her husband on the covenants of a deed executed by them, it may be shown aliunde that it was intended that she should and that she actually did receive the consideration.—Agar v. Streeter, 183 Mich. 600.

¶ 476. That a married woman receives the consideration for a conveyance of her husband's property, in which she joins, must be clearly shown by one seeking to hold her upon the covenants thereof.—Menard v. Campbell, 180 Mich. 583.

§ 144. Charges on separate estate.

See also ante ¶ 238.

Improvements on separate property, see post § 145.

Family necessaries and household expenses, see post § 146.

Wife's last sickness and funeral expenses, see post § 147.

Interests and estates which may be charged, see post § 148.

Separate property in general, see ante II, C.
Relation of contract to wife's separate property, see ante § 80.
Presumption of knowledge of law relating to charges on separate estate, see Evidence § 47, ¶ 254.

¶ 477. The old doctrine of enforcing in equity the contracts of a married woman as charges upon her equitable interests in property held to her separate use rested upon her disability to bind herself in personam, or to transfer or charge a legal estate by her sole act or agreement, and it is not applicable to cases at law arising under our statutes, which have removed the very disabilities on which the doctrine was originally founded.—West v. Laraway, 28 Mich. 464.

§ 145. ——Improvements on separate property.
Improvements by husband on wife's separate lands, see ante § 43.

¶ 478. Where a married woman has given her note to secure her husband's indebtedness for materials which went, with her knowledge and consent, to improve her own separate estate, although originally furnished on the credit of her husband, an action may still be maintained against her upon such note, if the indebtedness for which it was given was equitably due from her, as if the materials were so used without her having paid or become bound to pay her husband, or any one else, for them, or if the husband, as between himself and his wife, was only acting as her agent. This would substantially be a debt incurred on account of her own separate property, and she would be bound, as there would be a good and valuable consideration for the note.—Emery v. Lord, 26 Mich. 431.

§ 146. ——Family necessaries and household expenses.
Wife's contracts for family support and household expenses, see ante § 112.

¶ 479. It is competent for a wife, residing with her husband, to become personally liable, so as to charge her separate estate, for family necessaries purchased for and actually used in the husband's family and homestead.—Campbell v. White, 22 Mich. 178.

§ 147. ——Wife's last sickness and funeral expenses.
Wife's contracts for physicians and nurses, see ante § 113.

¶ 480. A wife's estate not liable for her funeral expenses if husband is able to pay them.—Galloway v. McPherson's Estate, 67 Mich. 546.

¶ 481. Recovery cannot be had against a wife's estate for care and nursing to her and her husband, rendered to the husband, in the absence of an express contract on her part to pay for the same out of her individual estate.—
Mich. 154; Dudec

§ 148. ——Interest
charged.
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§§ 88-43.

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V. TORTS

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§ 149. Husband's
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Mueller, 41 Mic
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¶ 489. No act
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by his wife's careless driving, if it is not shown that she acted under his direction or with his knowledge or consent.—Ricci v. Mueller, 41 Mich. 214.

¶ 490. A man was sued for overflowing plaintiff's land by obstructing a ditch. His wife and child were the persons who filled it up, but when the plaintiff cut trenches to let off the water, defendant himself filled them up again, threatened those who were sent to reopen them, and asserted his purpose not to let the main ditch be cleared for less than $1,500; there was some evidence also that he knew where his wife was when she was at work. Held, that the jury were justified in finding him responsible for the mischief.—Enright v. Hartsig, 46 Mich. 469.

§ 150. Husband's tort in use or control of wife's lands.

¶ 491. A husband may be sued in tort for destroying the lateral support to plaintiff's land by removing earth from premises belonging to defendant's wife.—Wykes v. Ringleberg, 49 Mich. 567.

¶ 492. A wife owning land on which a building is being erected by servants employed by her husband is not liable for an injury to one of them merely because of her ownership of the land.—Hoar v. Merritt, 62 Mich. 386.

§ 151. Wife's liability for husband's tort.

Wife's liability for injury by dog owned or kept by husband, see Animals ¶ 81.

Responsibility of married woman for crime committed with her husband present, see Crimes § 12.

Liability of wife sued jointly with husband for personal injury caused by defective premises, see also Buildings ¶ 50.

¶ 493. A woman owned a store and an adjacent stairway in which her neighbor had a perpetual easement for himself and his lessees, who put up professional signs therein. Her husband, who occupied her store by virtue only of the marital relation, tore down one of the signs. Held, that his lawless conduct in so doing does not affect her rights and make her subject to legal process.—Bennett v. Seligman, 32 Mich. 500.

¶ 494. In proceedings by a husband's creditors to attack certain property of his wife alleged to have been obtained by fraud, the wife stands in the litigation like any third person. Husband and wife are not mutually responsible for each other's conduct.—Scott v. Chambers, 62 Mich. 532.

§ 152. Torts against each other.

Actions against each other, see post §§ 180-182.

Criminal conversation and alienation, see post V, B.

Criminal liability of husband for nonsupport or desertion, see post § 196.

Wrongs amounting to crimes by husband or wife against each other or against third persons, and responsibility for wife's crimes, see Crimes; Indictment; Homicide.

¶ 495. Under the statute giving a married woman control of her own property and enabling her to sue in relation thereto as if she were unmarried, a divorced wife cannot maintain suit against her former husband for a personal tort committed while they were living together as husband and wife.—Bandfield v. Bandfield, 117 Mich. 80.

¶ 496. Whether a married woman can maintain an action of libel against her husband, quære.—Smith v. Smith, 73 Mich. 445.

§ 153. Actionable torts to property.

Wife's right to sue for conversion of exempt property of husband, see also ante ¶ 29.

Wife as "occupant" entitled to distrain animals, see Animals ¶ 19.

Burning own house as burning house of "another," see Crimes ¶ 198.

Right of wife to damages for injury to property, person or means of support through intoxication, see Pub. Acts 1917, No. 338, § 47.

¶ 497. The possession by the wife of personal property belonging to the husband, during his temporary absence (a crop of potatoes in which he had a share with a right in her to supply the family table), is the possession of the husband, and the wife cannot sue in her own name for a conversion of such property.—Janauschek v. Eddy, 108 Mich. 190.

¶ 498. A wife cannot maintain an action for trespass upon land in possession of her husband and herself under a deed running to both of them since such trespass would be against the entire estate and to recover therefor the husband and wife must both join.—Fowles v. Hayden, 130 Mich. 47.

§ 154. Fraud and deceit.

Effect of husband's fraud on wife's contract rights, see ante § 128.

Necessity for joinder of wife who knowingly acts as husband's agent in a fraud, see post ¶ 605.

Proper parties in bill by married woman to set aside fraudulent deed, see post ¶ 601.

Right of surety to be released from liability on contract which is without her knowledge illegal and fraudulent, where she is wife of guilty principal, see ante ¶ 412.

General fraud, see Fraud.

Actionable right of husband in injury to wife caused by fraud which induced her to part with her homestead which she owned as her separate property, see Homesteads ¶ 273.

¶ 499. The consideration given by a wife for a conveyance to her need not pertain

to her sole property to enable her to sue for damages if defrauded in the transaction.—Bissell v. Taylor, 41 Mich. 702.

¶ 500. A husband cannot recover damages for being, through his "impaired mental condition," "induced and persuaded to cause and procure his wife to trade and sell her lands for certain other lands."—Devereaux v. Hubbard, 117 Mich. 119.

§ 155. Slander or libel.

Action of libel against husband by wife, see ante ¶ 496.

General law of slander and libel, see Libel and Slander.

¶ 501. A married woman may bring a sole action for slander.—Leonard v. Pope, 27 Mich. 145.

¶ 502. A husband is not to be joined with his wife as plaintiff in an action for slander to a business solely owned by her.—Child v. Emerson, 102 Mich. 38.

§ 156. Actionable personal injury to wife.

Cost of medical attendance and incidental expense, see post § 157.

Injuries suable by husband, see post § 158.

Damages recovered for personal injury to wife as her separate property, see ante § 39.

Necessity for joinder of husband in suit by wife for personal injuries, see post ¶¶ 580, 581.

Necessity for joinder of husband in action by wife for assault committed upon her, see post ¶ 588.

Right to waive tort for injury to wife, see Assumpsit ¶ 23.

Measure of damages to husband for injury to wife or of wife for injury to herself, see Damages §§ 154, 155.

Common law right to recover for loss of services from injury followed by death, see Death by Wrongful Act § 1.

Measure and elements of damages for loss of services of wife or of support by husband, see Death by Wrongful Act § 33 et seq.

Right of action for death of either spouse or issue of marriage where marriage illegal, see Comp. L. 1915, § 14579.

¶ 503. A married woman carrying on a separate business may recover for the loss of time occasioned by a negligent injury.—Gregory v. Oakland Motor Car Co., 181 Mich. 101.

¶ 504. A married woman may recover damages for the medical expenses incurred because of an injury, where shown to have been keeping a boarding house and doing business in her own name.—Green v. Muskegon Traction & Lighting Co., 17[illegible] Mich. 18.

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¶ 513. In an action by a married woman for personal injuries a recovery cannot be had for the services of a physician where there is not testimony that she has paid or has promised to pay him therefor.—Rogers v. Orion, 116 Mich. 324.

§ 158. ——Injuries suable by husband.

Recovery by husband for injuries to his wife from defective sidewalk, see Highways § 265.

¶ 514. Where his wife is injured by another's unlawful act or negligence, a husband may sue at common law for the loss of service accruing between the injury and the death, and such action is not barred by the death.—Hyatt v. Adams, 16 Mich. 180.

¶ 515. A husband cannot in an action for injuries negligently inflicted on his wife recover for the loss of her consortium.—Blair v. Seitner Dry Goods Co., 184 Mich. 304.

¶ 516. In a suit for personal injuries plaintiff wife cannot recover for the loss of her business services as chief clerk in her husband's store which the husband sustained on account of the accident.—McCauley v. Detroit United Ry., 167 Mich. 297.

§ 159. Presumptions and evidence.

¶ 517. In an action against a husband and wife for the tortious act of the wife a husband cannot be held guilty because of the marital relation nor because he did not prevent the wife from doing the act where the evidence shows that he merely knew that she got a spade and tortiously dug a hole in the highway, and did not get the spade for her, and that he told her she had better not block the road, and did not know what she had done until two weeks later.—Sweezy v. Fisher, 142 Mich. 258.

§ 160. Questions of law and fact and instructions.

¶ 518. Where a husband and wife are shown to have been engaged in an assault and battery, for which the husband alone is sued, if he wish to rebut the presumption that the wife was acting under his control, he may have the question submitted to the jury as a part of his defense.—Miller v. Sweitzer, 22 Mich. 391.

¶ 519. An instruction in an action against husband and wife for injuries sustained by plaintiff in an elevator, which was equivalent to saying that the wife could not be bound by his admissions unless the husband was her agent, but if he was her agent she would be bound by them if the jury were able to find from such admissions and other testimony that he was negligent, for the reason that being her agent, his negligence was her negligence, was erroneous; since it invited a finding that he admitted himself to be negligent and therefore liable, and then made her liable because he was.—Hall v. Murdock, 119 Mich. 389.

B. CRIMINAL CONVERSATION AND ALIENATION.

§ 161. Criminal conversation.

Pleadings and issue, see post § 162.
Presumptions and evidence, see post § 163.
Of condonation and connivance, see post § 164.
Questions for jury and instructions, see post § 165.
Action for assault and rape, see post ¶ 526.
Damages for crim. con., see Damages.
Measure of damages for criminal conversation, see Damages § 131.
Admissibility of evidence as to damages for criminal conversation, see Damages § 317.
Crime of bigamy, see Crimes § 48.
Adultery, see Crimes § 41.
Rape as crime, see Rape.
Divorce, see Divorce.
General principles of pleading, see Pleading.

¶ 520. The action for criminal conversation with plaintiff's wife is distinguished from that for simply enticing her away, thus depriving him of her affection, society and assistance.—Perry v. Lovejoy, 49 Mich. 529.

¶ 521. The action crim. con. lies although the intercourse with plaintiff's wife was obtained by force.—Egbert v. Greenwalt, 44 Mich. 245.

¶ 522. A husband is not precluded from maintaining an action for the debauching of his wife because the intercourse was procured under circumstances which would render the defendant guilty of rape.—Hirdes v. Ottawa Circuit Judge, 180 Mich. 321.

§ 162. ——Pleadings and issues.

Averments for capias for crim. con., see Civil Arrest §§ 7, 10, 11.
Pleading damages for crim. con., see Damages § 255.

¶ 523. In an action for crim. con. the criminal intercourse must be substantially averred.—Perry v. Lovejoy, 49 Mich. 529.

¶ 524. In an action for criminal conversation where it is alleged that on a certain day "and on diverse other days" the defendant had illicit carnal intercourse with plaintiff's husband, the circuit court may in its discretion require plaintiff to furnish a bill of particulars as to time, place and date of each act relied upon.—Gary v. Eaton Circuit Judge, 132 Mich. 105.

¶ 525. Where, in an action for criminal conversation, only one act is charged, the plaintiff is not confined to a specific date, but may show that it was committed at any time within the period of the statute of limitations; and this, too, whether the defendant does or does not rely on an alibi.—Johnston v. Disbrow, 47 Mich. 59.

¶ 526. An action by a husband to recover for the debauching of his wife by defendant who was charged with having given her intoxicants and taking advantage of her while in an intoxicated condition, is for assault and rape and not for adulterous criminal conversation.—Hirdes v. Ottawa Circuit Judge, 180 Mich. 321.

§ 163. ——Presumptions and evidence.

Of condonation and connivance, see post § 164.

Admissibility of evidence as to damages for criminal conversation, see Damages § 317.

General law of evidence, see Evidence.

Disqualification through privileged relationship of husband and wife, see Witnesses, V, D.

Admissions and declarations as evidence in crim. con. suits, see Evidence, VII.

¶ 527. An actual marriage between plaintiff and the alleged wife must be proved in an action for criminal conversation; and such evidence of cohabitation and reputation as suffices in other civil cases is not enough here.—Hutchins v. Kimmel, 31 Mich. 126; Perry v. Lovejoy, 49 Mich. 529.

¶ 528. In an action of criminal conversation evidence of prior acts of intercourse with other men and that the wife associated with women of bad repute is competent and admissible.—Smith v. Hockenberry, 146 Mich. 7.

¶ 529. In an action of criminal conversation the previous reputation of the wife and distinct acts of immorality may be given in evidence.—Smith v. Hockenberry, 146 Mich. 7.

¶ 530. In criminal conversation, testimony of the wife's criminal intimacy with others after the offense in question should be excluded.—Smith v. Hockenberry, 138 Mich. 129.

¶ 531. In an action for criminal conversation evidence that the wife interviewed the attorney employed by the plaintiff before he did, and a letter written by plaintiff's counsel to defendant are properly admitted in evidence where defendant disclaimed any purpose of showing connivance or conspiracy but claimed that the object thereof was to show the wife's depravity and that the alleged acts of intercourse were brought about by her, and under circumstances indicating that discovery was expected. Such evidence having a bearing on the question of the wife's character, and affecting the question of damages.—Smith v. Hockenberry, 146 Mich. 7.

¶ 532. Testimony of a neighbor of plaintiff's wife, in an action of criminal conversation, that during plaintiff's frequent absences from home defendant spent much time there in company with such wife, that he went in without knocking

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¶ 538. In an action for alienation of affections containing a count for criminal conversation, an instruction, requiring the plaintiff to prove adulterous disposition of the defendant, and of the plaintiff's wife and opportunity, is argumentative and unnecessary in the face of stronger testimony which came near being direct evidence on the subject.—Knickerbocker v. Worthing, 138 Mich. 224, Moore, C. J., dissenting.

¶ 539. In an action for alienation of affections containing a count for criminal conversation, the refusal of an instruction that adultery must be proved specifically as charged is held not error in the light of a general charge covering the subject.—Knickerbocker v. Worthing, 138 Mich. 224. Moore, C. J., dissents on the ground that it is not covered in the general charge.

§ 166. Alienation of affections.

Defenses, justification or excuse, see post § 167.
Pleadings and issues and variance, see post § 168.
Burden of proof and presumptions, see post § 169.
Admissibility of evidence, see post § 170.
Admissibility on affection or estrangement, see post § 171.
Weight and sufficiency of evidence, see post § 172.
Questions of law and fact and instructions, see post § 173.
Damages for alienation, see Damages.
Measure of damages for alienation, see Damages § 131.
Admissibility of evidence as to damages for alienation, see Damages § 317.
Public policy as to settlement of alienation suits, see Contracts § 63.
Divorce, see Divorce.

¶ 540. A wife may sue for damages for alienation of her husband's affections and consequent loss of his society, assistance and support.—Warren v. Warren, 89 Mich. 123. See Mitchell v. Mitchell, 49 Mich. 68.

§ 167. ——Defenses, justification or excuse.

Failure to interpose defense in divorce suit as bar to action for alienation of crim. con., see Former Adjudication ¶¶ 269, 270.

¶ 541. Death of the wife whose affections were alienated does not bar or abate the husband's action.—Philpott v. Kirkpatrick, 171 Mich. 495.

¶ 542. The fact that the plaintiff secured a divorce from his wife on the ground of extreme cruelty, testifying in that case that they had been estranged since 1906, is not a defense to an action against the defendant for alienation of his wife's affections, in which the intimacy complained of was alleged to have begun in 1908, there being no inconsistency in the two cases, the question in the divorce case being whether there was enough cruelty to justify a divorce, and in the second whether the defendant invaded the home of the plaintiff.—Philpott v. Kirkpatrick, 171 Mich. 495.

¶ 543. The mere fact that a husband and wife are not for a period on friendly terms does not furnish an excuse for the interference into the domestic relation of an outsider, although the real injury he may do may be less than when a tranquil, happy family life is destroyed.—Hendrickson v. Harry, 200 Mich. 41.

¶ 544. The fact that there is an estrangement between a husband and his wife does not give a third party the right to invade the home and justify the action on the ground that there was no affection to alienate, since either party's chance of reconciliation cannot be interfered with.—Philpott v. Kirkpatrick, 171 Mich. 495.

§ 168. ——Pleadings and issues and variance.

Pleading damages for alienation, see Damages § 255.
Amendments of pleadings, see Pleadings, VI.
General principles of pleading, see Pleading.

¶ 545. Where a declaration for alienating the affections of plaintiff's husband alleges that by defendant's acts plaintiff has been deprived of her husband's "society, comfort, assistance and support" which she should and otherwise "might and would have had," and of the happiness, reputation, and honor theretofore enjoyed by her as his wife, and of his affections towards her, and that by such acts her husband was caused to desert her, and that the defendants knowing the husband's whereabouts conceal the fact, it is sufficient, certainly unless demurred to, without expressly averring that she possessed her husband's affections.—Bowersox v. Bowersox, 115 Mich. 24.

¶ 546. In an action for enticing away his wife, plaintiff cannot show defendant's acts of adultery with her, not having complained of such in his declaration.—Perry v. Lovejoy, 49 Mich. 529.

¶ 547. Testimony tending to prove adultery of the wife are inadmissible in an action by her husband for alienation of her affections by other means than adultery, since such testimony does not tend to establish the pleaded cause of action.—Merrill v. Leisenring, 149 Mich. 423.

§ 169. ——Burden of proof and presumptions.

Order of proof, see Trial, V, B.

¶ 548. While interference by a stranger with the affections of a husband or wife is presumed to be malicious, it is otherwise

in the case of parents and near relatives, whose malice must be affirmatively shown. —Smith v. Smith, 192 Mich. 566.

§ 170. ——Admissibility of evidence.

See also ante ¶ 547.

Admissibility on affection or estrangement, see post § 171.

Admissibility of evidence to reduce or mitigate damages for alienation, see Damages § 340.

Admissibility of evidence as to damages for alienation, see Damages § 317.

Disqualification through privileged relationship of husband and wife, see Witnesses, V, D.

Admissions and declarations as evidence in alienation suits, see Evidence, VII.

Admissions and declarations by husband or wife against each other, see Evidence § 425.

Declarations evincing affection or the lack of it, see Evidence § 332.

Evidence in alienation suit as to times other than pleaded, see also Evidence § 94.

General rules of evidence, see Evidence.

¶ 549. Testimony is admissible in an action for alienating the affection of the plaintiff's wife, showing the conduct of the defendant after the bringing of the action and after the plaintiff's wife left the defendant. —Sweikhart v. Hanrahan, 184 Mich. 201.

¶ 550. In an action for alienating the affections of her husband, it is proper to ask the plaintiff at what time she began a divorce suit and a slander suit against the defendant, such questions throwing a possible light on the reasons for her leaving her husband as well as on the question of damages.—Derham v. Derham, 125 Mich. 109.

¶ 551. In a wife's action against her father-in-law for alienating her husband's affections, the testimony of defendant's wife as to her objections to the marriage has no bearing upon the issue and is properly excluded.—Rice v. Rice, 104 Mich. 371.

¶ 552. Where one is sued by his daughter-in-law for alienating her husband's affections, questions put to his wife on cross-examination as to whether the extent of plaintiff's sinning at a certain time against defendant's household was by attending again a certain church, and whether witness does not think a person in this country should be allowed, under reasonable restrictions, to embrace whatever religion seems to him or her proper, are immaterial and irrelevant.—Rice v. Rice, 104 Mich. 371.

¶ 553. In an action by a husband for alienation of his wife's affections, the defendant put in evidence to show that shortly before the separation of defendant and his wife, defendant insisted that his daughter go to school rather than work in a cigar factory, and that a quarrel ensued, after which

are admissible in evidence for the purpose of showing that on account of plaintiff's conduct she had already ceased to care for him.—Merrill v. Leisenring, 149 Mich. 423.

¶ 561. One man sued another for enticing his wife away. He showed that he and his wife had been living close by defendant and on the latter's lands, and that he had left his wife there while he went west to seek a location; that he was gone about three months, during which time he had letters from his wife, one of which indicated affection for him; as a later one did not, he returned at once, and, after living with his family about a week, his wife left him and went home to her father, with whom she stayed some time and then went to work at defendant's; that she afterwards refused to live with her husband and sued for a divorce. Held, that, having shown all this, plaintiff was properly allowed to introduce the letter from his wife to show that at one time since he went away she was affectionately disposed.—Perry v. Lovejoy, 49 Mich. 529.

¶ 562. In an action by a husband for alienation of his wife's affections, it is error to exclude a statement by the husband that the wife's feelings cooled toward him shortly after defendant began to pay marked attention to her.—Barnes v. Tibbitts, 164 Mich. 217.

¶ 563. In an action by a husband for alienation of his wife's affections, the defendant may not show that thirty years previous the husband and wife quarreled, where there was a subsequent reconciliation.—Barnes v. Tibbitts, 164 Mich. 217.

¶ 564. In an action by a husband for alienation of his wife's affections, the defendant may, under the general issue, show how plaintiff treated the wife and also the wife's attitude to the plaintiff.—Barnes v. Tibbitts, 164 Mich. 217.

¶ 565. In an action for alienating the affections of her husband, the husband may testify as to whether he would have continued to live with the plaintiff if she had not left him.—Derham v. Derham, 125 Mich. 109.

¶ 566. In an action to recover for alienation of the affections of plaintiff's husband, where there is evidence of malice on the part of defendants, declarations of the husband are competent as tending to prove his state of mind towards plaintiff.—Smith v. Smith, 192 Mich. 566.

¶ 567. In an action for alienating the affections of her husband, testimony by the divorced husband in response to his wife's testimony, that he had not procured a doctor for his wife because he had not thought it necessary was admissible in rebuttal, as tending to show that it was not because of want of affection.—Derham v. Derham, 125 Mich. 109.

¶ 568. In an action for alienating the affections of her husband, testimony that the husband had said to witness that his folks did not like his wife and that he wished he had married another girl might be admissible to show the husband's feelings, under proper instructions to disregard it as hearsay in regard to his father, the defendant.—Derham v. Derham, 125 Mich. 109.

¶ 569. In an action for alienating the affections of her husband evidence that the plaintiff had said she was ashamed of her husband is admissible on the question of damages and also as explaining loss of his affections.—Derham v. Derham, 125 Mich. 109.

¶ 570. In an action for alienating the affections of her husband evidence of gifts of provisions and other things by the defendant to the husband, in which the plaintiff shared, is admissible to show the feeling of the defendant.—Derham v. Derham, 125 Mich. 109.

§ 172. ——Weight and sufficiency of evidence.

Divorce bill as evidence in alienation suit, see Evidence ¶ 2769.
General law of evidence, see Evidence.

¶ 571. Circumstantial evidence reviewed, and held to be sufficient to justify a finding by the jury that defendant was guilty of the alienation of the affections of plaintiff's husband.—Metcalf v. Tiffany, 106 Mich. 504.

¶ 572. In an action to recover for alienation of the affections of a husband or wife, malice is shown when it appears that parents have interfered with the domestic relations of a child simply to gratify their dislike or hatred of the other party to the marriage.—Smith v. Smith, 192 Mich. 566.

¶ 573. In an action to recover for alienation of the affections of plaintiff's husband, where defendants were the mother and sister of the husband, the fact that the husband was induced to leave plaintiff by the conduct or solicitations of defendants purposely directed toward that end held sufficient to prove malice where there was no evidence of a motive on the part of defendants other than hatred and ill-will towards plaintiff.—Smith v. Smith, 192 Mich. 566.

¶ 574. In a suit by a wife against her mother-in-law for the alienation of her husband's affections, evidence that defendant was opposed to the marriage of her son to plaintiff and that after the marriage she persuaded him to desert his wife held sufficient upon which to base a verdict against defendant.—Deidrich v. Swift, 178 Mich. 593.

¶ 575. In an action to recover for alienation of the affections of plaintiff's husband,

where defendants were the mother and sister of the husband, and where the evidence was conflicting as to whether defendants were instrumental and effective in depriving plaintiff of her husband's affections, evidence examined and held to sustain a verdict for plaintiff.—Smith v. Smith, 192 Mich. 566.

§ 173. ——Questions of law and fact and instructions.

General principles as to instructions, see Instructions.

¶ 576. In a suit for alienation of a wife's affections, the first count of the declaration charged adultery and the second enticement. Plaintiff abandoned the first count, and went to trial on the second. The evidence showed many acts from which the inference of an alienation might be drawn, and while collectively they perhaps justified an inference of adultery, such inference did not necessarily follow. Held, that the case presented a question for the jury on the count charging enticement, and it was error to direct a verdict for the defendant.—Merrill v. Leisenring, 157 Mich. 188.

¶ 577. In an action against parents-in-law for enticing their daughter from plaintiff and alienating her affections, the evidence was reviewed and held to warrant an instruction to the jury that there was no case for their consideration.—White v. Ross, 47 Mich. 172.

¶ 578. A charge, in a suit by a wife against the parents of her husband for alienation of affections, that it was the duty of defendants to urge their son to live with plaintiff, is erroneous.—Walter v. Walter, 172 Mich. 351.

¶ 579. In a suit for alienation of affections brought by a wife, it is not error to refuse the requested instruction of defendant that the parents are not liable if the husband had determined to live apart from his wife before consulting with his parents, where the point is covered fully in the court's general charge.—Gornetzky v. Gornetzky, 174 Mich. 492.

¶ 580. In an action by a husband against his wife's mother for the alienation of his wife's affection, it is not prejudicial error for the court to instruct that the jury must be satisfied by a preponderance of the evidence that the defendant wrongfully, wilfully, and maliciously alienated the affections of her daughter and that she is entitled to a verdict unless the jury can say that she was actuated by malice or had motives toward the plaintiff, where from the oral charge of the court it is apparent that the jury could not have been misled as to the meaning of malice in law and they were fully informed as to what conduct of the part of the defendant would entitle the plaintiff to a verdict.—Zimmerman v. Whiteley, 134 Mich. 39.

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VI. ACTIONS AN
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Capacity of married woman to sue or defend on cause of action accruing to or against her, see Comp. L. 1915 § 12357.
Capacity of married woman to sue or defend in relation to her separate property or property which husband cannot alien or incumber without her joinder, see Comp. L. 1915, § 12356.
Capacity of wife after divorce to sue and be sued, see Comp. L. 1915, § 11474.
Capacity of married woman coming from another state or country without husband to sue or defend, see Comp. L. 1915, §§ 11470-11472.

¶ 583. A married woman is now fully competent to assert and maintain her rights either as plaintiff or defendant.—Wilson v. Coolidge, 42 Mich. 112.

¶ 584. The right of a married woman to sue in her own name for a homestead right is placed by Comp. L. 1871, § 4805, How. St. § 6297, on the same basis as her right to prosecute in relation to her sole property.—Comstock v. Comstock, 27 Mich. 97.

¶ 585. The statute which empowers a married woman to maintain suit in her own name for property of her husband which he cannot incumber without her consent, or which is exempt by law from sale on execution or other final process of a court, does not limit her right to cases in which the husband has incumbered the property, or in which it is taken on final process of a court.—Ingersoll v. Gage, 47 Mich. 121.

¶ 586. For the purpose of enforcing a homestead right she may file a bill for specific performance of a land contract relinquished by her husband.—McKee v. Wilcox, 11 Mich. 358.

§ 175. Right of deserted wife to sue.

Statutory provision entitling abandoned wife to sue, see Comp. L. 1915, § 11454.

¶ 587. Where a husband, in order to avoid arrest for a confessed crime, abandons his family and leaves the country, his wife, for the purpose of suing and being sued, will be regarded by the court as a feme sole.—Sanborn v. Sanborn, 104 Mich. 180.

§ 176. Joinder of husband and wife as parties plaintiff.

Actions concerning separate property, see post § 177.
Actions for assertion or defense of exempt property rights, see post § 178.
Joinder of husband and wife as parties defendant, see post § 179.
Joinder of husband and wife as parties plaintiff in suit for slander or libel, see ante ¶ 502.
Joinder of husband and wife in suit for trespass on land in possession of both under deed running to both, see ante ¶ 498.
General principles as to parties, see Parties.
Proper parties in ejectment for homestead, see Homesteads § 85.
Necessity for joinder of other spouse with one complaining in suit for trust accounting, see Trusts, XI.
Right of husband alone to sue as plaintiff for protection of homestead where decree is to benefit his family, see Homesteads ¶ 244.
Joinder of wife with husband in suit to establish lien on homestead, though wife did not sign instrument purporting to declare lien, see Homesteads ¶ 238.
Necessity of joinder of husband in suit by wife to set aside deed of homestead procured from her through fraud, see Homesteads ¶ 242.
Necessity for joinder of husband in suit by wife for fraud which induced her to part with homestead which was her sole property, see Homesteads ¶ 274.
Joinder of wife with husband in crossbill to assert homestead in creditors' suit or suit in aid of execution, see Homesteads ¶ 275.
Parties in bills for partnership accounting, see Partnership, VII, E.
Joinder of wife with guardian of husband in partition proceedings, see Comp. L. 1915, § 11473.

¶ 588. Under Comp. L. 1857, § 3292, How. St. § 6297, a wife can maintain an action in her individual name without joining her husband for an assault committed upon her.—Berger v. Jacobs, 21 Mich. 215.

¶ 589. Under Comp. L. 1871, § 4804, How. St. § 6297, an action for the personal sufferings of a married woman from an injury received in a railroad accident should be brought by the wife alone, and not by the husband and wife jointly; the statute supersedes the common law in this respect. Whether, where they have sued jointly, the error may be cured by amendment, quære.—Michigan Cent. R. Co. v. Coleman, 28 Mich. 440.

¶ 590. A wife may recover for personal injuries in an action for negligence, without joining her husband as plaintiff.—Blair v. Seitner Dry Goods Co., 184 Mich. 304.

¶ 591. No joinder of husband is necessary where the wife sues in tort for a personal grievance or cause of action.—Berger v. Jacobs, 21 Mich. 215; Leonard v. Pope, 27 Mich. 145.

¶ 592. A husband may maintain an action in his own name for loss of his wife's services caused by injury from an assault upon her.—Berger v. Jacobs, 21 Mich. 215.

¶ 593. A wife may sue alone or husband and wife may join in replevin suit for exempt property.—Shepard v. Cross, 33 Mich. 96; Hanselman v. Kegel, 60 Mich. 540.

¶ 594. A husband need not join his wife as plaintiff but may sue alone for the price of personalty whereof he has made sale with his wife's knowledge and consent, though some of such personalty was his, some was hers, and some belonged to them both jointly. —Gillett v. Knowles, 97 Mich. 77.

¶ 595. A husband can sue in his own name for the services of his wife without his wife joining as plaintiff.—Harrington v. Gies, 45 Mich. 374.

¶ 596. One who has engaged in his own name to furnish his own services and those of his wife can sue on the contract in his own name; as his wife is not a party thereto, and her earnings under it belong to her husband, she need not be joined as plaintiff. —Sines v. Superintendents of Poor of Wayne County, 58 Mich. 503.

¶ 597. Where plaintiff's declaration and evidence in trespass ground his right to recover solely upon fifteen years' adverse possession, the fact that the record title of the land adjoining the strip trespassed upon is in plaintiff and his wife does not require her to be joined as plaintiff.—Hockmoth v. Des Grand Champs, 71 Mich. 520.

§ 177. ——Actions concerning separate property.

Replevin against husband for wife's separate property, see post § 182.

What constitutes separate property of wife, see ante §§ 38-43.

Separate property in general, see ante II, C.

Right of wife to join as plaintiff in suit for disturbance of possession under joint lease running to her and her husband, see ante § 127, ¶ 431.

Injunction by wife against sale of her separate property on execution against her husband, see ante ¶ 136.

¶ 598. In a suit brought in 1854, by the husband alone for personal property acquired by the wife before her marriage, held, that the wife should have been joined.—Brown v. Fifield, 4 Mich. 322.

¶ 599. A husband cannot sue in his own name on a non-negotiable due-bill belonging to his wife.—Blackwood v. Brown, 32 Mich. 104.

¶ 600. Husband may sue alone for price of personalty belonging partly to him, partly to his wife, and partly to both jointly, and of which he made a sale with her consent.—Gillett v. Knowles, 97 Mich. 77.

¶ 601. A woman who has bargained with her husband for his title is the proper party to file a bill to cancel a fraudulent deed made by them to defendants and procured by the fraud of one of the defendants in making them believe they were executing a proper instrument to convey the title to complainant from her husband join.—Bellair v. W

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¶ 602a. A wife and wife may jo empt property.— 96.

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Joinder of husband with wife in suit for wife's tort, see Comp. L. 1915, § 12358.
Necessity for joinder of husband in suit against wife on liability created during absence of husband who has deserted wife, see Comp. L. 1915, §§ 11459, 11460.
Condemnation of property of married woman, see Comp. L. 1915, § 11468.

¶ 604. As a wife is now solely responsible for her own torts there is no need of joining the husband in a suit against her unless both are to be sued as wrong-doers.—Weber v. Weber, 47 Mich. 569.

¶ 605. A wife who has knowingly perpetrated a fraud in her husband's behalf, and as his agent, need not be joined with him in an action of tort therefor.—Weber v. Weber, 47 Mich. 569.

¶ 606. Under Comp. L. 1871, §§ 6129, 7382, How. St. §§ 7714, 8959, the husband is no longer responsible, in person or property, for the torts of his wife, so that there seems to be no reason for joining him as a defendant in action for slander; yet it is assumed, in these very statutes, that he is still a proper party, and whether necessary or not, he is not an improper party.—Burt v. McBain, 29 Mich. 260.

¶ 607. Where a house built on land under contract of purchase is by the vendee wrongfully removed, no homestead right attaches so as to require the vendor to make the vendee's wife a defendant in replevin.—Michigan Mut. Life Ins. Co. v. Cronk, 93 Mich. 49.

¶ 608. A husband who as his wife's agent has made notes in her name for her debt, and has also signed them with her, apparently as an accommodation indorser, though the notes in form are joint and several, need not be joined with her as defendant in an action upon such notes.—First Commercial Bank v. Newton, 117 Mich. 433.

¶ 609. In an action upon an appeal bond jointly executed by husband and wife as principals the wife must be joined as a defendant.—Post v. Shafer, 63 Mich. 85.

¶ 609a. A wife in actual occupancy of a homestead is entitled to be made a party defendant to a bill foreclosing a mortgage thereupon.—Haviland v. Chase, 116 Mich. 214.

¶ 609b. The wife of the defendant must be joined in ejectment to recover from her husband land occupied by them as a homestead.—Sessions v. Sherwood, 78 Mich. 234; Kalkes v. Storms, 93 Mich. 480.

§ 180. Actions against each other.
Contract actions against each other, see post § 181.
Replevin against husband for separate property, see post § 182.
Torts against each other, see ante § 152.
Right of wife to foreclose mortgage against her husband, see ante ¶ 133.
Effect on right of wife to foreclose mortgage of fact that she signed it to release dower on its execution to her assignor, see ante ¶ 133.
Right of one spouse to sue other for property left to plaintiff by divorce, see Divorce § 144.
Cross-bill for divorce to bill by husband to restrain wife from engaging in competing business, see Equity ¶ 495.
Necessity for appointment of next friend to represent wife in suit against her husband, see Guardian ad Litem ¶ 2.
Right or authority of husband to select guardian ad litem for his insane wife in suit against her for divorce, see Guardian ad Litem ¶ 18.

¶ 610. A wife may sue her husband at law or in equity in respect to her separate property.—Markham v. Markham, 4 Mich. 305.

¶ 611. A married woman, in suing a firm in which her husband is a partner, must implead him as defendant, if the partners are not severally liable, in order to maintain her action.—Benson v. Morgan, 50 Mich. 77.

¶ 612. A woman assigned a claim she held against her husband, and the assignee, as trustee for her, recovered judgment for it. Meanwhile the husband abandoned the wife and sought, with others, to embarrass the enforcement of the judgment by clouding the title to their homestead property, on which it had been levied. Held, that the wife, as equitable owner of the claim and also as having a homestead right, could properly join with the assignee in filing a bill against the husband and the others to clear the title.—Eaton v. Eaton, 68 Mich. 158.

§ 181. ——Contract actions against each other.
Contracts and dealing after marriage, see ante § 4.

¶ 613. A husband cannot sue his wife at law or in equity to enforce a purely executory contract.—Jenne v. Marble, 37 Mich. 319.

¶ 614. Where a wife delivered a note held by her against her husband to him, with the understanding that it was paid, and that he was to use the money due upon it in his business until she called for it, her action should be, not upon the note, but for such money, which will be considered as loaned to the husband at time of receiving the note.—Letts v. Letts, 73 Mich. 138.

§ 182. ——Replevin against husband for separate property.
See also ante ¶ 159.
Actions concerning wife's separate property in general, see ante § 177.
What constitutes wife's separate property, see ante §§ 38-43.

Separate property of wife in general, see ante II, C.
Wife's right to trover against husband for carrying off personalty belonging to her under separation contract, see post ¶ 632.

¶ 615. A wife living apart from her husband can bring replevin against him for her individual property after making due demand therefor.—White v. White, 58 Mich. 546.

§ 183. Pleading, evidence and trial practice.

Burden of proof, presumptions and evidence as to property rights between husband and wife, see ante §§ 18, 19.
Presumptions and evidence as to estate held by the entireties, see ante § 35.
Presumptions and evidence as to ownership of wife's separate property, see ante § 52.
Burden of proof, presumptions and evidence as to conveyances to each other, see ante §§ 59, 60.
Burden of proof and presumptions as to agency of husband for wife, see ante § 109.
Presumptions and evidence as to contract rights and liabilities of husband toward third persons, see ante §§ 71, 72.
Burden of proof and presumptions as to legal capacity and disabilities in contract dealing of wife with third persons, see ante §§ 92, 93.
Presumptions and evidence as to compensation for services furnished by wife to third persons, see ante § 126.
Presumptions and evidence as to liability of wife on covenants for title, see ante § 143.
Presumptions and evidence as to torts by and against either spouse, see ante § 159.
Presumptions and evidence as to criminal conversation, see ante §§ 163, 164.
Burden of proof and presumptions in suit for alienation of affections, see ante § 169.
Evidence of fraud or coercion respecting conveyances to each other, see ante § 60.
Evidence as to liability of husband for necessaries, see ante § 72.
Sufficiency of evidence as to gifts between spouses, see ante § 19.
Admissibility and sufficiency of evidence as to disabilities and capacity of wife in contract dealings with third persons, see ante § 94.
Admissibility and sufficiency of evidence of agency of husband for wife, see ante § 110.
Admissibility of evidence in alienation suit, see ante §§ 170, 171.
Weight and sufficiency of evidence in alienation suit, see ante § 172.
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Separation amounting to desertion, see Divorce §§ 9-11.
Separation of wife's domicile from husbands, see Domicile ¶ 13.

¶ 616. A husband's obligation to support his wife apart from him can only arise from his turning her out of doors, or being guilty of such misconduct as would justify her in leaving him.—Randall v. Randall, 37 Mich. 563.

¶ 617. Where a wife seeking divorce is justified, by her husband's conduct, in living apart from him, he is bound to provide support for her elsewhere.—Page v. Page, 51 Mich. 88.

¶ 618. Where alimony, fixed in a divorce suit brought by the wife, has been duly paid, and no application has been made for a greater amount, the husband is not liable for necessaries afterwards furnished to her.—Crittenden v. Schermerhorn, 39 Mich. 661.

§ 185. Separation agreements.

Invalidity for fraud, mistake or inequitable division, see post § 186.
Avoidance or recovation by subsequent reconciliation, see post § 187.
Procedure to enforce separation agreement as to property, see post § 188.
Contracts after marriage in general, see ante § 4.
Validity of contract for care of minor children on separation, see Parent and Child, I.
Public policy as to separation agreements and agreements to resume relations, see Contracts § 64.
Agreements for alimony or property adjustments on divorce, see Divorce § 135.
Parol evidence to show that separation agreement did not effect complete division, see Evidence ¶ 1100.

¶ 619. A contract between them will not be sustained when likely to favor a separation that has not yet taken place.—Randall v. Randall, 37 Mich. 563.

¶ 620. When a husband and wife have fully decided to separate, a contract between them that does not spring from fraud or coercion, and contemplates a suitable provision for the wife and children by an equitable division of the property, is sustainable.—Randall v. Randall, 37 Mich. 563.

¶ 621. A contract between a husband and wife for the maintenance of the wife, entered into after separation, is enforceable if fair and not the result of fraud or coercion.—Mesler v. Jackson Circuit Judge, 188 Mich. 195.

¶ 622. An agreement between husband and wife providing for the latter in contemplation of their judicial separation, is valid.—Owen v. Yale, 75 Mich. 256.

¶ 623. A husband and wife upon separating signed an agreement as to the division of property, in which the wife agreed in consideration of land and personalty received by her to relinquish all right to support, and to release all claim to property then owned or afterwards acquired by the husband. Held, that thereafter the property owned in her own right remained her own; that personal property of the husband not mentioned in the agreement remained his own; and that household chattels originally the husband's, or accumulated after their marriage by joint efforts, and not divided, belonged to the husband.—Carpenter v. Carpenter, 154 Mich. 100.

¶ 624. Subdivisions 7, 9, §§ 8612, 10322, Comp. L. 1897, relating to the exemption of household property from sale on mortgage without the consent of the wife, do not relate to marriage agreements, and do not prevent a wife from releasing her interest in the property by a separation contract.—Carpenter v. Carpenter, 154 Mich. 100.

¶ 625. A deed of land, containing no reservation as to crops, made by a husband in pursuance of a separation contract, conveys the title to the growing crops to the wife.—Carpenter v. Carpenter, 154 Mich. 100.

¶ 626. Where a husband in a separation agreement conveyed to his wife certain realty reserving a life interest in certain events, and there was a mortgage signed by both on the premises; which he agreed to pay within two years, but if in the meantime she should make any payments of principal or interest she should be subrogated to the rights of the mortgagee or have a lien corresponding to the amount paid as security and to assure the final payment, such contract created a personal liability to pay within two years, but did not create a personal liability to reimburse the wife for payments made by her more than ten years after the mortgage had become due.—Clinton v. Clinton's Estate, 148 Mich. 496.

§ 186. ——Invalidity for fraud, mistake or inequitable division.

¶ 627. As a wife has not a present subsisting interest in her husband's personalty, but only a contingent interest, she cannot bring an action against him for damages because he has misrepresented to her the value of such personalty, and thus has induced her to agree to a separation upon terms to which she would not have agreed but for such misrepresentation.—Schmoltz v. Schmoltz, 116 Mich. 692.

¶ 628. A settlement between husband and wife on their separation whereby he gave her in lieu of all marital property rights $100 and non-negotiable, noninterest-bearing notes for $3,900 falling due successively through four years was held inequitable and unconscionable, where he was worth $20,000 to

$25,000 at the time and afterward refused to pay the notes, assigning as a reason that he had designedly drawn them that way and that she "would never get a cent," and where he afterwards gave her land worth $1,200 or less for all of the remaining notes ($3,500) and she only realized $1,000 for it.—Bechtel v. Barton, 147 Mich. 318.

¶ 629. A husband was worth some $28,000 and had a net annual income of some $1,200. Under an agreement for separate maintenance he was to pay his wife $7 a week, with an additional amount for the support of the son until he was fourteen years of age, bringing the sum total up to about one-half of said net income. The wife was no longer young. Held, said provision was not a fair one and should be set aside.—Nichols v. Nichols, 169 Mich. 540.

§ 187. Avoidance or revocation by subsequent reconciliation.

Abrogation of separation agreement by resuming marital relations, see also Divorce ¶ 495.

¶ 630. A wife's relinquishment to her husband in contemplation of a separation of all her rights expectant on her surviving him is avoided by their subsequent reconciliation and resumption of marital relations.—Knapp v. Knapp, 95 Mich. 474.

§ 188. Procedure to enforce separation agreement as to property.

¶ 631. In an action between a husband and wife on a separation contract between them, equity will, whenever needful, give effect to provisions in behalf of the wife by adjudging the husband to be her trustee and requiring him to account accordingly.—Randall v. Randall, 37 Mich. 563.

¶ 632. When, after an agreement for separation and division of property, a husband carries off personalty belonging to the wife, she is entitled to recover in trover its market value.—Carpenter v. Carpenter, 154 Mich. 100.

§ 189. Separate maintenance suits.

Effect of existing agreement for support, see post § 190.
Pleading and evidence, see post § 191.
Judgment and decree; amount and relief, see post § 192.
Granting divorce on separate maintenance suit, see post § 193.
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Right of deserted wife to sue in general, see ante § 175.
Actions affected by coverture in general, see ante VI.
Amendment of separation bill to pray divorce, see Divorce § 51.
Nature of bill as one for divorce or one for separation, see Divorce § 40.
Annulment suits, see Marriage, IV.
Statutory provision as to care and custody of minor children on separation suit, see Comp. L. 1915, § 11484.
Statutory provisions for separate maintenance suit, see Comp. L. 1915, §§ 11479-11483.

¶ 633. A woman's petition under How. St. § 6291 for support out of the property of her alleged husband cannot be sustained unless there has been a valid marriage between the parties.—Clancy v. Clancy, 66 Mich. 202.

¶ 634. A valid marriage and the relation of husband and wife are prerequisites to a proceeding under Comp. L. 1897, § 8686, conferring upon chancery courts jurisdiction to compel husbands to support their wives under certain circumstances.—Judson v. Judson, 171 Mich. 185.

¶ 635. Complainant and defendant were married in Minnesota and lived together for a year, when defendant abandoned complainant and came to Michigan. Complainant secured a divorce in Minnesota and now seeks support for herself and minor child. Held, that this bill for support is an independent suit in this state, and, in the absence of appropriate legislation, alimony cannot be allowed, independent of divorce proceedings and existence of the marriage relation in courts of equity.—Judson v. Judson, 171 Mich. 185.

¶ 636. Exclusive of any statutory provision equity has no jurisdiction of a case where the bill is filed for alimony alone.—Peltier v. Peltier, H. 19.

¶ 637. A husband who makes to his wife indecent and criminal proposals, is filthy in his habits about the house, inconsiderate of her tastes and enjoyment, neglectful of her in sickness, vile in his insinuations as to her relatives and friends, of ungovernable temper, penurious, and unreasonable, and who finally, upon her leaving home by agreement for a temporary visit to her son, sends out printed notices that she has left his bed and board, and forbidding all persons to extend credit to her on his account, is guilty of extreme cruelty, entitling her to a decree for separate maintenance upon petition filed under Pub. Acts 1889, No. 243, which provides that such a decree shall not be made unless, on the hearing, such a state of facts shall appear as would entitle the wife to a decree of divorce upon the grounds specified in the petition.—Wolcott v. Wolcott, 114 Mich. 528.

¶ 638. Eighteen years' delay in suing a husband for support where the wife is living apart from him is fatal to the suit, even if the wife originally left him for cause.—Reed v. Reed, 52 Mich. 117.

¶ 639. While demurrer properly lies to a petition filed by a wife for separate mainte-

nance, on ground of laches, she cannot be said to be guilty of laches merely because she has refrained for nearly ten years after desertion from bringing such proceedings.—Parkinson v. Parkinson, 177 Mich. 336.

§ 190. ——Effect of existing agreement for support.

¶ 640. Comp. Laws 1897, § 8686, providing that the circuit court in chancery shall set apart and decree to the wife a part of the husband's real estate and personal property under certain conditions justifying separate maintenance, gives the chancery court jurisdiction notwithstanding an allegation of an adequate remedy at law on a contract for separate maintenance.—Meyerl v. Meyerl, 125 Mich. 607.

¶ 641. Under Comp. Laws 1897, § 8686, providing that the circuit court in chancery shall set apart and decree to the wife a part of the husband's real estate and personal property under certain conditions justifying separate maintenance, a suit will lie by wife against the husband notwithstanding the parties have entered into a contract upon the subject, where the husband fails and refuses to continue payments agreed upon.—Meyerl v. Meyerl, 125 Mich. 607.

§ 191. ——Pleadings and evidence.

General law of evidence, see Evidence.
Evidence of conspiracy to cause separation, see also Conspiracy ¶¶ 24, 27.

¶ 642. Where a bill conforms with all the statutory requirements for a bill of divorce, asks for separate maintenance for life, and makes no allusion to another statute, it is a bill of divorce and not a proceeding under Act No. 243, Pub. Acts 1889, to "provide wives with property and maintenance."—Horning v. Horning, 162 Mich. 130.

§ 192. ——Judgment and decree; amount and relief.

Judgments in general, see Judgments.
Award of separate maintenance on denying divorce, see Divorce § 126.

¶ 643. A bill for the support of the wife separate from the husband will only be sustained when the reasons for it are imperative. If from the evidence the court is satisfied the difficulties between the parties are not serious, the bill will be dismissed, especially where there are young children for whom they ought to provide a home.—Davidson v. Davidson, 47 Mich. 151.

¶ 644. An allowance of $2 per week may be a sufficient allowance for a deserted wife's maintenance in a case where the husband has had nothing but his monthly earnings as a member of the fire department, and a few hundred dollars saved from such earnings since the separation of the parties.—Russell v. Russell, 75 Mich. 572.

¶ 645. Where the defendant in a petition filed by his wife for separate maintenance was shown to be possessed of a farm of 170 acres, worth $35 per acre, of a house and two lots in a village, and of personalty amounting to several thousand dollars, he was ordered to pay the petitioner for her separate support $200 within sixty days, and the sum of $200 per annum payable quarterly, during her lifetime or until the further order of the court, the same to be made a lien upon the realty.—Wolcott v. Wolcott, 114 Mich. 528.

§ 193. ——Granting divorce on separate maintenance suit.

Suits for limited divorce, see Divorce.
Adjustment of property rights in divorce, see Divorce, X.
Absolute divorce on bill for separation under the statute, see Divorce § 95.

¶ 646. Act No. 324, Pub. Acts 1907, provides that a divorce shall not be granted unless the court hearing the evidence shall deem best. Held, this act does not preclude the supreme court, in an appeal from a decree granting separate maintenance, from ordering an absolute divorce.—Horning v. Horning, 162 Mich. 130.

¶ 647. On grounds of public policy the supreme court will in a proper case reverse a decree granting separate maintenance and enter a decree for absolute divorce.—Horning v. Horning, 162 Mich. 130.

¶ 648. A decree for separate maintenance on the ground of cruelty gave the wife title to the home, but reserved to the husband the right to use a barn standing on the premises. The supreme court modified the decree so as to give the wife an absolute divorce. Held, that the wife's right to the home would be relieved from all claim of the husband to the use of the barn.—Utley v. Utley, 155 Mich. 258.

§ 194. ——Liens on realty to secure enforcement.

¶ 649. How. St., § 6293, providing that the sum fixed by the court may be secured upon the husband's real estate, is not repealed by Laws 1889, Act No. 243, providing deserted wives with separate maintenance, empowering the court to restrain the sale of husband's property, and authorizing the filing of notice and levy of execution; but they are construed together.—Tobey v. Tobey, 100 Mich. 54.

¶ 650. A husband induced his wife to join with him in a conveyance to his father of eighty acres of land, after which a deed to forty acres of other land, valued at $2,000, subject to a mortgage of $600, was taken in the son's name, and the forty acres were occupied by the son and his wife until their separation, when the father, who had agreed to pay the $600 mortgage, secured a mort-

gage for $1,000 on the forty acres. He then sold the eighty acres, and, having secured an assignment of the $600 mortgage, began to foreclose both mortgages. Upon the wife's bill for separate maintenance it appeared that the eighty acres were conveyed without consideration, and were not intended as a gift to the father, and that the forty acres were bought with the understanding that they were to be paid for by the father in consideration of the conveyance to him of the eighty acres; and the sum awarded for the wife's support was made a lien upon the forty acres, and given priority over both mortgages.—Tobey v. Tobey, 100 Mich. 54.

§ 195. ——Modification of decree.

¶ 651. The application of the husband for the modification of a decree of separate maintenance for the payment of $5 weekly to the wife was denied where the husband was earning $65 per month at the time of the rendition of the decree, and, at the time of the application for modification thereof, was earning $14 per week.—Dreijer v. Dreijer, 200 Mich. 619.

§ 196. Criminal liability and prosecutions.

Criminal prosecution for wife abandonment, see Indictment.

Crime of abandonment and neglect, see Crimes § 38.

Criminal responsibility of infant for nonsupport of wife, see Crimes § 63.

Nonsupporting husband as disorderly person, see Crimes § 63.

Indictment or information for wife abandonment, see Indictment, I.

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HUSH MONEY to IMPLICATIONS.

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Delinquent or truant children, see Incompetents and Delinquents § 5.
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As factor in fraud, mistake or undue influence, see Fraud; Mistake; Gifts, IV; Wills, III.
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IMPLIED CONTRACTS.

TREATS of obligations sounding in contract implied by rule of law or by inference from facts. It excludes actual contracts and promises both written and oral (see Contracts) and also the procedural law of assumpsit (see Assumpsit). Several species of implied contract are specifically treated elsewhere for convenience, e. g., the implied obligation to repay money paid by mistake or illegality (see Payment, VI). Further exclusions are pointed out by cross-references in the body of the topic.

Analysis.

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§ 18. Payments made by mistake or fraud.
§ 19. Obligation arising from use or disposal of another's property.
§ 20. Obligation imposed by law.
§ 21. Performance or benefits under void or unenforceable contracts.
§ 22. Measure of value or quantum meruit.
§ 23. ——Equitable deductions and adjustments.
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III. Actions and procedure.

§ 25. In general; cross-references.
§ 26. Presumptions and evidence to raise or rebut implication.

I. IMPLICATION OF PROMISE FROM CONDUCT OR FACTS.

§ 1. In general.

Negation by express contract, see post §§ 2, 3.
From prior contracts, payments or gratuities, see post § 4.
Service or goods furnished at request, see post § 5.
Acceptance or acquiescence by person benefited, see post §§ 6, 7.
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Capacity of municipalities to be bound by implied contract, see Municipal Corporations, XI; Public Contracts, V.
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Implied obligations based on ultra vires or illegal corporate acts, see Corporations § 92.
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Recovery of tax money paid under mistake, compulsion or where illegally levied, see Taxes, VIII.
Implied trusts, see Trusts, III.
Disability of courts to imply contracts against parties' own failure to assent mutually, see Contracts, § 19.
Implication against county, limitation by ultra vires doctrine, see Counties § 29.
"Privity" or mutuality essential to implication, see also Contracts § 2.
Implied promise as consideration for other's promise, see Contracts § 105 et seq.

¶ 1. When negotiations for a contract are pending, the law will not conclude them by any presumption of an implied contract.—White v. United States Gypsum Co., 168 Mich. 238.

¶ 2. The law does not make a contract when the parties entered none, nor does it

regard an arrangement as completed which the parties thereto regard as incomplete.—Central Bitulithic Paving Co. v. Village of Highland Park, 164 Mich. 223.

¶ 3. Where an express agreement would be null and void because it is to do what the statute prohibits, an implied contract to do the thing forbidden is void.—Affeld v. City of Detroit, 112 Mich. 560.

§ 2. Negation by express contract.

By contrary intent or gratuitous service, see post § 3.

Performance or benefits under void or unenforceable contracts, see post § 21.

Implication of contract by acceptance of benefits under broken, rescinded or abandoned contracts, see post § 7.

Breach of express contract as sustaining implied contract, see post ¶ 42.

Accord and satisfaction as bar to recovery on implied contract, see Accord and Satisfaction § 10 et seq.

Express agreement for services as excluding implied promise to pay, see also Attorneys ¶ 134.

¶ 4. Where there is an express agreement between parties covering the subject-matter, the law will not imply one.—Cashin v. Pliter, 168 Mich. 386.

¶ 5. While an express contract is in force none can be implied covering the same subject.—Galloway v. Holmes, 1 D. 330; Wilson v. Wager, 26 Mich. 452; Hunt v. Sackett, 31 Mich. 18; Keystone Lumber Co. v. Dole, 43 Mich. 370.

¶ 6. No contract can be implied where the express contract in substance covers the entire matter.—Boughton v. Boughton's Estate, 111 Mich. 26.

¶ 7. Where the contract between the parties is express, covering the entire matter, there can be no implied agreement or understanding.—Schurr v. Savigny, 85 Mich. 144.

¶ 8. One cannot recover as upon an implied contract where the facts show an express contract.—Van Fleet v. Van Fleet, 50 Mich. 1.

¶ 9. There can be no implied contract in relation to a particular matter where the parties have made an express contract on the same subject.—In re De Haan's Estate, 169 Mich. 146.

¶ 10. Where there is undisputed evidence that a deaf mute understandingly entered into a contract to serve his brother-in-law during his natural life, in consideration of an agreement for support by the brother-in-law, the deaf mute cannot recover in assumpsit for work and labor.—Alexier v. Matzke, 151 Mich. 36.

¶ 11. That plaintiff boarded defendant, and did his washing and mending, for an agreed price per week, will by her upon an im services as a nurse, show that they were express contract.—P Mich. 614.

¶ 12. Under a co party to cut and to timber" upon certain upon the quantum the lake, logs which woods by a scaler to saw, but which should be put afloa v. Martin, 103 Mich

¶ 13. There may quantum meruit for where the testimon press contract unde cut logs and put the and that after a c cut and skidded th to cut no more, an tions that such log Creek.—Boyce v. M

¶ 14. Where suit labor performed u and the parties di agreed to be paid, the contract and re reasonably worth.- Mich. 311.

¶ 15. Where a cl ceived against an e agreement between pay over proceeds ductions for specifi entitled to any dec of items not speci the ground that manifestly just, a posed that the pa tract to provide f Estate, 42 Mich. 2

¶ 16. One contr the labor of a spec be selected by the work and labor ir alleged convict wl oned, since the ex implied one.—Tho 455.

¶ 17. Where pl fendant, on maki ment, that he cla performed at a le by plaintiff, and plaintiff cannot g of the work on t contract, and that reasonable worth Mich. 311.

¶ 18. One hav mason work in t

may recover on implied contract for services rendered in superintending the work of other contractors which in no way concerned the mason work or the matters covered in the express contract.—Friedland v. McNeil, 33 Mich. 40.

¶ 19. Plaintiff automobile company sold an automobile to defendant, who paid part cash for the same with the agreement that he should pay the balance out of the dividends of stock sold to him at the same time. The stock proved worthless. Held, the plaintiff could not pass over the fact of the express contract, and recover of defendant on an implied contract for money and benefits conferred upon defendant.—Hathaway v. Vaughan, 162 Mich. 269.

¶ 20. In an action to recover a balance on a contract for filling an ice house with ice, defendant having claimed that the ice was not packed in a satisfactory manner but having agreed to pay a certain sum on a certain date and the balance sued for at a certain later date if the ice was in good condition, held that it was error to admit evidence to prove the value of the work done by the plaintiff.—Stevens v. Lakewood Utilities Co., 189 Mich. 203.

§ 3. ——By contrary intent or gratuitous service.

See also post ¶ 57.

¶ 21. Where a litigant has not employed counsel for her solicitor, and has not authorized the latter to employ counsel, and where she has told the counsel she will not pay for any services he may render, there cannot be implied from subsequent acceptance of services a promise on her part to pay for them.—Fraser v. Haggerty, 86 Mich. 521.

¶ 22. Where the owner of logs has not only not requested that his logs be moved, but has protested against such moving, there is no room for the inference of a promise to pay therefor.—Crane Lumber Co. v. Bellows, 117 Mich. 482.

¶ 23. The owner of land on which a canal was dug, and who appeared to have incurred the major part of the expense of making it, gave notice to other individuals who had contributed to its repair that they must compensate him for its use at a rate which he specified in his notice; and on their refusal, and continuing its use under a claim of right to do so, he brought action in assumpsit to recover compensation for the use. Held, that the law would not imply a promise to make compensation for the use of the canal before the notice was given and while it was permitted by the plaintiff without objection and without demand of compensation.—Ward v. Warner, 8 Mich. 508.

¶ 24. As to one who made a drain and gave notice that users must contribute to cost, the law would not imply a promise after the notice, since any implication of a promise was precluded by the denial by defendants of all right to compensation, and the assertion of an adverse right in themselves. The adverse entry, if the claim of right was unfounded, was a naked trespass, upon which no duty to compensate would arise which could be converted into a contract.—Ward v. Warner, 8 Mich. 508.

¶ 25. An employee of a widow is debarred from claiming compensation from the trustees of the estate of her deceased husband for services in watching property belonging in part to the widow and in part to the estate, where it is apparent that the joint agent of the widow and of the estate, who directed him to watch the property, supposed that such duty came within his employment, and the employee did nothing to indicate that he expected extra compensation therefor, at the only time a contract is alleged to have been made, and for two years gave monthly receipts importing payment by the widow "in full" for services to date.—Forster v. Green, 111 Mich. 264.

¶ 26. The existence of an implied agreement to pay for services rendered is negatived by evidence that the plaintiff was a member of the defendant incorporated association for many years, that he knew that no officer had ever been paid by the association, that its revenue would not justify the payment of any salaries, and that he served as curator for years without making any demand for remuneration.—Whittemore v. Kent Scientific Institute, 128 Mich. 518.

§ 4. From prior contracts, payments or gratuities.

Subscription to stock as implying promise to pay for it, see Corporations § 48.

Inefficacy of custom of paying voluntary recompense to establish implied contract to pay in particular instance, see Customs ¶ 60.

¶ 27. Previous payment by the defendant for like services may be proved as a circumstance bearing on the question whether one who has performed services for the defendant is entitled to recover payment therefor.—Strong v. Saunders, 15 Mich. 339.

¶ 28. On the issue of gratuitousness of extra-official services rendered to a religious corporation by an attorney, who was one of its trustees and who claimed that they were to be paid for, it is proper to show what had been the custom in the past as to paying trustees for such services rendered by them to the corporation, it being presumable that plaintiff's services were rendered in accordance with the custom in that regard.—Cicotte v. St. Anne's Catholic Church, 60 Mich. 552.

¶ 29. Action against a vessel-owner to recover for services in keeping up signal lights in a dangerous channel. No direct promise to pay was proved. Held competent to prove

that defendant had paid for the like services the preceding year, as a circumstance tending, in connection with other evidence, to show that defendant was fully informed of the nature of plaintiff's services, acknowledged their value and willingness to pay for them. —Strong v. Saunders, 15 Mich. 339.

§ 5. Service or goods furnished at request.

Acceptance or acquiescence of person benefitted, see post §§ 6, 7.
Voluntary services, see post § 8.
Acknowledgment or recognition of benefit of services or goods furnished, see post § 9.
Services rendered against protest of person to be benefited, see ante ¶ 22.
Implication by law to pay for services or thing of value furnished to defendant's use, see post § 17.
Measure of value or quantum meruit, see post §§ 22-24.
Compensation of officers and public employees, see Officers, VIII.
Expectation of payment for services as element necessary to establish implied contract for services, see Estates of Decedents ¶ 653.
Architects' custom as implying agreement to pay for sketches, see also Customs ¶ 10.
To pay for value of broker's services, see also Brokers § 16.
To pay reasonable worth of attorney's services, see Attorneys §§ 37-39.
For attorney's services which were unsuccessful or not beneficial, see also Attorneys § 38.
Implication that services rendered decedent in last illness by stranger are to be paid for, see Estates of Decedents ¶ 608.
Medical attendance to injured servant with sanction of superintendent, implication as to personal liability, see also Contracts ¶ 103.
To pay corporate officer for services rendered to corporation, see Corporations §§ 152, 153.

¶ 30. If the plaintiff's intestate, a clerk employed at the county's expense in the office of the register of deeds, was hired by the register to perform certain special services out of office hours, and was promised extra compensation therefor, recovery may still be had upon the quantum meruit though plaintiff fails to establish a contract for a specific sum. —Lewis v. Roulo, 93 Mich. 475.

¶ 31. Where deceased made an oral contract to convey a farm to claimant as compensation for caring for his sister during her life, and deceased died before his sister, whereby performance of the contract became impossible, an agreement would be implied to pay the fair value of the services rendered. —Buell v. Adams, 157 Mich. 248.

¶ 32. In an action for services as a surgeon, where defendant's physician had advised that defendant go to a hospital, and thereupon at defendant's request telephoned to the hospital and made a contract for $15 per week for a private ward, which was to include room and board, nursing and medical attendance, and where defendant upon going to the hospital was attended by plaintiff, who was called in by the house physician, and operated on, and was thereafter cared for by plaintiff at defendant's request, plaintiff was entitled to recover for the reasonable value of his services, aside from the contract with the hospital.—Crumrine v. Austin, 133 Mich. 283.

¶ 33. Where the law imposes a liability on the husband to pay for the funeral expenses of his wife the mere presence of another person assisting the husband in making the funeral arrangements will not make the third person liable without his express promise to pay.—Sears v. Giddey, 41 Mich. 590.

§ 6. Acceptance or acquiescence by person benefited.

See also post ¶¶ 148, 155.
Benefits under broken, rescinded or abandoned contracts, see post § 7.
Voluntary services, see post § 8.
Acknowledgment or recognition of benefit or performance, see post § 9.
Implication of promise from prior contracts, payment, or gratuities, see ante § 4.

¶ 34. Acceptance of beneficial services raises an implied assumpsit.—Hosmer v. Wilson, 7 Mich. 294; Donovan v. Halsey Fire Engine Co., 58 Mich. 38.

¶ 35. A contract by a decedent to pay for services rendered by a cousin may be presumed where the services are accepted.—In re Wigent's Estate, 189 Mich. 507.

¶ 36. The appropriation by one person the benefits of another's services, for wh a third person has agreed, by a contract is void under the statute of frauds, to does not raise an implied promise o third person's part to pay therefor.— v. Sutton, 115 Mich. 365.

¶ 37. Where one party has perfor ices from which another has receiv efit, he is entitled to recover pay f from the circumstances a promise be implied.—Strong v. Saunder 339.

¶ 38. Under the postal laws States, each railroad compar carry to and from the postof terminal points of its road, ment lets special contracts to and from the stations al city which was a termin of defendant's road, and main line, plaintiff had fendant for the carria of its divisions, and government for the line mail. Supposing

his contract with the government to carry the mail of the other division, plaintiff continued to do so without charge, until he learned of defendant's duty in the premises, when he declined further carriage of such mail. Held, that defendant having permitted the performance of such services, and having had the benefit thereof, the law will presume that they were to be paid for, there being nothing in the relation of the parties that would repel the idea that payment was intended.—McClary v. Michigan Cent. R. Co., 102 Mich. 312.

§ 7. ——Benefits under broken, rescinded or abandoned contracts.

See also post ¶¶ 153, 157.
Right to repayment of money advanced upon abandoned contract, see post ¶ 122.
Benefits under void or unenforceable contracts, see post § 21.
Negation of implication by express contract, see ante § 2.

¶ 39. From the acceptance and appropriation of beneficial services, work done, materials furnished, goods sold, etc., in part performance of an entire contract, the law generally implies a promise to make compensation.—Clark v. Moore, 3 Mich. 55; Allen v. McKibbin, 5 Mich. 449; Wildey v. Paw Paw & Antwerp Fractional School Dist. No. 1, 25 Mich. 419; Wilson v. Wagar, 26 Mich. 452; Begole v. McKenzie, 26 Mich. 470; Chapman v. Dease, 34 Mich. 375; Howell v. Medler, 41 Mich. 641; Gage v. Meyers, 59 Mich. 300.

¶ 40. One who has not entirely or strictly performed his contract may recover upon the appropriate common counts for anything done under such contract from which the other party has derived substantial benefit and which such party has accepted or appropriated.—Allen v. McKibbin, 5 Mich. 449; Wildey v. Paw Paw & Antwerp Fractional School Dist. No. 1, 25 Mich. 419; Wilson v. Wagar, 26 Mich. 452; Begole v. McKenzie, 26 Mich. 470; Chapman v. Dease, 34 Mich. 375; Howell v. Medler, 41 Mich. 641; Gage v. Meyers, 59 Mich. 300.

¶ 41. Recovery may be had quantum meruit for work performed under a written contract, though the work did not conform to the contract, where defendant accepts and makes use of the work done.—Gross v. Creyts, 130 Mich. 672.

¶ 42. The breach of an express contract will not sustain an action on an implied assumpsit for benefits received.—Thorp v. Bateman, 37 Mich. 68.

¶ 43. If a party defrauded by an express contract rescinds it he cannot set up an implied contract and sue the other party thereon for benefits accepted.—Galloway v. Holmes, 1 D. 330.

¶ 44. Where a party fails to comply substantially with a non-apportionable agreement, he cannot sue or recover upon it at all. But when anything has been done from which the other party has received substantial benefit, a recovery may be had on the quantum meruit.—Hanley v. Walker, 79 Mich. 607.

¶ 45. One who, by his contract, has agreed to receive payment in something else than money, cannot, where he has broken the contract, recover on the quantum meruit the value of his labor performed under the contract.—Roberts v. Wilkinson, 34 Mich. 129.

§ 8. Voluntary services and unsought benefits.

Implication of promise from prior contracts, see ante § 4.

¶ 46. No implied contract or promise arises from a spontaneous service done as an act of kindness and without being asked, or where it is accounted for on more likely grounds than a promise of payment.—Woods v. Ayres, 39 Mich. 345; Cicotte v. St. Anne's Catholic Church, 60 Mich. 552.

¶ 47. Voluntary services rendered under circumstances not fairly indicating an expectation of reward need not be paid for.—Covel v. Turner, 74 Mich. 408.

¶ 48. One cannot recover for his labor performed by mistake upon another's property without the owner's consent; e. g., for cutting another's trees and hauling and piling the wood.—Isle Royale Min. Co. v. Hertin, 37 Mich. 332.

¶ 49. An agreement to compensate cannot be implied from the mere fact that services were rendered.—Godfrey v. White, 43 Mich. 171.

¶ 50. A woman repaired certain buildings that were the joint property of her husband and his brother, the decedent, but no express authority was shown from decedent to the husband to repair or to authorize the wife to repair. Held, that she could not recover from the estate for the repairs.—Stackable v. Stackable's Estate, 65 Mich. 515.

¶ 51. The mere fact that valuable services are rendered for the benefit of a party does not make him liable upon an implied promise to pay for them.—Notley v. State Bank of Vicksburg, 154 Mich. 676.

¶ 52. Where one has employed another to manufacture articles at an agreed price out of materials to be furnished by the former, the fact that he himself, without request, assists in the manufacture, will not raise an implied promise on the part of the other party to pay for such services.—Lange v. Kaiser, 34 Mich. 317.

¶ 53. A merchant who for his own purposes sends his customers to another dealer does not thereby acquire any claim on him.—Godfrey v. White, 43 Mich. 171.

¶ 54. A contractor agreed to haul logs at his own expense of teams, etc. Held, that in an action by him on the quantum meruit defendants could not recover for outlays in repairing roads and sleighs, where it was not shown that plaintiff had requested it.—Spence v. Bowen, 41 Mich. 149.

¶ 55. A contractor cannot consistently be superintendent of construction so far as his own work is concerned, and claim payment for services as superintendent thereof, unless there is a clear understanding that he is to be paid for them.—Friedland v. McNeil, 33 Mich. 40.

¶ 56. Where a monument was ordered to be erected on a foundation to be built by defendant and the contract was renounced before the monument was erected, the plaintiff cannot proceed to construct a foundation and erect the monument and then recover therefor under the common counts, since the contract was not performed before the renunciation and plaintiff was never requested to construct the foundation.—Wigent v. Marrs, 130 Mich. 609.

¶ 57. No promise to pay for services will be implied where the circumstances not only fail to indicate that they were rendered or received for compensation, but clearly repel the idea that payment was to be made or asked for; it was error to allow a claim for services as sexton to one who at the time was a vestryman, and some of the time a senior warden and treasurer of the society, where the evidence clearly showed that the performance of the duty was voluntary, and that it was supposed on both sides that his service was something he was spontaneously giving from a desire to promote a cause he had at heart, and not in any intent to get money.—St. Jude's Church of Fentonville v. Van Denberg, 31 Mich. 287.

§ 9. Acknowledgment or recognition of benefit or performance.

Acceptance or acquiescence by person benefited, see ante §§ 6, 7.

¶ 58. After discharge in bankruptcy a new promise to pay must be express, and an acknowledgment of debt must be unqualified, but such promise or acknowledgment need not be written.—Craig v. Seitz, 63 Mich. 727.

§ 10. Relationship of parties as basis of implication or rebuttal.

See also post ¶ 117.

Parent and child, implication from services rendered, see post § 11.

Implication by rule of law as to money had and received by agents and persons in fiduciary relation, see post § 14.

Relation between the parties as basis of rebuttal, see also post ¶ 164.

Liability on implied contract of husband for money loaned his wife without his knowledge, see Husband and Wife § 67.

General law of Agency, see Agency.

Implied agencies, see Agency § 18.

Implied contract for services rendered one spouse by the other, see also Estates of Decedents ¶ 654.

¶ 59. Though the presumption may be overcome by the circumstances, no promise is implied to pay for services rendered one in loco parentis.—Harris v. Smith, 79 Mich. 54.

¶ 60. A man is not entitled as of course to charge his sister for board while living in his house.—Martin v. Sheridan, 46 Mich. 93.

¶ 61. The presumption is that services rendered by a relative by marriage are gratuitous, in absence of an express contract.—Vandecar v. Nowland's Estate, 188 Mich. 429.

¶ 62. A man lived much of his time in his sister's family, where his washing and ironing were done, and he was taken care of when sick. He never paid anything, but repeatedly said he would pay for all that was done for him, and there was no showing that compensation was not expected. Held, that his estate was liable on an implied assumpsit for the services done him.—O'Connor v. Beckwith, 41 Mich. 657.

¶ 63. A step-mother is not impliedly liable to her adult step-daughter, from whose father she has been divorced, for services rendered by such daughter living in defendant's family, working as a dressmaker, giving some of her earnings to defendant, and doing some of the household work.—Feiertag v. Feiertag, 73 Mich. 297.

¶ 64. There is no promise implied to pay for services rendered a man by his adult step-daughter, who had lived in his family from the time she was nine years old, and wh after coming of age lived as a member of t family, performing the same duties and ceiving board, clothing and money, from t to time, the same as before her majori Harris v. Smith, 79 Mich. 54.

¶ 65. A woman cannot recover fr father-in-law for services rendered member of his family, in the absen express agreement to pay for such s Harris v. Harris, 106 Mich. 246.

¶ 66. No one is bound to pay teered services rendered under c which do not fairly indicate ar of reward. So held where a ma father-in-law's family without sued for work which he did farm.—Coe v. Wager, 42 Mic

¶ 67. Where services ha by a husband to his wife's ber of the family, with recompense therefor, an capable of making a c can be implied to pay Heller Aller Co. v. Ri

¶ 68. An emancipated son who, at the special request of his uncle, and on promise of payment, renders services and spends money in taking care of his own mother and the other minor children, has a valid claim against the uncle's estate.—Grimm v. Estate of Taylor, 96 Mich. 5.

¶ 69. No promise can be implied to repay moneys voluntarily paid by a son to his sister-in-law, without her request, as contributions toward his mother's support.—Hough v. Comstock, 97 Mich. 11.

¶ 70. No promise on a father's part to pay the mother for anything she may do in the discharge of her moral duties to their offspring can be implied.—Lapworth v. Leach, 79 Mich. 16.

¶ 71. In the absence of an express contract that plaintiff and his wife should be paid for work done on the farm and in the house of plaintiff's uncle, where both lived, no contract could be implied from a conversation in which plaintiff stated to defendant that he was going to get married and defendant replied that if he was going to get a "smartish" woman he might fetch her to defendant's house, and both husband and wife could work for defendant, to which plaintiff replied that defendant ought to know how smart she was. —Alderton v. Wright, 81 Mich. 294.

¶ 72. The presumption that washing, rooms, lights, fuel, and attendance, furnished to a decedent by one claiming compensation therefor against his estate, were gratuities, arising from the fact that the claimant was the daughter-in-law of decedent, and that he lived with her and her husband as a member of the family, is not overcome by evidence that there was an express agreement by him to pay for board.—Boughton v. Boughton's Estate, 111 Mich. 26.

§ 11. ——Parent and child, implication from services rendered.

Services rendered father-in-law or step-parent, see ante § 10.

Implication of promise to pay for services rendered one in loco parentis, see also ante ¶ 59.

Contract for repayment of money expended by child for parent's use and at his request, see also post ¶ 120.

Services and earnings of child, see Parent and Child, III.

Property and contract rights between parent and child, see Parent and Child, IV.

To pay for services of adopted child, see also Adoption ¶ 12.

¶ 73. From the discharge of a purely filial duty—such as the care by a daughter of her aged father—no obligation to pay can be implied.—Wright v. Estate of Senn, 85 Mich. 191.

¶ 74. No promise is implied to pay for services rendered by an adult daughter to her father while living as a member of his family.—Ionia County Savings Bank v. McLean, 84 Mich. 625.

¶ 75. The presumption is that services rendered by a son to his father in boarding and taking care of him in his old age are gratuitous.—In re De Haan's Estate, 169 Mich. 146.

¶ 76. Services performed by a child for the parent are presumptively performed gratuitously and in the line of filial duty, and compensation cannot be recovered by proof alone of the services and of their value.—In re Teller's Estate, 200 Mich. 181.

¶ 77. An express contract is essential to overcome the presumption that a son who continues to live with his parent is not entitled to compensation for his services, since the law will not imply a contract from the mere rendition of the services.—Hialey v. Hialey's Estate, 157 Mich. 45.

¶ 78. Where a son continues to live with his father and renders services for him, it is presumed that they are members of one family contributing to the common support. —Hialey v. Hialey's Estate, 157 Mich. 45.

¶ 79. Where the facts and circumstances attending the performance of work by a child for its parent and in the acceptance are sufficient to rebut the presumption that the services were gratuitous and to authorize the inference that both parties acted upon the understanding that they were to be paid for, the parent is liable for such services.—Maynard v. Schrumpf's Estate, 192 Mich. 494; In re Scully's Estate, 199 Mich. 181.

¶ 80. In order that a son living with his parents shall be entitled to compensation for services rendered them, there must be an express agreement.—In re Colburn's Estate, 153 Mich. 206; More v. Luther, Id.

¶ 81. Where a man and his wife live with the man's father, on the father's farm, it is presumed that they are not living together under any contract relation, but as a family and that there can be no claim for services, or for supplying the ordinary conveniences of life.—Mason v. Dunbar, 43 Mich. 407.

¶ 82. A widower, the owner of a farm, asked his son to move upon the same and till it. The parties expressly agreed that the son should have two-thirds of the crops and the old gentleman one-third, and that the son should have the use of a cow and a horse as compensation for the father's board. The father reserved two rooms of the house and lived in same, taking his meals with the son's family. He required no special care and there was no evidence as to the care involved during his last sickness. Nothing was said between the parties as to further compensation for the son except a general expression by the father that he was being

well treated and intended to remember the son in his will. The father left forty acres of land to the son. In a suit on an implied contract against the father's estate for care extended and services rendered, held, no recovery could be had.—In re De Haan's Estate, 169 Mich. 146.

¶ 83. It is unnecessary that a child, in an action on a claim for services against the parent's estate, establish that at a given time before the services were performed a formal contract was made, for the payment on the one hand and for performance of the services on the other hand, it being sufficient if the evidence shows that both parent and child acted upon the understanding that the services were to be paid for.—In re Teller's Estate, 200 Mich. 181.

¶ 84. Under an agreement whereby a son is to have a farm upon condition that he resides thereon and renders services for his father and mother until their death, his estate is not entitled to compensation for his services in the event of his death before that of his parents.—In re Colburn's Estate, 153 Mich. 206; More v. Luther, Id.

¶ 85. Where a son lives with his parents and renders services to them with the understanding that he is to have a certain farm upon their death, his estate, in event of his death before that of his parents, cannot recover on a quantum meruit, since under the circumstances there is no implied contract to pay for his services.—In re Colburn's Estate, 153 Mich. 206; More v. Luther, Id.

¶¶ 86, 87. Where, in a suit by a daughter to enforce a claim against her father's estate for services, there is evidence that the services were valuable, that, during the period of their performance, the father frequently stated in the presence of the claimant that he intended to convey his farm to her in consideration of such services, that he did make such conveyance, but that the same was inoperative, the question is for the jury whether the services were rendered and accepted with the understanding that they were to be paid for.—Sammon v. Wood, 107 Mich. 506.

¶ 88. It was held to raise an implied contract between foster father and adopted son that latter is to have former's estate at father's death in return for work done for and care taken of foster parents, such having been the agreement, and part performance taking case out of statute of frauds. (Per McGrath, C. J., Long, J., concurring, and Grant, J., concurring on another ground.)—Wright v. Wright, 99 Mich. 170.

¶¶ 89, 90. A daughter lived with her father as a member of his family for some eleven years after attaining her majority, but without any contract for hire, and with no other relation than that of father and daughter,

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the death of his father and his mother being 216 months. Held, in the absence of evidence of a contract made with the father for compensation, complainant could not recover for services rendered after the death of his father against the estate, and such contract could not be inferred from the facts above set forth.—In re Myron's Estate, 165 Mich. 63.

II. IMPLICATION BY RULE OF LAW.

§ 12. In general; test of equity and good conscience.

Money had and received to use, see post §§ 13-15.
Money paid to use or benefit, see post § 16.
Services or thing of value furnished to defendant's use, see post § 17.
Payments made by mistake or fraud, see post § 18.
Obligations imposed by use or disposal of another's property, see post § 19.
Obligations imposed by law, see post § 20.
Performance or benefits under void or unenforceable contracts, see post § 21.
Measure of value or quantum meruit, see post §§ 22-24.
Implication of promise from conduct or facts, see ante I.
Actions and procedure, see post III.
Right to recover mistaken or illegal payments, see Payment, VI.
Capacity of municipalities to be bound by implied contract, see Municipal Corporations, XI; Contracts, V.
Implication of covenants for title, see Covenants for Title §§ 2, 3.
Recovery of tax money paid under mistake, compulsion or where illegally levied, see Taxes, VIII.
Implied promise of mortgagee to pay mortgagor for goods purchased at unfair foreclosure sale, see Chattel Mortgages § 138.
Nonliability of bank to payee of check on implied contract theory, see Banking § 13.

¶ 97. A vendor who agrees to accept in part payment shares of stock at the price paid for them by the purchaser, and who, in reliance on the latter's false representations that he paid a certain amount accepts them at such valuation, may maintain assumpsit for the difference between such valuation and the price actually paid by the purchaser, though the shares were actually worth more than they cost.—Hidey v. Swan, 111 Mich. 161.

¶ 98. Land was conveyed in consideration of a certain sum in cash and "all of the notes" given to the grantee. The vendor did not know their amount and had no memorandum of them. Without the knowledge of the grantor the grantee had transferred and failed to turn over one of such notes. Held, the grantor, upon being compelled to pay the note, can maintain an action of assumpsit against the grantee to recover the amount so paid.—Reed v. Reed, 108 Mich. 498.

§ 13. Money had and received to use.

See also post ¶ 152.
Secret profits and receipts of agents and persons in fiduciary relation, see post § 14.
Failure or want of consideration for money received, see post § 15.
Money paid to use or benefit, see post § 16.
Recovery of mistaken or illegal payments, see Payments, VI.
Recovery of tax money paid under mistake, compulsion or where illegally levied, see Taxes, VIII.
Against attorney by other party to repay money received wrongfully for client, see also Attorneys ¶ 105.
Estoppel to deny receipt by enabling third person to collect, see Estoppel ¶ 142.
Liability of owner for money paid to auctioneer, see Auctions ¶ 7.
Rebuttal of implication based on money had and received, where receiver was corporation which innocently transmitted money for a purpose beyond its power, see Corporations ¶ 327.

¶ 99. A merchant who has a claim for an amount due him for goods furnished servants of another on presentation of orders from him, under an arrangement by which these orders were to be honored by the master and the amount deducted from the servants' wages, may properly sue as for money had and received by the defendant to the plaintiff's use.—Ball v. Brockway, 48 Mich. 523.

¶ 100. One who has been adjudged owner of premises cannot, under a count for money had and received, recover rent paid thereon by a tenant to one who had leased the premises in good faith under a belief that he had title, there being no contractual relation and no express or implied promise to pay to plaintiff.—Sherman v. Spalding, 132 Mich. 249.

¶ 101. In an action to recover money paid on a contract with defendant for the purchase of a share in a boat, he having failed to pass title, it is immaterial whether the money was all paid to defendant or that a part was paid to another if the payments were induced by defendant's promises.—Hayes v. Stortz, 131 Mich. 63.

¶ 102. An undisclosed agent may be sued for money paid to him without consideration, though he has paid it over to his principal.—Smith v. Kelly, 43 Mich. 390.

¶ 103. One who has left money for safekeeping with another who has put it in a bank can bring assumpsit on the common counts against one who has drawn and appropriated it on pretense of being the guardian of the person to whom it was left.—Martin v. Sheridan, 46 Mich. 93.

¶ 104. In assumpsit by the state against a commissioner intrusted to prepare an exhibit to the New Orleans Exposition for money

not applied thereto amounting to $750, it is immaterial whether a total sum of $1000 received by defendant was derived from a direct appropriation by the state in reimbursement of money raised on bonds of the commission or from a sum given by the managers of the exposition to the state in aid thereof; since both sums were the property of the state designed for purposes of an exhibit.—People v. Swineford, 77 Mich. 573.

¶ 105. The owner of standing timber, who contracts for the sale and delivery of the logs to be by him cut therefrom, is not limited to a recovery of the contract price in an action of assumpsit brought to recover the proceeds of logs unlawfully cut from said timber by the vendee, against the protests of plaintiff. —Sixma v. Montgomery, 98 Mich. 193.

¶ 106. Where plaintiff and defendant had sold their joint rights in a patent, and each was given back an individual license, and afterwards to extinguish the licenses and vest the entire ownership in the purchaser of the patent a sale to it of such licenses is made, the plaintiff being fully informed that his former partner negotiating the transaction is receiving a higher price than he, it is plaintiff's duty to complain before consummating the deal, and having permitted the sale to go through, with knowledge of all the facts, he is estopped from claiming any other part of the purchase price.—Gordon v. O'Neill, 174 Mich. 575.

¶ 107. In a contract for clearing land one party was to chop all the timber suitable for rail cuts into rails, and all the other timber and brush, except some trees to be left for shade, he was to cut and burn. He cut a portion of this last timber into fire-wood and sold it—no objection thereto appearing to have been made by the other party. Held, that the law would not imply a promise to account for the amount received for the wood so cut and sold.—Daniels v. Mosher, 2 Mich. 183.

§ 14. ——Secret profits and receipts of agents and persons in fiduciary relation.

Money had and received by agent for another, see Agency § 83.

Obligation of attorney to repay to client amount paid for costs which attorney assumed, see Attorneys ¶¶ 116, 117.

Profit made by agent as money had and received for principal, see Agency ¶ 503.

¶ 108. A defendant real estate agent who had agreed to sell plaintiff's property for him, later secured an option of plaintiff on the property for four hundred dollars and then sold the same to a third person for four hundred dollars cash and an interest bearing note for one hundred dollars secured by a mortgage on the property. Held, that plaintiff after affirming the transaction might recover in assumpsit the one hundred dollars

¶ 112. If after the sale of land the consideration fails totally, the law raises an implied promise that the grantee will pay the amount of the consideration actually agreed upon.—Child v. Pierce, 37 Mich. 155.

¶ 113. The guardian of an incompetent person gave a lease for years, receiving rent in advance. He died before the time was up, and the heirs declined to affirm the lease. Held, that the lessee might recover of the estate the rent paid for the balance of the term, as paid without consideration.—Campau v. Shaw, 15 Mich. 226.

¶ 114. When unexpected difficulties occur in the transportation of property by a carrier, and the consignor agrees, in view of them, to pay a sum for the carriage, in addition to what had been previously fixed upon, and pays the same, he cannot recover it back as paid without consideration.—Detroit & B. C. R. Co. v. McKenzie, 43 Mich. 609.

¶ 115. An action lies for money had and received to recover money paid for a worthless railroad bond sold on the representation that it was the bond of Michigan Central Railroad where name on bond was similar to Michigan Central.—Ripley v. Case, 78 Mich. 126.

§ 16. Money paid to use or benefit.

Sum paid to buy in title as money paid to use of covenantor, see also Covenants for Title ¶ 65.

Implied contract for repayment of money paid under garnishment, see Garnishment § 113.

Rights in case of accession or confusion of goods or improvements on land, see generally Accession and Confusion.

¶ 116. Payment by a grantee, for his own protection, of incumbrances which the grantor had bound himself to pay, is compulsory, and supports an action for money paid to the grantor's use on an implied promise to repay it.—Norton v. Colgrove, 41 Mich. 544.

¶ 117. An action will lie at law as for moneys paid out to defendant's use where plaintiff and defendant were partners and plaintiff had made payments which, under the partnership agreement, defendant should have made.—Bates v. Lane, 62 Mich. 132.

¶ 118. Where an order for merchandise was largely exceeded, and the consignee received the excess to be sold or held subject to the consignor's order, and advanced the freight in good faith and for the consignor's benefit, he could recover the amount so advanced in assumpsit against the consignor as for money paid to his use.—Larkin v. Mitchell & Rowland Lumber Co., 42 Mich. 296.

¶ 119. Where unlawful proceedings are taken to enforce an alleged liability, a third person who knows their character, but on pretense of befriending the party held liable binds himself to pay money for the latter's release, pays it in his own wrong, and establishes no legitimate claim for reimbursement.—Storrs v. Scougale, 48 Mich. 387.

¶ 120. Where a son living in his father's family expends money at his father's request and with his knowledge and assent, in building a house for his father, the father is liable to the son for the amount so expended unless there has been a different understanding between them; and it is for a jury to decide whether there was or not, in view of all the circumstances.—Hillebrands v. Nibbelink, 44 Mich. 413.

¶ 121. Money paid out for the decedent's use and benefit with her knowledge and assent, but without her directions, is recoverable as if she had directed it so paid.—Wilson v. Estate of Hotchkiss, 81 Mich. 172.

¶ 122. Where money was advanced upon a contract which was mutually abandoned, the law implies a promise to repay the money advanced and a declaration upon the common counts in assumpsit is sufficient for its recovery.—Murphy v. Dalton, 139 Mich. 79.

¶ 123. There is no implied liability to reimburse the salvor for the entire cost of litigation necessary to permit the attempt to raise a sunken vessel, where the salvage contract was to raise her for 70% of the salvage, defendant owner to bear no share of the expense, the litigation having been begun with the owner as a cocomplainant with its consent, and there having been no warranty of title or right by the owner.—Murphy v. Northern Steamship Co., 131 Mich. 120.

¶ 124. A landowner, who during the period for redemption, paid drain taxes and did not redeem cannot recover their amount from the mortgagee, who bought in; since it was the duty of a mortgagor to pay such taxes, even though eventually it inured to the mortgagee's benefit.—Roff v. McCreery, 199 Mich. 391.

¶ 125. A. entered land in his own name, agreeing in writing to sell it to B. for a certain price within a specified time. It appeared that A. took the land in his own name by way of security. Held, that, he having refused to convey it to B., except upon payment of a tax-bill that A. had been obliged to pay, and B. having paid the amount of the tax-bill under protest, B. could not maintain an action to recover back the amount.—Congdon v. Preston, 49 Mich. 204.

¶ 126. Where the agent of a bucket shop firm paid a customer the balance due him from the firm, by means of a check on a partnership of which the agent was a member, and the firm sent him a check in repayment which was protested, failure of the

partnership to seasonably notify the customer of the protest and that they would hold him responsible for the unauthorized payment out of partnership funds, will prevent a recovery from him.—Clippinger v. Starr, 130 Mich. 463.

¶ 127. Where defendant, to whom plaintiff is delivering sand, pays a certain sum to an employee of plaintiff to secure earlier deliveries, no legal obligation rests upon plaintiff to reimburse defendant where it was a voluntary payment without plaintiff's knowledge for defendant's own interest and plaintiff does not agree to pay it when informed of it.—Detroit River Transit Co. v. Aldrich, 176 Mich. 357.

¶ 128. Claimant took a deed on certain Canadian land from Cook, the deceased, to secure payment of services rendered. Later one Farwell, a prior mortgagee of Cook, brought a bill to reform his mortgage so as to include the land held by claimant as security. Claimant and Cook were made parties defendant. Claimant's lien was not disputed, and the mortgage was reformed to include the land in question subject to claimant's lien. Later the lien was paid, and the Canadian counsel employed by Cook and claimant in the reformation proceedings subtracted their fees from the lien money. Claimant filed a claim with the probate commissioners for a balance due from Cook's estate, and included the sum paid to satisfy the aforesaid counsel fees. Held, that the claimant was entitled to charge against the estate the sum so paid for said counsel fees without proving any express agreement with Cook to that effect, since Cook was the real defendant in the reformation suit and as such liable for the fees.—Warren v. Sheehan, 156 Mich. 432.

§ 17. Services or thing of value furnished to defendant's use.

See also ante ¶¶ 48-51.

Services or goods furnished at request, see ante § 5.

Voluntary services and unsought benefits, see ante § 8.

Retention of benefits under partial or defective performance as raising implication of fact, see ante § 7.

Measure of value or quantum meruit, see post §§ 22-24.

Repairs furnished by vendor while property was in his possession to put in condition after damage by fire, see Sales.

Liability for extra work on building contract, see Building Contracts, V.

Implied contract of husband to pay for necessaries furnished wife, see Husband and Wife, III.

¶ 129. Where a deed is set aside on the ground of the grantor's incompetency and of undue influence, the grantee may yet recover against the estate of the grantor for care, support, and bur by the grantee, grantee on the deed.—Cuenat v.

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§ 18. Payments made by mistake or fraud.

Labor performed by mistake on another's property without his consent, see ante ¶ 48.
Recovery of illegal or mistaken payments, see Payment, VI.
General principles of mistake, see Mistake.
Recovery of tax money paid under mistake, compulsion or where illegally levied, see Taxes, VIII.
Of officer to repay overpaid compensation, see Officers, VIII.
Implied contract for money paid defendant by intestate when mentally incompetent and under undue influence, see Estates of Decedents ¶ 268.
Right to sue in assumpsit for implied contract arising out of fraud, see Fraud § 88.

¶ 135. A. borrowed $1,000 from B. on a forged mortgage. Subsequently he borrowed $3,000 from C. on another forged mortgage upon the same land, C., in order to get a first mortgage, paying out of his loan the former loan and taking up B.'s note and mortgage. Neither B. nor C. knew at the time that the securities were forged. Held, that C. could not recover from B. the amount paid to take up B.'s note and mortgage.—Walker v. Conant, 69 Mich. 321.

¶ 136. The American Trotting Association, a corporation under Pub. Acts 1887, No. 18, and having as members various local societies, cannot recover as money had and received the purses obtained by defendant wrongfully from local associations by racing a horse under a false name and class, where one of the articles makes it the duty of the member to pay all premiums won unless the same are properly withheld under the by-laws and rules of the Association, and it was so paid and no assignment from the member to the plaintiff of the right to recover was ever made; though the rules of the Association, which the articles make obligatory on the members, provide that every entry shall constitute an agreement that the person making it and the horse shall be subject to the rules, that a person obtaining a purse through fraud or error shall on demand pay the same to the secretary of the Association, and that a horse entered in a class to which he does not belong shall forfeit entrance money and be ruled out.—American Trotting Ass'n v. Reynolds, 141 Mich. 340.

§ 19. Obligation arising from use or disposal of another's property.

See also ante ¶ 107.
Assertion of adverse claim or right as trespass and not basis for implication, see ante ¶ 24.
Use of drain under claim of right, see ante ¶ 24.
Implications from use of canal where use is under claim of right, see ante ¶ 23.
Obligation arising from use and occupation of real property, see Landlord and Tenant, IV.
Based on delivery by bailee to third person, see Bailments § 16, ¶ 57.

¶ 137. Trover or case rather than assumpsit is the proper remedy against a gratuitous bailee of bonds who delivers them without receiving anything therefor to a third party claiming title.—Barnum v. Stone, 27 Mich. 332.

¶ 138. Where the president of a private industry constructs a belt line railroad for transfer purposes which is intended for the use of such industry and others that may be located and organizes a corporation to take over such railroad and holds all the stock therein, except as to qualifying shares, and cars are transferred to and from such plant only by engines of connecting railroads, there is no implied contract by such railroads to pay for the use of such line, where demands for payment meet with refusal or with conduct tantamount thereto.—Grand Rapids Terminal Belt Ry. Co. v. Waters, 198 Mich. 285.

¶ 139. Where a son resides upon a farm owned by his parents, and at his decease there is personal property upon the farm belonging to him, his estate may recover therefor as against the estate of another child who has converted such property. In re Colburn's Estate, 153 Mich. 206; More v. Luther, Id.

§ 20. Obligation imposed by law.

Implied contract against husband for support and necessaries furnished wife, see Husband and Wife, III.
Statutory right to compensation for driving logs or breaking jams, see Forestry § 10.
Liability for necessary expense of driving out another's logs and of breaking jams, see Forestry §§ 5, 10.
Statutory liability of bank stockholder as contract with depositor, see Banking § 79.
Assumpsit to enforce judgment, see Judgments, XII.
Assumpsit for taxes, see Taxes.

§ 21. Performance or benefits under void or unenforceable contracts.

See also ante ¶ 36.
Negation of implication from express contract, see ante §§ 2, 3.
Want of implied contract to cover matters as to which law makes an express contract illegal and void, see ante ¶ 3.
Benefits under broken, rescinded or abandoned contracts, see ante § 7.
Acceptance of benefits not conforming to written contract, see also ante ¶ 41.
Liability of attorney for money received and kept under void contract for share of alimony, see also ante ¶ 111.
Recovery for money paid or services rendered under contract void under statute of frauds, see Frauds, Statute of, §§ 125, 126.

Implied contract rights arising out of invalid agreement or part performance thereunder, see Contracts § 96.
Implication based on void Sunday contract, see also Contracts ¶ 1144.

¶ 140. Money advanced on an oral agreement to purchase lands, to be held as stipulated damages on default in the purchaser, and otherwise to be applied as part of the purchase money, may be recovered back.—Scott v. Bush, 26 Mich. 418; Scott v. Bush, 29 Mich. 523.

¶ 141. Money advanced upon a contract void under the statute of frauds cannot be retained on the claim that there was sufficient consideration for the payment, growing out of collateral matter, which was in effect but part of the void contract itself.—Scott v. Bush, 29 Mich. 523.

¶ 142. A. conveyed to B. land in part payment for which it had been orally agreed that B. should convey a house and lot, which, however, B. refused to do, and afterwards B. sold to another. Held, that as B.'s agreement was void under the statute of frauds, his refusal to convey rescinded the contract and raised an implied promise to pay for the land which he had received on the contract, and that the value of such land could be recovered on the indebitatus count for real property sold.—Nugent v. Teachout, 67 Mich. 571.

¶ 143. Where a contract, void under the statute of frauds, has been substantially performed by one party while the other has received the benefits expected therefrom, the former may recover the actual value of his services as ascertained by the jury.—Cadman v. Markle, 76 Mich. 448.

¶ 144. The equitable owner of land, title to which was in a third party, caused it to be conveyed, to secure a debt, by deed absolute in form, to a person to whom he subsequently agreed, orally, to sell the land, and to whom he then surrendered possession, receiving from him part of the purchase money. Held, that the common counts would lie for the balance due.—Miner v. O'Harrow, 60 Mich. 91.

¶ 145. A void Sunday contract cannot itself be the basis of an implied contract.—Searles v. Reed, 63 Mich. 485.

¶ 146. The equitable owner of land, title to which was in a third party, caused it to be conveyed, to secure a debt, by deed absolute in form, to a person to whom he subsequently agreed, orally, to sell the land, and to whom he then surrendered possession, receiving from him part of the purchase money. Held, that the common counts would lie for the balance due.—Miner v. O'Harrow, 60 Mich. 91.

to recover more than his actual loss.—Havens v. Church, 104 Mich. 135.

¶ 153. Where an action lies upon the quantum meruit for work and labor done under an unapportionable contract whereof defendant has prevented completion or which he has broken, the measure of damages is the value of the services, not the price named in the contract.—Hosmer v. Wilson, 7 Mich. 294; Kearney v. Doyle, 22 Mich. 294.

¶ 154. Where action is brought on a quantum meruit for labor done under a special and entire contract, which has not been substantially performed by the plaintiff on his part, the plaintiff can in no case recover more than the contract price; and cannot recover that if his work is not reasonably worth it, or if, by paying it, the rest of the work will cost the defendant more than if the whole had been completed under the contract.—Allen v. McKibbin, 5 Mich. 449; Wilson v. Wagar, 26 Mich. 452.

¶ 155. The right of a contractor, who failed to complete his contract, to recover upon a quantum meruit because of the other party's acceptance of his part performance, is limited to a sum not exceeding the contract price, less the cost of completing the work, and less any damages and added expenses caused by his breach of the contract.—Sheldon v. Leahy, 111 Mich. 29.

¶ 156. A plaintiff contractor failed to furnish a building up to specifications. In a suit to recover the contract price, held, his recovery must be on a quantum meruit and the measure of recovery should be the reasonable value of the building, less what it would cost to complete it.—Germain v. Union School Dist. City of Stanton, 158 Mich. 214.

¶ 157. Where a party to a contract that has been broken by the other party sues on the quantum meruit for work done, his measure of damages is not necessarily the contract price, but he may recover the reasonable value of his services, although in excess of the rate fixed by the contract.—Hemminger v. Western Assurance Co., 95 Mich. 355.

¶ 158. The proper amount recoverable on an implied promise of repayment of the grantor who conveyed land in consideration of the discharge of a mortgage mistakenly supposed to be in force is the supposed amount of the indebtedness intended to be thus discharged; since that was the amount of consideration intended and which failed.—Child v. Pierce, 37 Mich. 155.

¶ 159. In an accounting between a city and a waterworks company, after the rescission of a contract for the use of city owned hydrants for fire purposes, an allowance based on the amount of interest and depreciation saved by the city during a certain period, and thereafter on the amount of water actually furnished, was sustained in the absence of better data, although the compensation might not have been adequate.—City of Grand Haven v. Grand Haven Waterworks, 119 Mich. 652.

§ 23. ——Equitable deductions and adjustments.

¶ 160. Under Comp. L. 1897, § 10054, How. St., 2nd Ed., § 12704, providing that the assignee of a non-negotiable chose takes, subject to every defense which existed before notice of assignment, the assignor of a non-negotiable contract for the erection of a boat is liable when sued by the purchaser, upon the common counts, in assumpsit, for the instalment paid on the purchase price, after the purchaser was himself in default on the contract, only for the excess of the benefit received over the damage sustained by plaintiff's nonfulfillment of the contract.—Michigan Yacht & Power Co. v. Busch, 143 Fed. 929.

§ 24. ——Extra work or expense required by other party under contract.

¶ 161. Where defendant's fraud in the making or carrying out of the contract for labor and materials between the parties has led to the performance of extra work by plaintiff, a subcontractor, the latter may recover the reasonable value of such work, and is not limited to the contract prices, the action being assumpsit based on waiver of the fraud.—Bush v. Brooks, 70 Mich. 446.

III. ACTIONS AND PROCEDURE.

§ 25. In general; cross-references.

[Note. Beyond the distinctions of common assumpsit from special assumpsit, and their equivalents under the Judicature Act, there is no procedure peculiar to implied contracts. The procedural law is therefore treated in Assumpsit, which deals with the common counts and the waiver of tort, and in Contracts, X.]

Presumptions and evidence to raise or rebut implication, see post § 26.

Existence of contract for repayment of money expended by child at parent's request as jury question, see ante ¶ 120.

Implication of promise from conduct or facts, see ante I.

Implication by rule of law, see ante II.

Assumpsit and procedure therein, see Assumpsit.

Waiver of tort, when allowable, see Assumpsit, I.

For numerous holdings that assumpsit is proper remedy, see generally Assumpsit. In many instances these holdings imply that there was an implied contract.

Procedure for recovery of mistaken or illegal payments, see Payment, VI.

Alleging both implied and express contract in declaration, see Pleading, II.

Assignability of accrued right to recover money, see Assignments § 5.
Necessary parties defendant, see Contracts § 281.
Gratuitousness of payments as jury question, see Contracts § 335.
Parties to implied contract as jury question, see Contracts § 337.
Existence of express contract or implied one as jury question, see Contracts § 336.
Instruction as to intention to pay, see Contracts ¶ 1524.
Actions for recovery of stakes or winnings paid over, see Gambling Contracts § 4.
Right to attachment in action on implied contracts, see Attachment § 7.
Liability on implied contract as subject of garnishment, see Garnishment § 20 et seq.

§ 26. Presumptions and evidence to raise or rebut implication.

[Note. It is not intended to include in this section the implications or reasoning from the facts or conduct to the obligation but only the presumptions and evidence by which the primary facts are established on which the implication is based. In a sense all implied contracts are presumable contracts, but to give the word "presumption" so extensive a meaning would submerge the matters which are separated into the foregoing sections. See those sections and also the cross-references which follow.]

Presumption of implied contract from negotiations for express one, see ante ¶ 1.
Admissibility of evidence to prove value of work done where same is covered by express contract, see also ante ¶ 20.
Implication as to payment for services rendered by child to parent as jury question, see ante ¶ 87.
Presumption as to implication of promise to pay for services rendered one in loco parentis, see ante ¶ 59.
Evidence as to intention to pay, see also Contracts ¶¶ 1355, 1386.
Admissibility of evidence of custom to support implication, see Contracts § 313.
Evidence as to reasonable values, see Values.
Evidence as to reasonable value of attorney's services, see Attorneys § 43.
Payment or loan presumable from delivery of money or possession of cancelled check, see Payment, V.
Expert and opinion evidence as to value of services and labor, see Evidence, VI.
Evidence of overpayment in action to rebut money had and received, see also Evidence ¶ 381.
Irrelevancy to action for money paid by mistake of character of payee, see Evidence ¶ 1950.
Nonassertion of claim as admission of gratuitousness of services, see also Evidence ¶ 2075.

¶ 162. It is presumed that a person legally liable for goods or services understands that he is to be charged Giddey, 41 Mich. 590.

¶ 163. In an acti claimed to have been tract it will be presu that services rendere dered in performan Hapke v. Davidson, 1

¶ 164. The presun sumpsit may be rep special agreement or the relations betwee rounding circumsta gher, 37 Mich. 407.

¶ 165. In an acti testimony by the pla with the defendant worked continuously and that her service understanding that ficient to support a tiff.—Snyder v. Nea

¶ 166. In assump recover a balance d under a plea of th of faulty work of know, is admissibl plaintiff's work bot ance of the contrac nature and extent the plaintiff to hav into between the p 129 Mich. 448.

¶ 167. On the were gratuitous or tion of payment f material whether cedent's having d to claimant and h son's Estate, 160 Wetherbee, Id.

¶ 168. Oral evi show a promise t represented that sum and that if would be made u a written agreem as alleged, this since if there was ing does not re since under the contract would baker, 107 Mich.

¶ 169. Plaintiff B., who was sta Plaintiff while v out some money that he turn sa did, treating the fused to return t defendant's brot to show that de had the money o

vantage therefrom, and none tending to prove any arrangement or effort on his part to bring about the marriage of Kate and his brother, or to interfere with plaintiff and Kate. In a suit to recover said money, held, a verdict should have been directed for defendant.—Hilliard v. Hilliard, 169 Mich. 447.

¶ 170. Evidence of general usage may repel the presumption of an implied assumpsit.—Peters v. Gallagher, 37 Mich. 407.

IMPOSITION to INCOMPETENCY.

Cross-References.

Imposition—
- As constructive or implied fraud, see Fraud, II; Wills, III; Gifts, IV.
- As fraud in personal relationship, see also Husband and Wife §§ 4, 54 et seq.; Parent and Child, IV; Trusts, VIII; Estates of Decedents, X, A.

Imposition of Terms—
- See topics treating of relief grantable in discretion or on conditions, e. g., Continuances § 11; Pleading, VI (amendments); Defaults § 33 (opening); New Trial, I, II; Motions and Orders.
- Affirmance or reversal on conditions, see Appeal, XIII.

Impossibility—
- As excuse for default in contract, see Contracts § 234.
- Effect on legality of contract, see Contracts, IV.
- Construction to effectuate and avoid impossibility, see Contracts, VI, A; Deeds, III, A; Wills, VI, A; Statutes, V.
- Impossible conditions, see Contracts, VI, C, VII; Wills, VI; Deeds, III, E.
- Of proving exact damages, measure applicable, see Damages § 2.
- Of execution of decree as reason against specific performance, see Specific Performance, II.
- Inefficacy of injunction as reason against allowance, see Injunctions, I, II.
- Inability to make restitution as bar to rescission, see Rescission, III.

Imposters—
- Crime of false personation, see Crimes § 76; Indictment.

Impotency—
- Ground for divorce or annulment of marriage, see Divorce § 8; Marriage, IV.

Imprisonment for Contempt—
- See Contempt §§ 39, 41.

Imprisonment for Crime—
- See Arrest; Prisons; Crimes, I, E (punishments); Indictment, XI (sentence); Pardons and Paroles.
- Wrongful arrest as tort, see False Imprisonment.
- Wrongful prosecution, see Malicious Prosecution.

Imprisonment for Debt—
- See generally Civil Arrest; Constitutional Law § 193.
- For nonpayment of alimony, see Contempt; Divorce § 183.

Improbability—
- As factor in weighing evidence, see Evidence § 610; Indictment, VIII, C; Witnesses, VI, A.

Improvements—
- As fixtures or movables, see Fixtures.
- Doctrine of accession as applied to improvements of another's property, see Accession.
- Allowance for value in ejectment or in partition or dower proceedings, see Ejectment, VI; Partition, IV; Dower, VI, C.
- Relative rights and duties of tenants and others, see Landlord and Tenant, IV, C; Life Estates, II; Tenants in Common, II; Vendors and Purchasers, IX, X.
- Agreements required to be in writing, see Frauds, Statute of, § 56.
- Making improvements as evidence on question of adverse possession or boundary, see Adverse Possession § 46 et seq.; Boundaries § 28.
- Making improvements as performance of oral contract so as to be specifically enforceable, see Specific Performance, III.
- Mechanics' liens for building improvements, see Mechanics' Liens.
- Local public improvements, see Local Improvements.
- Works of internal improvement, constitutional powers, see Constitutional Law § 281 et seq.
- Highway or waterway improvements, see Highways, IV; Navigable Waters, III.

Improvident Judgments or Orders—
- Relief from, see Defaults, VI; Judgments, V, VI; Motions and Orders.

Imputation of Crime—
- As defamation, see Libel.

Imputed Negligence—
- See Negligence, IV.

Imputed Notice or Knowledge—
- See Agency, II, E; Corporations, XVII, E; Master and Servant, IV.

Inability—
- To obey or perform as excuse, see Contempt § 14 et seq.; Divorce §§ 167, 178 (alimony decrees); Contracts § 234 et seq.

Inadequacy of Consideration—
- See Contracts § 128 et seq.
- As implied fraud in the bargain, see Fraud § 70.

Inadequacy of Price—
- Ground for setting aside executor's or other judicial or execution sale, see Estates of Decedents § 242; Judicial Sales, II; Executions § 92; Foreclosure §§ 40 et seq., 150.

Inadequate Damages—
See Damages, IX; Death by Wrongful Act §§ 39, 40.
In eminent domain proceedings, see Eminent Domain § 37 et seq.
Inadequate Legal Remedy—
See Equity, III, B.
Inadvertent Acts—
As negligence, see Negligence.
Relief from default of judgment entered inadvertently, see Default, VI; Judgment, V, VI.
Relief from discontinuance taken inadvertently, see Discontinuance § 8.
Inapplicable Instructions—
See Instructions, IV; Indictment, IX, E.
In Blank—
Indorsements of bills and notes, see Negotiable Instruments, VII.
Indorsements of stock certificates, see Corporations § 276.
Incapacity—
Of natural persons, see Infants; Insane Persons; Husband and Wife; Incompetents; Bastards; Aliens.
Of corporations, ultra vires doctrine, see Corporations, XI-XIV; Municipal Corporations, III.
For marriage, see Marriage, II.
To make will, see Wills, II.
To inherit or transmit inheritance, see Aliens; Bastards.
Effect of incapacity on bequest or devise, see Wills, VI.
See also cross-references under Disability.
Incest—
See Crimes, II; Indictment.
Inchoate Dower
See Dower
Inclosures—
Entering a
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INCOMPETENTS AND DELIN(

TREATS of persons legally incompetent or non sui juris It excludes to specific topics the commonly known classes those who are non sui juris. See Insane Persons; Infants; abilities of coverture). The guardianship of incompetent pe ship. Criminal responsibility of mental defectives is treate

Analysis.

§ 1. In general.
§ 2. Drunkards and drug addicts.
§ 3. Spendthrifts.
§ 4. Homeless, destitute or abandoned c
§ 5. Delinquent children.
§ 6. Proceedings against juvenile delin
§ 7. ——Procedure for discharge.

§ 1. In general.

Drunkards and drug addicts, see post § 2.
Spendthrifts, see post § 3.
Homeless, de
see post
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Procedure against juvenile delinquents, see post §§ 6, 7.
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Disabilities of coverture, see Husband and Wife, IV.
Illegitimate children, see generally Bastards.
Duress destructive of free agency, see Duress.
Capacity of deaf mute to contract, see Deaf and Dumb Persons ¶ 1.
Incompetents—
Mental capacity of insured to change beneficiary, see Fraternal Associations § 43.

§ 2. Drunkards and drug addicts.

Ratification of contract and waiver of defense of incompetency by drunkenness, see Contracts § 95.
Right of drunken grantor to have relief against person causing drunkenness to obtain conveyance, see also Equity ¶ 53.
Law as to intoxicating liquor generally, see Intoxicating Liquors.
Guardianship for habitual drunkard or drug addict, see Jud. Act. chap. LVIII, § 1, ¶ 6; Comp. L. 1915, § 13950, ¶ 6.

¶ 1. A drunkard is not incompetent, like an idiot or one generally insane. He is simply incompetent upon proof that at the time of the act his understanding was clouded or his reason dethroned by actual intoxication.—Wright v. Fisher, 65 Mich. 275.

¶ 2. An instrument executed by one addicted to the constant and excessive use of intoxicating liquor is valid if made by him during a sober interval when he is competent to transact business understandingly.—Somers v. Ferris, 182 Mich. 392.

¶ 3. Equity will relieve one from a contract made by him in drunkenness, though his reason may not have been wholly overthrown where fraudulent advantage has been taken or where the drunkenness has been brought about by the other party.—Scanlan v. Connor, 168 Mich. 133.

¶ 4. A note signed by a person who though intoxicated was yet aware of what he was doing, and not deceived as to the identity of the paper signed, is not void, and any defense to it must rest on the ground of fraud and not of absolute incapacity.—Miller v. Finley, 26 Mich. 249.

¶ 5. A delay of twenty years will defeat a suit to set aside for fraud a conveyance made by an habitual drunkard who has had frequent lucid intervals, during which he was possessed of sufficient mind to understand his rights and to move for their enforcement, and where his grantee has conveyed to a third party who has made valuable improvements.—Wright v. Fisher, 65 Mich. 275.

¶ 6. A wife obtained two divorces, one of them contested, from the deceased, on the ground of excessive use of liquor. She also got an order appointing her guardian of the property of her husband, on the same ground, but failed to qualify as such. There was no dispute in the testimony as to the excessive habit of the deceased, but there was a sharp dispute as to his incompetency. Held, sufficient to warrant a decree in favor of the children as complainants in a bill to set aside a conveyance by the deceased, on said grounds.—Troub v. Thorp, 152 Mich. 363.

§ 3. Spendthrifts.

Guardianship for spendthrifts, see Jud. Act. chap. LVIII, § 1, ¶ 3, Comp. L. 1915. § 13950, ¶ 3.

§ 4. Homeless, destitute or abandoned children.

Rights of children in general, see Infants.
Authority of asylum or hospital in custody to consent to adoption, see Adoption § 1.

§ 7. In an action by its grandmother to have a child declared a dependent under Act No. 310, Pub. Acts 1909, which defines a dependent child as one who is homeless, destitute or abandoned, or dependent on the public for support, and asking that she be awarded the custody of it, where it appears from the undisputed testimony that the child has lived with the petitioner with the tacit consent of the father since the death of its mother, that it has been amply cared for, and that the child's aunt is anxious to have the custody of it, and is capable of properly rearing it, the court properly held that the child was not "dependent" within the meaning of the act.—In re Gould, 171 Mich. 540.

¶ 8. The probate court exercised jurisdiction of the case where it entertained a petition under Act No. 310, Pub. Acts 1909, to have a child declared destitute, heard the evidence, decided the question on its merits and dismissed the petition because the case did not come within the act under the undisputed evidence.—In re Gould, 171 Mich. 540.

§ 5. Delinquent children.

Rights of minors in general, see Infants.
Act for custody and protection of truant and delinquent children, see Comp. L. 1915. § 15576 et seq.

¶ 9. A child fourteen years committing a felony is a delinquent child. In re Mould. 162 Mich. 1.

§ 6. Proceedings against juvenile delinquents.

Procedure for discharge, see post § 7.
Constitutional jurisdiction of courts, see Constitutional Law, II, B; Courts, V.
Statutory provisions for custody, regulation and control of juvenile delinquents, see Comp. L, 1915, § 2011 et seq.

¶ 10. Under Pub. Acts 1903, No. 221, relating to disorderly juvenile offenders, a

justice obtains no jurisdiction over a child within the act, where its requirements relative to notice to and report of the county agent are not complied with.—People v. Turja, 157 Mich. 530.

¶ 11. A charge that respondent is "a disorderly juvenile offender, in that she neglected and refused to go to school, and was a truant and is an unmanageable child," is insufficient to sustain a conviction under the provisions of Act No. 200, Pub. Acts 1905, and Comp. L. 1897, § 11765, inasmuch as it contains no allegation as to the age of respondent, nor that she was not excused from attending school, nor that she was under parental charge, and against the command of the parent had wilfully absented herself from school.—People v. Turja, 157 Mich. 530.

¶ 12. Under the Constitution of 1908, § 13, art. 7, and Act No. 6 of the Extra Session of 1907, as amended by Act No. 310 of the Pub. Acts of 1909, conferring jurisdiction upon the probate court to deal with delinquent children, no appeal lies to the circuit court from an order of the probate judge committing a delinquent child to a state institution, since neither of the said acts provides for any such appeal and since the right of appeal does not lie by virtue of section 669, Comp. L. 1897, which confers the right of appeal from the probate judge only in matters of usual probate jurisdiction.—Van Leuven v. Ingham Circuit Judge, 166 Mich. 115. (Blair and McAlvay, JJ., dissenting.)

¶ 13. A child under fourteen years residing with her guardian in Livingston county was summoned to appear as a witness in Wayne county. At the trial she committed perjury and was committed to the custody of a probation officer by the probate court of Wayne county. Upon habeas corpus, held, that under Act No. 6, Pub. Acts 1907, the Wayne county court had no jurisdiction over said delinquent child, as she was a resident of another county.—In re Mould, 162 Mich. 1.

¶ 14. The proceedings under Pub. Acts 1907, Extra Session, No. 6, §§ 1-6, as amended, How. 2nd Ed., §§ 11644-11649, as amended, before a probate judge to determine the delinquency of a child are not criminal proceedings, and the rules governing criminal trials do not apply.—In re Broughton, 192 Mich. 418.

¶ 15. The probate judge alone has jurisdiction to determine whether a delinquent child shall be returned to its parents or guardians, or committed to one of the several institutions provided by law, under Pub. Acts 1907, Extra Session, No. 6, §§ 1-6, as amended, How. 2nd Ed., §§ 11644-11649, as amended.—In re Broughton, 192 Mich. 418.

¶ 16. Under Comp. L. 1897, § 684, How. 2nd Ed., § 12132, and Pub. Acts 1913, No. 363, a probate judg journ the proceedin of the delinquency time in his discretio Mich. 418.

¶ 17. Pub. Acts a probate judge in the delinquency of pose of the case o produced, on return or as soon thereaf complied with in rela of testimony where of the county agen child confessed to a decision of the court investigation of the and the child adjud In re Broughton, 19

¶ 18. In proceed 1907, Extra Session, How. 2nd Ed., §§ 1 to determine the de is discretionary wi whether or not he p tion.—In re Brought

¶ 19. The order of mitting a delinquen held under Pub. Ac No. 6, §§ 1-6, as a §§ 11644-11649, as and final.—In re Br

§ 7. ——Procedure f

Power of judge at c corpus for child court, see Court

Habeas corpus to be ment as juvenil Corpus § 1.

¶ 20. Under Com person may make charge of a child a detained by a prob other than that of t —In re Mould, 162

INCONSISTENCY

Cross-

Inconsistency—
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- Election betwee
  - Election a
  - Dower, V.
- In charges to j dictment,
- In findings, s IV; Refer
- In pleading, s
- Construction inconsister
  - Contracts, Wills, VI,

Inconsistent Statements—
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See Corporations; Municipal Corporations.
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See Easements; Real Property.
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As harmless error, see Harmless Error § 12; Indictment, XV.
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See Mortgages; Liens (and cross-references under that topic); Easements.
Marketability of title or compliance with sale contract as affected by incumbrances, see Vendors and Purchasers, III.
Covenants against, see Covenants for Title.
Placing or suffering incumbrance as avoiding insurance, see Insurance, VIII, XII.
Notice and record of mortgages and incumbrances and rights of bona fide purchasers and takers, see Notice and Record of Title.
In Custodia Legis—
See references under Custody of Law.
Indebtedness—
See references under Debt; Debtor and Creditor.
Indecency; Indecent Exposure—
As crime, see Crimes, II; Indictment.
Indefiniteness—
See specific topics treating of the writing questioned for indefiniteness, e. g., Contracts; Deeds; Wills; Pleading; Indictment, I; Statutes, V.

INDEMNITY AND CONTRIBUTION.

TREATS of express or implied promises to indemnify one against loss or liability from some specified action or cause, also of liability at law or in equity of one or more of several persons to contribute his share to the discharge of a joint or common liability or to reimburse or exonerate others who are not primarily liable. It excludes guaranty of the principal debt or obligation of a primary debtor (see Guaranty), suretyship as a copromisor to pay another's debt or obligation (see Suretyship), and the liability of indorsers and drawers on default of the makers or acceptors of commercial paper (see Negotiable Instruments). Contracts of insurance against a general kind or class of risk or casualty are treated in Insurance.

Analysis.

I. Bonds and other express agreements.

§ 1. Nature and requisites.
§ 2. Construction and operation.
§ 3. ——Fidelity bonds against defalcations and misappropriations.
§ 4. ——Necessity of loss or liability incurred.
§ 5. ——Liability incurred but not yet paid.
§ 6. ——Liability paid conditionally.
§ 7. ——Conditions on liability; notice and claim.
§ 8. Waiver of rights and conditions by indemnitor.
§ 9. Performance and discharge or breach of obligation to indemnify.
§ 10. Amount and elements recoverable.

§ 11. Lien or other right in property hyp
for indemnity.
§ 12. Agreement for contribution.

II. Implied or equitable liability.

A. In General.

§ 13. Contribution.
§ 14. ——Between joint obligors or debtor
§ 15. ——Amounts and proportions.
§ 16. Exoneration.

B. Between Persons Liable for Wrongdoing.

§ 17. In general.
§ 18. Between parties to illegal contract.
§ 19. Amount and measure of recovery.

III. Actions to enforce.

A. At Law.

§ 20. In general.
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B. In Equity.

§ 24. In general.

I. BONDS AND OTHER EXPRESS AGREEMENTS.

[Note. Contracts and bonds which partake of the character of agreements for indemnity or contribution are numerous and varied. Generally speaking, those which are distinctive in nature or object have been treated in specific topics appropriately named. Thus insurance contracts, injunction bonds, replevin bonds, bonds for supersedeas, and attachment bonds are in a sense indemnity contracts. (See Insurance; Injunctions; Replevin; Stay, II; Attachment.).]

General law of contracts, see Contracts.
General law as to bonds, see Bonds.
By agent against loss on loans or contracts made by him, see also Agency § 94.
Appeal bonds, see Appeal, XVI; Stay, II.
Attachment bonds, see Attachment, IV, B.
Of attorney by client, see Attorneys § 40.
Authority of bank president to give indemnity bond, see Banking § 158.
Authority of bank cashier to make contract of indemnity, see Banking § 56.
Bonds to secure repayment of public moneys deposited in bank, see Banking § 25.
Indemnity for payment of savings deposit without production of pass book, see Banking § 28.
Bonds of building Contracts, VII
Bonds of public co tracts, VII.
Guardian's bonds,
Injunction bonds,
Right of sheriff t executing writ IV, A.
Replevin bonds, se
Exaction of indem ways in condi service plant,
Requiring indemni for violation tempt § 42.
Indemnity contrac ful or other Death by Wr
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§ 1. Nature and
Contribution base see post II.
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to indemnify against loss on a specified subject against specified perils or risks, and in that the undertaking is by an insurer engaged in the business of insurance and a stranger to the subject and the risk. See Insurance.

Nature and requisites of contracts generally, see Contracts, I.

Nature and requisites of bonds generally, see Bonds § 1.

Nature of guaranty contract, see Guaranty.

Nature of suretyship contract, see Suretyship.

Necessity that agreement to answer for another be in writing, see Frauds, Statute of, I, B, and particularly §§ 11, 12.

Indemnity on lost note as provision of foreclosure decree on mortgage securing note, see Foreclosure ¶¶ 396-398.

Necessity of filing contract of indemnity which amounts to chattel mortgage, see Chattel Mortgages § 44, ¶ 189.

¶ 1. A bond of principals, for the payment of notes, to their sureties, within thirty days from maturity, is not a bond of indemnity, but the sureties have an immediate right of action upon breach thereof, with the design to collect enough from the principal to discharge the obligation.—Hall v. Nash, 10 Mich. 303.

¶ 2. One member of a firm covenanted with the other to pay the debts of the firm and save the other harmless therefrom. Such a covenant is not one of indemnity merely, but an omission to pay the creditors as their demands fell due would constitute a breach of it.—Dye v. Mann, 10 Mich. 291.

¶ 3. The lessee of land agreed to raise and deliver to a sugar factory 40 acres of sugar beets and the lessor furnished the money therefor, also taking a mortgage upon the crop. The contract contained no guarantee against loss and provided that no agent of the company should have authority to change its terms and conditions. It appearing that the crop would not be profitable, the lessor refused to furnish more money unless the company would give the same guaranty against loss as it had given to other parties. The manager denied such guaranty to others, but agreed to give him the same guaranty as had been given to certain other parties named, which was in fact a guaranty against loss. The lessor thereupon furnished the necessary money and the parties completed the growing of the crop. Held that the company was liable as on a guaranty against loss.—Constantine v. Kalamazoo Beet Sugar Co., 132 Mich. 480.

¶ 4. Plaintiff applied to the defendant road commissioner to work out highway tax. The defendant set him to work plowing a road upon which a neighbor had sowed grain. Plaintiff told the defendant that the neighbor would make trouble over the plowing. Defendant told him to go ahead and he would stand by him. The neighbor recovered damages against the plaintiff in trespass. Held, plaintiff could recover against defendant on an implied contract of indemnity.—Hoek v. Township of Allendale, 161 Mich. 571.

§ 2. Construction and operation.

General law as to construction and operation of contracts, see Contracts, VI.

Interpretation of bonds generally, see Bonds § 2.

Implication in aid of indemnity contract where part of single transaction involving other contracts, see also Contracts ¶ 735.

Validity of agreement to indemnify officer against action to be taken under disputed law, see Contracts § 53, ¶ 225.

Bond of indemnity to liquor surety as evasion of law disabling wholesaler to be surety for retailer, see Contracts § 50, ¶ 218.

Liability of bailee on contract of indemnity, see Bailments ¶ 22.

Individual or official nature of indemnity contract made by bank officer, see Banking § 60.

Indemnity bond as contract of cashier of his bank, see Banking § 56, ¶ 162.

Contract or obligation secured as part of the bond, see Bonds § 2.

Construction of indemnity mortgage given to bail, see Chattel Mortgages ¶ 272.

Indemnity bond by brewing corporation to sureties on saloonkeeper's bond as ultra vires, see Corporations § 77.

Agreement to make good deficiency as affecting nature of contract as one of factorage, see Brokers and Factors ¶ 8.

Estoppel of person indemnifying mortgagee against tax title to set up such tax title against title of mortgagee as foreclosure purchaser, see Foreclosure ¶ 587.

Check as liquidated indemnity for failure to exercise granted franchise, see Franchises ¶ 17.

Construction of indemnity mortgage to secure bail, see Chattel Mortgages ¶ 272.

Indemnity contract with assignment to person indemnified as chattel mortgage, see Chattel Mortgages ¶ 3.

¶ 5. Where parties indemnified become liable jointly and severally, and one pays the whole debt, the indemnity may properly be regarded as corresponding to the debt, and to be to the parties severally as well as jointly.—Potter v. Brown, 35 Mich. 274.

¶ 6. A guaranty by the organizers of a corporation, who have issued the entire capital stock to themselves as fully paid, that stock purchased from them shall be "non-assessable" until the full par value of all of the stock shall have been expended in the enterprise, operates to indemnify subsequent purchasers against liability under a statute declaring that stockholders shall be individually liable to the creditors of the corporation in an amount equal to their stock, such

liability to be enforced by an action against all of the stockholders, in which the amount payable by each upon the total corporate indebtedness shall be found and determined.—Omo v. Bernart, 108 Mich. 43.

¶ 7. A defendant and sureties are liable on the defendant's bond as a plumber given to save a city harmless from excavations made by him in the streets in the performance of his services for the city, although the testimony shows that in the particular case of injury an excavation made by the defendant had been properly filled except at the point where it was crossed by an excavation made by another contractor where it was left open at the latter's request and not properly guarded by him, even though the latter contractor had also given an indemnity bond to the city.—City of Grand Rapids v. Van Rossum, 126 Mich. 310.

¶ 8. A highway tax levied by the authority of the city is included within the meaning of "any city or school tax" in a contract between a city and a waterworks company by which the city agreed to hold the company harmless from any such taxes.—Alpena City Water Co. v. City of Alpena, 130 Mich. 518.

¶ 9. A stipulation in a contract between a city and a water company that the city will "save and keep harmless the waterworks aforesaid from any city or school tax" applies to all works necessary for the company to erect in the proper conduct of its business and not to existing works only.—Alpena City Water Co. v. City of Alpena, 130 Mich. 518.

¶ 10. A bond to indemnify an owner against any pecuniary loss resulting from the breach of "any of the terms, covenants and conditions" of a building contract covers loss due to the perfecting of materialman's liens for materials which the contractor did not pay for.—Stoddard v. Hibbler, 156 Mich. 335.

¶ 11. Where an indemnity bond contains a renewal provision that the bond may be continued for subsequent years at the option of the company, by issuing a continuation certificate duly signed and attested by its authorized officers and with its corporate seal attached and a new consideration is paid for such continuation the original bond and its renewal constitute two different contracts.—Ladies of Modern Maccabees v. Illinois Surety Co., 196 Mich. 27.

¶ 12. In an action by an indemnitee against whom judgment had been recovered against the indemnitor, the latter may set up any defense which, from the nature of the action or the pleadings, he could not have set up in the former action, had he been a party to it.—Grant v. Maslen, 151 Mich. 466.

from loss or damage on account of any claim for possession set up by plaintiff, and the rent was paid thereon. Title to the premises was adjudged to be in plaintiff, who took an assignment of all the rights and interest of F to the rent paid under the lease. Suit was then brought to recover the rent paid. Held that no recovery could be had on the guaranty to hold the tenant harmless since no recovery had been had against him, and he had suffered no damage.—Sherman v. Spalding, 132 Mich. 249.

¶ 18. A party to a contract cannot sue upon a note deposited by the other party with a third person merely as security for fulfilling the contract, where the damages for nonfulfillment have not been determined in a suit upon the contract.—Rumney v. Coville, 51 Mich. 186.

§ 5. ——Liability incurred but not yet paid.

¶ 19. A contract of indemnity against liability for personal injury or death caused by the operation of street cars, providing that the indemnity should not be payable until settlement by the company and that the latter should have control of the defense of legal proceedings against the assured, constituted an indemnity against liability for damages and not merely indemnity for damages, and therefore payment of a judgment against assured, was not essential to recovery against the company upon a judgment against the assured.—Stephens v. Pennsylvania Casualty Co., 135 Mich. 189.

§ 6. ——Liability paid conditionally.

¶ 20. A bond was given by garnishment plaintiffs to a garnishee pending judgment in the principal suit to indemnify him against harm and damage resulting from the immediate payment to the obligors of a part of a fund which, according to his disclosure in the case, he holds as trustee for the principal defendant. The obligors failed to establish their claim against the principal defendant, and the latter obtained a judgment against the trustee for the amount paid over. The bond was thereupon assigned to the principal defendant under an agreement that the sum realized thereon should be applied upon the judgment. Held, that the defense in a suit on the bond that there was "no harm and damage" since the judgment was not paid is untenable since the assignment constituted a conditional payment of the judgment.—Klock v. Pack, 112 Mich. 670.

§ 7. ——Conditions on liability; notice and claim.

Waiver of provision against retention of employee after knowledge of his default, see post § 8.

¶ 21. Provisions of an indemnity bond limiting liability thereon to losses which shall be discovered within six months after the officers whose defalcations are insured against, cease to occupy their positions and within six months after the expiration of the bond, and requiring suit to be brought within one year after the termination of the bond, are valid and not against public policy.—Ladies of Modern Maccabees v. Illinois Security Co., 196 Mich. 27.

¶ 22. Where a surety company has actual notice from a plaintiff employer of a default by the employee, it cannot escape liability on the ground that the plaintiff did not, as required by the contract, notify it by registered letter.—Crystal Ice Co. v. United Surety Co., 159 Mich. 102.

¶ 23. Where the obligee of an indemnity bond gives notice of the principal's default to the general agent of the surety, who signed the bond for the surety and was actively engaged with the obligee in all that concerned the principal's default, the notice is sufficient to comply with a requirement in the bond for notice.—McPharlin v. Fidelity & Deposit Co. of Maryland, 162 Mich. 141, 146.

¶ 24. Plaintiff surety company bonded the employees of a railway company. A station agent on entering the employment was obliged to give an indemnity bond to the surety company. The railway company's bond provided that shortages must be reported to the surety as soon as discovered. The first shortage that occurred was supposed to be an error and was not reported. Subsequently a substantial shortage was discovered, reported and paid. On a suit on the indemnity bond, held, that the sureties were liable for the whole amount, the railway company being only bound to report shortages which were the evident result of dishonest acts.—Fidelity & Deposit Co. of Maryland v. Maile, 177 Mich. 231.

§ 8. Waiver of rights and conditions by indemnitor.

Notice, claim and other conditions on liability of indemnitor, see ante § 7.

¶ 25. A surety company giving bond to protect an employer against the default of a certain employee is like an insurer, with reference to the binding nature of the acts of its general agents, and, where such agent with knowledge urged retention of the employee, is to be treated like fire insurance and life insurance companies waiving conditions.—Crystal Ice Co. v. United Surety Co., 159 Mich. 102.

¶ 26. The plaintiff employer notified the defendant surety company of the default of the employee as soon as plaintiff learned thereof. Upon the advice of the defendant's general agent, and with the knowledge of the defendant, the plaintiff retained the employee in its service. Held, the company was liable on its bond despite a clause therein prohibiting such retention of the employee after default.—Crystal Ice Co. v. United Surety Co., 159 Mich. 102.

§ 9. Performance and discharge or breach of obligation to indemnify.

Revocation of contribution agreement between taxpayers, see post § 12.

General law as to performance, discharge or breach of contracts, see Contracts.

Sufficiency of performance of agreement to "secure" against loss in firm, see also Contracts ¶ 897.

¶ 27. A bond conditioned on paying any decree that may be obtained in a foreclosure proceeding is not discharged by a sale of the mortgaged premises for less than the amount of the decree.—Rynearson v. Fredenburg, 42 Mich. 412.

¶ 28. Where one partner sold his interest in the copartnership, and took a bond from the purchaser conditioned for the payment of the debts and liabilities of the firm and for his indemnification therefrom, it was held that in an action on the bond proof that such payment to the amount of the penalty of the bond was made either by the purchaser alone, or in connection with the other partner, would prevent a recovery.—Perry v. Spencer, 23 Mich. 89.

¶ 29. The payment in full of the claim of a paving contractor who had agreed to keep the city harmless from loss in consequence of negligence, did not operate as a satisfaction of his liability under his contract so as to preclude the city from recovering the amount of a judgment rendered against it in an action for personal injuries sustained through the negligence of such contractor.—City of Detroit v. Grant, 135 Mich. 626.

§ 10. Amount and elements recoverable.

Loss or liability to indemnitee as condition to recovery against indemnitor, see ante § 4.

Extent and measure of recovery by way of contribution, see post §§ 15, 19.

Limitation of damages on penal bond to damages suffered, see Bonds § 8.

Remote and nonproximate damages from breach of indemnity contract, see also Damages ¶ 60.

¶ 30. Where, on A.'s written agreement to indemnify him, B. signs a replevin bond for C., A. is liable for any proper expense incurred by B. in defending suit on the bond.—Knickerbocker v. Wilcox, 83 Mich. 200.

¶ 31. The measure of damages on an indemnity bond given by A. to a sheriff for levying execution upon goods he has previously attached for B. contrary to a mortgagee's rights, is, in an action by the mortgagee after the goods have been sold under B.'s execution in the attachment suit and also under A.'s execution, the value of the goods on the latter execution.—Lee v. Maxwell, 98 Mich. 496.

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§ 11. Lien or oth
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§ 12. Agreemen

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¶ 36. A bill
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expenses incurred in prosecuting a suit in behalf of all to enjoin the issuance of waterworks bonds will be dismissed as to a defendant who, before any expense was incurred, notified the complainant that he withdrew his name from the contribution agreement, and would have nothing more to do with it, such contracts being revocable until acted upon.—Solomon v. Penoyer, 89 Mich. 11.

¶ 37. In a suit for contribution by one taxpayer against others on account of expenses incurred in prosecuting a suit in behalf of all to enjoin the issuance of waterworks bonds, the evidence tended strongly to show an understanding between the parties that they should pay said expenses according to their assessments. Such an arrangement held to be equitable; and as defendants made no objection on that ground when presented with bills upon that basis, the court declined to disturb a decree based thereon.—Solomon v. Penoyer, 89 Mich. 11.

II. IMPLIED OR EQUITABLE LIABILITY.

A. IN GENERAL.

[Note. All of the joint or fiduciary relationships carrying the right to an accounting or reimbursement involve an implied or equitable liability to contribute or to exonerate, but since the right is an incident to the accountability the cases are treated in the specific topics treating of the relationships. (See Agency; Brokers; Estates of Decedents; Guardianship; Receivers; Trusts; Partnership; Joint Adventures; Tenants in Common; etc.)]

For references to statutes giving or regulating contribution among specific classes of persons, see specific topics mentioned in last preceding reference.

General law as to implied agreements, see Implied Contracts.

Contribution and exoneration of guarantor, see Guaranty.

Contribution and exoneration between sureties, see Suretyship.

Right of broker to sell to indemnify self, see Brokers § 13.

Right of county or municipality paying health and quarantine charges to have action over against other governmental division, see Health § 13.

Abutting owners' liability over to the public for injuries from defective highways, see Highways § 263.

Responsibility of township to indemnify officer for damages incurred in committing trespass, see Townships, V.

§ 13. Contribution.

Contribution based on agreement, see ante § 12.

Contribution between wrongdoers, see post § 17.

Maxim that equality is equity, see Equity § 2.

Between principal and surety, see Suretyship.

Right of party to contract to recover from other for expenses advanced or incurred, see also Contracts ¶ 1026.

Contribution among stockholders liable for corporate debts, see Corporations § 350.

Among corporate officers or between officer and corporation, see also Corporations § 155.

Outlay for expenses as damages on breach of contract, see Damages, I, C.

Right of surety paying judgment to enforce contribution by creditors' suit without suing to new judgment, see Creditors' Suits § 11, ¶ 34.

Indemnity and contribution for corepresentatives, see Estates of Decedents § 301.

Contribution as claim against estate, see Estates of Decedents § 145.

Between partners and joint adventurers in adjusting their rights see Partnership, VII, E; Joint Adventures.

Contribution between paving contractor and board of water commissioners, see Municipal Corporations XII.

Recourse of secondary or accommodation parties to negotiable paper on primary parties, see Negotiable Instruments.

¶ 38. The doctrine of contribution rests upon the maxim, equality is equity.—Comstock v. Potter, 191 Mich. 629.

Provisions of Workmen's Compensation Act as to recovery of indemnity by employer from third person causing injury, see note, 5 N. C. C. A. 803-806.

Reimbursement of master by servant for damages paid one injured by servant's negligence, see note, 2 N. C. C. A. 484-493, 509.

§ 14. ——Between joint obligors or debtors.

Contribution between joint tort feasors, see post § 17.

Between joint adventurers, see Joint Adventurers.

Contribution between partners, see Partnership.

Between persons liable on negotiable instruments, see Negotiable Instruments.

Contribution between tenants in common, see Tenants in Common.

¶ 39. The right to contribution extends to joint contractors, and one who has paid more than his share of the joint obligation may recover contribution from his cocontractors.—Comstock v. Potter, 191 Mich. 629.

¶ 40. One joint obligor may not sue another joint obligor upon their common obligation until he has paid the debt, or a larger portion thereof than, as between himself and his co-obligor, he would be liable to pay; and his action should then be for contribution.—Kalamazoo Trust Co. v. Merrill, 159 Mich. 649.

¶ 41. An agreement in which the seven directors of a building and loan association

finding the assets less than the liabilities agree among themselves that two of them shall deposit with the association their individual notes covering the deficit without recourse against the assets of the corporation and providing that the other directors shall hold the makers of the notes harmless, gives the makers a general authority to pay the notes and exact contribution without resort to the corporate profits.—Crane v. Bayley, 126 Mich. 323.

§ 15. ——Amounts and proportions.

Extent of recovery upon indemnity bonds or agreements, see ante § 10.

As between wrongdoers, see post § 19.

¶ 42. Where one of several indorsers has been held for the full amount of the note, he is entitled to contribution from the rest; and if any of the others have become insolvent or are beyond the reach of process, he is entitled, in equity, to recover from the remainder the proportion they would have to pay of the whole amount if insolvents and nonresidents were excluded.—Stewart v. Goulden, 52 Mich. 143.

¶ 43. A joint debtor cannot be compelled wholly to reimburse another who has paid the joint debt, unless as between themselves the latter is surety.—In re Stewart v. Bruen's Estate, 39 Mich. 619.

¶ 44. One of several defendants in execution who pays the full amount may recover from each of his codefendants the proportionate share and no more.—Thornton v. Damm, 120 Mich. 510.

§ 16. Exoneration.

Agreements for contribution, see ante § 12.

Equitable or implied right to contribution, see ante § 13 et seq.

Right of agent to reimbursement, see Agency § 102.

Exoneration of representatives and distributees of decedents' estates, see Estates of Decedents § 301.

Subrogation to work out exoneration, see Subrogation.

¶ 45. Exoneration is the right of a person secondarily liable to call upon the party, primarily liable, to discharge the debt, or to reimburse him, if he has paid it.—Comstock v. Corbin, 191 Mich. 639.

¶ 46. Where the stockholders of a corporation were indorsers of notes of the corporation and subsequently the property of the corporation was transferred to one stockholder as trustee for the benefit of all the stockholders, and a trust agreement executed which recited that the trustee had borrowed certain sums of money as trustee and that the money had been used to purchase the equity of the corporation in certain real estate, and provided that complainant should handle the real estate and that if the prop-

his own wrong.—Upham v. Dickinson, 38 Mich. 338.

¶ 51. Where a duty rests upon parties jointly, and is neglected by both, neither can sue the other for damages resulting from their mutual faults.—Underwood v. Waldron, 33 Mich. 232.

¶ 52. The exception to the general rule as to nonliability for contribution between joint tort feasors that whenever the wrongful act of one person results in liability being imposed upon another, the latter may have indemnity from the person actually guilty of the wrong is inapplicable where one of such tort feasors seeking indemnity, was, in an action commenced against it, found to be actively negligent.—Detroit, G. H. & M. Ry. Co. v. Boomer, 194 Mich. 52.

¶ 53. There are cases where parties are technically wrongdoers in which the claim of one who has satisfied their liability to contribution from the others is not only equitable but contravenes no rule of public policy.—Upham v. Dickinson, 38 Mich. 338.

¶ 54. As a general rule whenever the wrongful act of one person results in liability being imposed upon another, the latter may have indemnity from the person actually guilty of the wrong.—Township of Hart v. Noret, 191 Mich. 427.

¶ 55. The rule that contribution cannot be enforced as between joint wrongdoers does not apply to partners against some of whom damages have been recovered for the firm's unintentional violation of a patent.—Smith v. Ayrault, 71 Mich. 475.

¶ 56. While there is no right of contribution between joint tort feasors, there may be a right to indemnity under a contract where the plaintiff is liable to a third party, but is not in pari delicto with his co-wrongdoer.—Hoek v. Township of Allendale, 161 Mich. 571.

§ 18. Between parties to illegal contract.

General law as to effect of illegal contracts, see Contracts, IV, D.

¶ 57. Parties to an illegal pooling agreement in interstate commerce, though it is fully executed, are not liable to contribute to payment of a compromise judgment against one of their number for injury suffered from a defect in a dock used by all; since it is the rule that a recovery based on an illegal executed contract must be based on benefits received by the contributory parties.—White Star Line v. Star Line of Steamers, 141 Mich. 604.

¶ 57a. Parties to a pooling agreement of steamers are not bound to contribute to a compromise judgment paid by one of them sued for injury suffered by a defect in a dock patronized by all, where after being notified of a suit brought upon their denying liability under the claim, the one sued with the dock owner and cast in judgment appealed and later settled on payment of half of a less sum than the amount of the judgment appealed from, which compromise included a sum paid to the husband of the plaintiff in that suit, and where they were not consulted about the settlement and had no knowledge of it.—White Star Line v. Star Line of Steamers, 141 Mich. 604.

§ 19. Amount and measure of recovery.

Amount and elements of recovery in indemnity, see ante § 10.

Measure of contribution in general, see ante § 15.

Admeasurement of damages as between several persons or for distinct torts, see Damages § 96.

¶ 58. A deputy sheriff was deceived by certain persons into converting property for their benefit. Judgment was recovered against him for the conversion, and he, in turn, suing them in tort for the damage caused him by their fraud, recovered the amount of the judgment obtained against himself. This was held a proper measure of damages.—Kenyon v. Woodruff, 33 Mich. 310.

III. ACTIONS TO ENFORCE.

A. AT LAW.

§ 20. In general.

Defenses available to indemnitor in action by indemnitee, see ante § 2.

Validity of provisions in bond limiting time within which suit may be brought, see ante ¶ 21.

Loss or damage to indemnitee as condition to suit against indemnitor see ante § 4.

Necessity of default or loss as conditions to enforcement of indemnity, see ante § 7.

Enforcement in equity, see post § 24.

Parties to actions upon indemnity or for contribution, see Parties.

Amendments of pleadings, see Pleading, VI.

Reference in argument to indemnity as error, see Argument of Counsel § 25.

When assumpsit is proper, see Assumpsit, II.

Actions for contribution between parties to negotiable instruments, see Negotiable Instruments, XIV.

Enforcing contribution between partners, see Partnership.

Bringing in joint tort feasors in libel for purpose of enforcing contribution, see Jud. Act, chap. XX, § 25; Comp. L. 1915, § 12761.

¶ 59. An action on a bond providing for indemnity against injury from negligence, joining the surety and principal as defendants, is not subject to the objection that an action of contract against the surety is joined with an action of tort against the principal.

—Cox v. Fidelity & Deposit Co. of Maryland, 157 Mich. 59.

¶ 60. A general count for money paid is sufficient in an action by a bondsman to recover back money paid for the benefit of his principal; and if the action is brought on both general and special counts, any objections based on the latter are immaterial.—Mitchell v. Chambers, 43 Mich. 150.

¶ 61. The plea of non damnificatus is not the proper plea to a declaration upon a covenant to indemnify, etc.—Wheelock v. Rice, 1 D. 267.

§ 21. Issues and variance.

General law as to issues and variance, see Pleading IX, X.

Variance in suit on bond as to debt secured, see also Bonds § 6.

Variance in actions for contribution between comakers of notes, see Negotiable Instruments, XIV.

¶ 62. Evidence of an agreement by a loan agent to pay any deficiency that might result on a foreclosure by the principal on loans made by the agent by reason of insufficient security or defect of title is not admissible in an action against the agent unless specially counted upon.—Perkins v. Hershey, 77 Mich. 504.

¶ 63. There was no error in receiving in evidence over an objection for variance the identical contract of agency set forth in the declaration, in assumpsit, on an agent's fidelity bond, though other evidence showed that the contract was antedated.

§ 22. Burden of proof, presumptions and evidence.

Proof of compliance with condition of bond to pay debts and liabilities of firm, see ante ¶ 28.

General law as to proof, presumptions and evidence, see Evidence.

Parol evidence to show that several independent mortgages were dependently and contributively liable, see Evidence ¶ 1125.

Files in other action as evidence of nature of indemnity agreement, see Evidence ¶ 2775.

Admissibility of judgment in action on contract of indemnity against it, see also Former Adjudication § 3.

Conclusiveness of judgment against indemnitee on indemnitor, see Former Adjudication §§ 60, 61.

Judgment against principal as evidence against surety, see Suretyship, IV.

Sufficiency of proof on foreclosure of mortgage to indemnify accommodation party, see Foreclosure ¶ 358.

Cross-examination as to existence and terms of contract to reimburse, see Examination of Witnesses § 49.

¶ 64. A. and B., two sons-in-law, jointly agreed to support C., their mother-in-law, during her natural life, and after B.'s death A. brought a claim a excess alleged to hav half toward the supp offered by the estate C. had spent at B.'s more than half the rebut plaintiff's cla Estate, 63 Mich. 79.

¶ 65. Where the bond was fully mad and it was shown t cuted between the p sufficiently establish on an indemnity bo Wisner, 38 Mich. 82

¶ 66. There is su surety on an agent' failing to account a in proof that applic the agent to his su his indebtedness to —Colby Wringer Co

¶ 67. Where a su ing on an employee' of the employer's fa amination of the e the fact that the m dence is inadequat fense.—Crystal Ice 159 Mich. 102.

¶ 68. In an actio his subcontractor, c nify plaintiff for da negligence of the s ting up guards and cavations, proof th the excavation, did by guards or light son was injured on a case against defe 151 Mich. 466.

¶ 69. A judgme against the person i facie evidence agai to him so far as e rendition of the ju the cause of action and therefore of th fered.—Grant v. Mi

¶ 70. It is imm demnity from the p he had notice of th was cast in judgm is not offered as c mary wrongdoer bu dence of the recov its amount, and w on the stand as a amined by defends suit.—Grant v. Mas

§ 23. Questions of tions.

General law as to see Trial, VI.

Instructions as to status and rights of principals and sureties, see Suretyship, IV.

¶ 71. Where, in an action against an agent upon a bond given to secure the performance of his contract with his principal, there is evidence tending to show that the agent received some items, at least, under the original contract, for which the bond would stand as security, the court cannot properly deny plaintiff the right to a verdict upon the ground that the amount so received is in dispute, it being the province of the jury to say how many and what items are shown to have been due to plaintiff.—Union Cent. Life Ins. Co. v. Howell, 101 Mich. 332.

B. IN EQUITY.

§ 24. In general.

Equitable right to contribution or exoneration, see ante II.
Actions at law to enforce, see ante § 20.
Propriety of supplemental bill to enforce contribution, see Equity § 237.
Suit for share due from decedent on mutual contract for support of mother of contracting parties, see Estates of Decedents ¶ 586.
Equity jurisdiction in suit for contribution from representative of surety involving cosureties' solvency, see Estates of Decedents ¶ 590.
Enforcing contribution between persons liable on negotiable instruments, see Negotiable Instruments, XIV.
Enforcing contribution between partners, see Partnership, VII.
Enforcing contribution between sureties, see Suretyship, IV.
Contribution between beneficiaries under a trust mortgage and purchasers of the property, see Trusts, XI.

¶ 72. Courts of law have concurrent jurisdiction with courts of equity to compel contribution, but where the remedy at law is inadequate or doubtful, a bill in equity is the proper remedy.—Comstock v. Potter, 191 Mich. 629.

¶ 73. Equity has jurisdiction on the ground of avoidance of multiplicity of suits, of an action to compel stockholders who are indorsers of and are jointly liable on notes given for corporate indebtedness, each of which respectively represents the interest of a particular stockholder, and is respectively signed by him as maker and by the others as indorsers, to make contribution to another stockholder and indorser who has paid the indebtedness.—Comstock v. Potter, 191 Mich. 629.

¶ 74. Cosureties who have paid the whole of a judgment rendered against all the sureties may jointly file a bill in equity to effect the removal of obstacles fraudulently interposed to prevent their obtaining contribution from the other sureties.—Smith v. Rumsey, 33 Mich. 183.

¶ 75. An administrator filed a bill for indemnity from the estate, or from the widow and heirs, alleging that by the advice of the judge of probate he had turned the property over to the widow and heirs, believing that they would take care of debts remaining unpaid; that he had received his discharge, but was afterwards cited to show why a particular claim had not been paid; that the judge of probate decided that the estate could not be reopened and he must resort to equity; and that he had himself paid the claim. Held, that the administrator had disregarded the statutory provisions governing the management of estates, and that the case was not within any head of equity; and the bill was dismissed.—Breining v. Schneider, 46 Mich. 385.

INDENTURES TO INDEPENDENT CANDIDATES.

Cross-References.

Indentures—
Of apprenticeship, see Apprentices.
In the sense of deeds, see Deeds; Execution of Instruments.
Independent Candidates—
See Elections § 27.

INDEPENDENT CONTRACTS.

TREATS of the status and liabilities and duties toward third persons of one employing an independent contractor in work which proves injurious.

Analysis.

I. Who are; distinction from agents and servants.

§ 1. In general.
§ 2. Persons under supervision or control.
§ 3. Servants of third person engaged for work.

II. Liability for injuries done by contractor.

§ 4. In general.
§ 5. Acts dangerous or injurious in ther
§ 6. Acts under control or supervision.
§ 7. Estoppel to plead independent cont
§ 8. Presumptions and evidence.

General law of negligence, see Negligence.
Contract rights and liabilites of parties to the contract, see Contracts; and see also specific topics, e. g., Building Contracts; Public Contracts; Mechanics' Liens.
Contracts, express and implied, for indemnity against loss or liability by act of independent contractor, see Indemnity.
Person regarded as principal of servant engaged on work involving independent contract, see Master and Servant.
Right of independent logging contractor to statutory lien for services, see Forestry ¶ 64.

I. WHO ARE; DISTINCTION FROM AGENTS AND SERVANTS.

§ 1. In general.

See also post ¶¶ 10, 11.
Persons under supervision or control, see post § 2.
Servants of third persons, see post § 3.
Presumptions and evidence as to nature of relation, see post § 8.
Proof of relation of independent contractor as variance in action for injuries to servant, see Master and Servant, III.
Nonliability for personal injuries to independent contractor, see Master and Servant, III.
Contract as best evidence of relation of builder to owner, see Evidence § 127.
Labor claims and contract claims against corporate stockholders, distinguished, see Corporations § 332.

¶ 1. The defendant gave one Crawford and one Smith a license to go in upon and clear certain wild land at so much per acre. They had full liberty to decide with reference to the manner, place and amount of clearing. Fires set by Crawford spread on the plaintiff's land. Held, that as Crawford was an independent contractor, defendant was not liable.—Rogers v. Parker, 159 Mich. 278.

¶ 2. Where persons under contract to dig a shaft in defendant's mine have entire charge and supervision of the work, the defendant is not liable for any injury to one of his employees caused by a defect in the contractors' apparatus of which defect contractors had notice and which it was their duty to remedy.—Lendberg v. Brotherton Iron Mining Co., 75 Mich. 84.

¶ 3. A manufacturer, through whose yards railroad switch tracks were built, was not responsible for
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terms of a written contract between defendants, the construction company agreed to construct a telephone plant and system for the telephone company, and to assume all risks connected therewith; to provide at its own expense all labor and material, and deliver the plant to the telephone company when completed; to install 10,000 telephones and procure 7,500 subscribers' contracts; to procure all necessary real estate, permits, and rights of way, and transfer same to the telephone company; to endeavor to secure and transfer to the telephone company property and franchises belonging to another telephone company; to employ a chief engineer, who should be selected by it and who should be under its control, and subject to removal by said construction company; to protect the telephone company against infringements of patent by its selection of tools, appliances, etc., furnished by it to the telephone company; and in order to facilitate the management of the plant upon completion, to obtain and train operators, linemen and workmen, and engage them for use of the telephone company after the termination of the contract. The plant and system were outlined in plans and specifications already prepared and identified, and such other plans and specifications as should thereafter, in the judgment of the telephone company's consulting engineer, be necessary or proper. The telephone company's consulting engineer was to approve all materials for the plant before they were put in, and the construction company was to carry out all his directions, explanations, and instructions. Said consulting engineer was to make all changes in the extent and character of the work. Held, the finding of the jury that the construction company was the servant of the telephone company, and not an independent contractor, should be sustained.—Larson v. Home Tel. Co., 164 Mich. 295. (Hooker, J. dissenting.)

§ 3. Servants of third person engaged for work.

See also ante ¶ 3, post ¶ 17.

¶ 9. One who has been struck and injured by a barrel of sugar suddenly and without notice rolled from defendant's warehouse upon the sidewalk by a truckman in the employ and entirely under the control of a cartage company that is under contract with defendant to do its cartage, cannot hold such defendant liable.—Riedel v. Moran, Fitzsimons Co., 103 Mich. 262.

II. LIABILITY FOR INJURIES DONE BY CONTRACTOR.

§ 4. In general.

Acts intrinsically dangerous, see post § 5.
Setting fires, see also ante ¶ 1.
Digging mine shaft, see ante ¶ 2.
Controlled or supervised acts, see post § 6.
Estoppel to claim contract independent, see post § 7.
Evidence of control and responsibility, see post § 8.
Liability for servant's torts, see Master and Servant, III.
For cases on the liability of the independent contractor to third persons injured by his acts or negligence or by the acts or negligence of his servants, see Negligence; Master and Servant, IV; and especially topics treating of negligence respecting particular things and places, e. g., Highways, XII, G, XIII, B.
Nonliability for acts of independent contractor injuring bridge in log drive, see Bridges ¶ 79.
Liability of owner or occupier of premises for injury to servant of independent contractor, see also Buildings § 6.
Liability of carrier for defects in cars and equipment furnished by others, see Carriers § 160.
Nonliability of county to contractor's servant injured in county building where working, see Counties § 36.
Liability of city for injuries to employee of contractor from defective streets, see Highways § 239.
Liability of public for injuries in highways due to acts or neglect by independent public contractors, see Highways § 254.
Liability of abutting owner for injury from sign erected by independent contractor, see Highways ¶ 1008.

¶ 10. Where an employee is exercising a distinct and independent employment, and is not under the immediate control, direction or supervision of the employer, the latter is not responsible for the negligence or carelessness of the employee.—De Forrest v. Wright, 2 Mich. 368.

¶ 11. Where a public licensed drayman was employed to draw merchandise from a warehouse and deliver at the store of his employer, and through his carelessness a barrel of the merchandise rolled against and injured the plaintiff, the employer was held not liable.—De Forrest v. Wright, 2 Mich. 368.

¶ 12. Where a boom company which has built a series of dams in a river lets to contractors the work of driving and delivering to itself at the mouth of the river a large quantity of its logs, it is liable for the damages caused to a third person by floods which the condition of the contract rendered necessary in the contractors' operations.—McDonald v. Rifle Boom Co., 71 Mich. 61.

¶ 13. A landlord is liable to the tenant for damages resulting from the negligence of an independent contractor whom he has employed to put in an automatic sprinkler system, such negligence consisting in the placing of a low fusing sprinkler head underneath a skylight, where solar heat opened it.—Peerless Mfg. Co. v. Bagley, 126 Mich. 225.

¶ 14. Where a spectator at a university athletic game is injured by the fall of an inadequate bleacher, the athletic association is not relieved of liability by the fact that the bleacher was put up by a competent builder, was inspected by competent engineers, and pronounced safe, since the spectator, having paid for admission, had a contract right to be protected against all defects except those not discoverable by reasonable care.—Scott v. University of Michigan Athletic Ass'n, 152 Mich. 684.

¶ 15. A street railway company owning a park used as a pleasure resort and to which its track extends is not, by advertising as among the attractions of the park a roller-coaster that is owned and operated by a third person, made liable for the carelessness of such operator; the coaster being itself notice of its character and purpose.—Knottnerus v. North Park St. R. Co., 93 Mich. 348.

¶ 16. A. leased his mine to B., B. agreeing to become responsible for any injuries to workmen, etc. A. retained no control over the mine, which was in an ordinarily safe condition. One of B.'s workmen was injured by a fall of rock in the mine. Held, that A. could not be made liable for damages.—Samuelson v. Cleveland Iron Min. Co., 49 Mich. 164.

¶ 17. Defendant contractors contracted to erect a water tower for a county. They sublet the contract to a bridge company, which furnished the material and constructed the tower according to plans furnished by it, and satisfactory to the county. Held, the defendant contractors were not liable for an injury to plaintiff, employed in building the tower, due to defective beams used in the construction, as the bridge company was an independent contractor.—Kilts v. Board of Sup'rs Kent Co., 162 Mich. 646.

¶ 18. The owner of a plant for manufacturing sash and doors, is not liable to a brakeman who was injured by being struck and thrown from a freight car, by lumber standing near the siding on premises owned or occupied by such owner, where the latter, who owned the lumber, had contracted with another to take it from the cars, pile it and put it in the kiln and take it from the mill and manufacture as much of it into doors as he wanted and load it upon cars at an agreed price, the rest being used by the owner for other purposes; such other party being an independent contractor.—Wright v. Big Rapids Door & Blind Mfg. Co., 124 Mich. 91.

Liability of master for acts of independent contractor in violation of law, see note, 7 N. C. C. A. 724-736.

Duty and liability of independent contractor to employees of common employer, see note, 3 N. C. C. A. 553-555.

§ 6. Acts under control or supervision.

¶ 23. Where a mining corporation contracting for the removal of ore reserves to itself such arrangements as are necessary for the protection of workmen, it is liable for such injuries as happen to employees of the contractors without the fault of the employees.—Lake Superior Iron Co. v. Erickson, 39 Mich. 492.

¶ 24. The owner of premises is not relieved from liability for the negligence of a contractor in excavating caisson pits on his land for a foundation where under the contract the architect may dictate the manner and order of putting down the pits and may partially control the work of erecting the building.—Bissell v. Ford, 176 Mich. 64.

§ 7. Estoppel to plead independent contract.

¶ 25. Defendants, composing an unincorporated driving association, employed an independent contractor to clear certain lands. Plaintiff, owning adjoining land, warned defendants of the danger of the fires they were setting. The defendants gave no indication to plaintiff that an independent contractor was in charge, stated that they would present the matter to the stockholders, and later told plaintiff to mind his own business. Held, defendants were equitably estopped in a suit for injuries arising from the spread of the fire from setting up the plea that the work was in charge of an independent contractor.—Inglis v. Millersburg Driving Ass'n, 169 Mich. 311.

§ 8. Presumptions and evidence.

¶ 26. In an action against the owner of a reinforced concrete building, the contractor, and a materialman furnishing material and plans for the concrete work, for the death of a carpenter due to the collapse of a portion of the second floor of the building which deceased, with other employees, was endeavoring to shore up to keep from falling, an instruction that if the jury believed from the evidence that the owner let the contract to different contractors and during the progress of the work reserved to himself certain control over the manner of executing the work and assumed control, in whole or in part, of the work, and by reason of such control the death of deceased was caused without any fault upon his part, the owner was liable, held improper, where the only evidence as to assumption of control related to another portion of the building.—Bayne v. Everham, 197 Mich. 181.

INDEPENDENT CONTRACTS to INDEX.

Cross-References.

Independent Contracts and Promises—
Entirety and severableness of contracts, see Contracts § 167; Sales, II.
Separate and independent covenants and conditions, see Contracts § 176.
Original promises and promises collateral to debt of another within statutes of frauds, see Frauds, Statute of, § 130.
Guaranty contracts, see Guaranty.

Indeterminate Sentences—
See generally Crimes § 32; Indictment, XI.
Constitutionality of law, see Constitutional Law, II.

Index; Indexing—
See Records; Notice and Record of Title, II.
Indexing record on appeal or error, see Appeal § 174.

INDIANS.

TREATS of the tribal and individual status and rights of Indians.

Analysis.

§ 1. In general; status and tribal relations.
§ 2. Indian treaties.
§ 3. Land titles and reservations.
§ 4. Individual rights, titles and allotments.

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§ 1. In general; status and tribal relations.

Indian treaties see post § 2.
Land titles and allotment rights, see post §§ 3, 4.
Power of state to punish sale of liquor to Indians, see Constitutional Law ¶ 538.

¶ 1. The validity of polygamous marriages among Indians, and the right of the offspring of such marriages to inherit, considered.—Compo v. Jackson Iron Co., 50 Mich. 578.

¶ 2. As Indians in tribal relations are not subject to state laws, polygamous marriages between such Indians must be regarded as valid by our courts if they were valid by Indian laws; there being no law or treaty of

the United States on the subject.—Kobogum v. Jackson Iron Co., 76 Mich. 498.

§ 2. Indian treaties.

¶ 3. In construing an Indian treaty courts should be guided by the obvious intention of the parties as expressed by the instruments, and should give effect to such intention.—Stockton v. Williams, 1 D. 546.

¶ 4. Enlarged rules of construction are adopted in reference to Indian treaties and they are not construed to the prejudice of the Indians.—Auditor-General v. Williams, 94 Mich. 180.

¶ 5. A treaty between the United States and an Indian tribe should be construed, not according to the technical meaning of the words to lawyers, but in the sense in which it would be naturally understood by the parties to the treaty.—Francis v. Francis, 136 Mich. 288, affirmed in 203 U. S. 233, 51 L. ed. 165, 27 Sup. Ct. Rep. 129.

¶ 6. The court cannot, from a construction of the treaty of Saginaw of Sept. 24, 1819, interpret the words "Indians by descent," as used therein, to mean persons of mixed white and Indian blood only, and not full-blooded Indians.—Campau v. Dewey, 9 Mich. 381.

¶ 7. The court cannot say from the language of the Saginaw treaty, the policy of the government as indicated by the Indian treaties, public records and dispatches, and the habits and modes of life of the Chippewa nation, that a presumption arises that all the reservees in said treaty were persons of mixed white and Indian blood.—Campau v. Dewey, 9 Mich. 381.

§ 3. Land titles and reservations.

¶ 8. By a treaty made in 1807 between the United States and the Chippewa, Ottawa, Pottawattomie and Wyandotte tribes of Indians certain lands near Detroit, among others, were reserved to these tribes. The treaty did not show on its face what tribe was in the occupancy of these lands. By another treaty with the Pottawattomies in 1827 these lands therein stated to have been before "reserved to the use of said tribe" were ceded to the United States. Held that, this treaty having recognized the right to their reserve to have been in the Pottawattomies, the courts are bound so to regard it, and must consider the treaty of 1827 as extinguishing the reserve.—Maiden v. Ingersoll, 6 Mich. 373.

§ 4. Individual rights, titles and allotments.

Presumption as to race of reservee, see also ante § 2.

Best evidence of selection of lands under treaty, see Evidence § 131, ¶ 659.

Parol proof of identity of Indian land reservee to whom patent issued under treaty, see Evidence ¶ 1095.

Certified copies of l
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Sufficiency of certifi
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Jud. Act, chap.
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Exemption of pers
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breeds, and that wishing to testify their gratitude they had assigned certain locations of land to such individuals, and had united in a strong appeal for the allowance of the same in the treaty, but that no such reservations could be permitted in carrying out the instructions of the President, it was agreed that, in addition to the general fund set apart for half-breeds in another article, the sum of $48,148 should be paid for the relinquishment of this class of claims, to be divided in the following manner: "To John A. Drew, for a tract of one section and three-quarters to his Indian family at Sheboygan Rapids, at $4 an acre," etc. Held, that the money was given to Drew absolutely and not in trust for his Indian family.—Cook v. Biddle, 2 Mich. 269.

¶ 17. An Indian's equitable interest held under an agreement with the lessee in a war department lease of mining land that had been recognized by congress passed by descent to the heir of said Indian.—Compo v. Jackson Iron Co., 49 Mich. 39. And see Compo v. Jackson Iron Co., 50 Mich. 578.

¶ 18. No disposition by an Indian of land in expectancy under the treaty of October 18, 1864, is valid.—Raymond v. Shawboose, 34 Mich. 142.

INDICIA OF TITLE OR RIGHT to INDICTABILITY.

Cross-References.

Indicia of Title—
See Deeds; Mortgages; Sales; Chattel Mortgages; Wills; Frauds, Statute of.
Records of title, see Notice and Record of Title, II; Chattel Mortgages, I; Sales, XII.
Estoppel or fraud by false or misleading indicia of title, see Estoppel § 33; Fraudulent Conveyances; Chattel Mortgages, I, D.
Evidence of title, see specific topics treating of the title or estate or of actions pertaining thereto, e. g., Ejectment.
Indictability—
Criminality of acts, see Crimes.

INDICTMENT AND PROSECUTION.

TREATS of the general law of criminal procedure, including the indictment or information, evidence and trial practice, sentence and review. The substantive law of crimes is treated in Crimes and Punishments and the law of arrest and preliminary examination and bail in Arrest, Commitment and Bail. For reasons of convenience several of the crimes have been given a separate treatment in specific topics, to wit, Assault and Battery; Combinations and Monopolies; Fish and Game; Food; Health; Homicide; Intoxicating Liquors; Larceny; Libel; Nuisances; Rape; Seduction. In the foregoing topics matters peculiar to them only are treated, while matters of general applicability are to be found in this topic. For matters peculiar to crimes other than those just mentioned see specific sections throughout this topic.

Analysis.

I. IN GENERAL; INDICTMENTS AND INFORMATIONS (§§ 1-81).
II. TIME FOR PROSECUTION; LIMITATIONS (§§ 82-84).
III. JURISDICTION AND PLACE FOR PROSECUTION; VENUE AND CHANGE (§§ 85-100).
IV. PREPARATORY AND PRELIMINARY MATTERS (§§ 101-103).
V. ARRAIGNMENT AND PLEAS (§§ 104-120).
VI. POSTPONEMENTS OR CONTINUANCES (§§ 121-126).
VII. DISMISSAL OR NOLLE PROSEQUI (§ 127).
VIII. EVIDENCE (§§ 128-324w).
IX. TRIAL AND TRIAL PRACTICE (§§ 325-474).
X. NEW TRIAL AND MOTION IN ARREST (§§ 475-483).
XI. SENTENCE AND JUDGMENT, AND EXECUTION THEREOF (§§ 484-499).
XII. RECORD OR MINUTES AND COMMITMENT (§§ 500-506).
XIII. COSTS AND FEES (§§ 507-509).
XIV. SAVING QUESTIONS FOR REVIEW; EXCEPTIONS (§§ 510-532).
XV. HARMLESS ERROR AND GROUND FOR REVERSAL (§§ 533-567).
XVI. REVIEW (§§ 568-640).
XVII. PROCEEDINGS AFTER REVIEW (§§ 641-644).
XVIII. TRIALS BEFORE JUSTICES AND MINOR COURTS (§§ 645-669).

I. In general; indictments and informations.

A. Nature of Prosecution, Finding, Filing, and Formal Requisites of Charge.

§ 1. Nature and propriety of criminal prosecution.
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§ 3. Proper mode and form of accusation; indictment or information.
§ 4. Preliminary accusation, arrest, examination, and commitment.
§ 5. ——As basis for information.
§ 6. Information based on lost commitment.
§ 7. Grand jury and proceedings before it.
§ 8. Proper persons to make complaint.
§ 9. ——Adultery.
§ 10. Signing and verifying informations.
§ 11. ——Sufficiency of verification.
§ 12. ——Jurat and signature to same.
§ 13. Time and term for filing.
§ 14. Conformity of information to examination and commitment.
§ 15. ——Variance in particulars of crime.
§ 16. ——Addition of counts for included or varying aspects of offense.
§ 17. Averments or recitals as to preliminary proceedings.
§ 18. Joint and separate indictments or informations.
§ 19. Duplicates and copies of information or indictment.
§ 20. Indorsement of names of witnesses.
§ 21. ——Adding or striking off names.

B. Substance and Requisites of Accusing Part.

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§ 23. Requisites and sufficiency of averments.
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§ 25. Averments as to time.
§ 26. Averment as to feloniousness or unlawfulness, knowledge, and intent.
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§ 28. Describing and laying title to property.
§ 29. Describing papers and documents.
§ 30. Averments as to foreign or technical words.
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§ 32. Negativing exceptions.
§ 33. Averments as to aiding and abetting.
§ 34. Crimes by convicts in prison.
§ 35. Averments as to previous convictions.
§ 36. Concluding words.
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§ 38. Bills of particulars.
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§ 40. Averments in words of statute.
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§ 43. For specific statutory and common-law crimes.
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§ 43a. Adultery.

§ 43a. Arson and statutory burnings, attempts and solicitations.
§ 43a. Assault and battery.
§ 43b. Banking crimes.
§ 43b. Bigamy and polygamy.
§ 43b. Bribery, embracery and corruption of agents.
§ 43b. Burglary, breakings and attempts.
§ 43b. ——Possession of burglars' tools.
§ 43c. Conspiracies.
§ 43c. Cruelty.
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§ 43e. Election crimes.
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§ 43f. Criminal frauds and obtaining signatures.
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§ 43i. Indecency and obscenity.
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§ 43m. Malicious mischief or injury to property.
§ 43o. Obstructing justice and contempts.
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§ 43p. Perjury and subornation.
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§ 43r. Rape and assaults and attempts thereat.
§ 43r. Receiving stolen goods.
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§ 43s. Seduction.
§ 43t. Threats.
§ 43u. Unlawful practice of profession or unlicensed business.

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§ 45. Propriety of joinder of counts and charges.
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§ 47. Time for election.
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§ 57. ——As to preliminary proceedings.
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§ 60. ——Defects in grand jury or proceedings before it.
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§ 63. Grounds and office of motion to quash.
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§ 72. ——Formal amendments after verdict.

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§ 76. ——As to duplicity.
§ 77. Variance of averments and proofs.
§ 78. ——As to time.
§ 79. ——As to principalship or accessary part.
§ 80. ——Proof of lesser or included crime.
§ 81. ——Proof of greater crime than charged.

II. Time for prosecution; limitations.

§ 82. In general.
§ 83. Commencement of prosecution and computation of time.
§ 84. Suspension of limitations.

III. Jurisdiction and place for prosecution; venue and change.

§ 85. Jurisdiction in general.
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§ 631. ——Discharge of jury.
§ 632. ——Rulings on new trial motions.
§ 633. Verdicts and findings on evidence.
§ 634. ——On exceptions before judgment.
§ 635. Sufficiency of evidence.
§ 636. Grounds and propriety of remand for new trial.
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XVII. Proceedings after review.

§ 641. In general.
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§ 657. ——Binding out or appren
§ 658. Sentence to reformatory.
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§ 661. Costs and fees.
§ 662. Appeals.
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§ 666. ——Judgment or relief on
§ 667. Retrial or sentence after r
§ 668. Certiorari.
§ 669. ——Review and judgmen

[Note. In this digest the topical arrangement of criminal matters is designed to embrace all criminal matters in a few topics, to wit, the general and substantive law of crimes in Crimes and Punishments, Prisons and Jails, Reformatories, Pardons and Paroles, and the procedural law in Arrest, Commitment and Bail, in Extradition, in Search and Seizure, and in Indictment and Prosecution. To this plan of treatment certain exceptions have been made because the crime and the tort were so similar as to make it advisable to combine them in one topic or because the crime was incident to regulation or because the volume of matter peculiar to the crime was great enough to require a separate topic. The crimes so excepted are treated in the following topics: Assault and Battery; Combinations and Monopolies; Fish and Game; Food; Health; Homicide; Intoxicating Liquors; Larceny; Libel and Slander; Nuisances; Rape; Seduction. Even in respect to these crimes the decisions that are general to criminal law and not peculiar have been treated in Crimes, I, or in Indictment and Prosecution.]

Search warrants and seizures, see Searches and Seizures.

Validity of laws questioned as infringing constitutional rights of persons accused of crime, see Constitutional Law, IX.

Right to jury trial, see Jury, I.

Privilege against self-crimination and immunity from prosecution on self-given testimony, see Examination of Witnesses, IV; Witnesses, I.

Admissibility of self-given criminating testimony, see post §§ 152, 153.

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Actions of debt for penalties, see Penalties.
Debt for penalty for liquor law violations, see also Intoxicating Liquors, VI, B; Penalties.
Nature of bastardy proceedings, see Bastards § 4.
What regarded as criminal prosecutions within the law of malicious prosecution, see Malicious Prosecution, II.
What regarded as prosecutions triable by jury, see Jury, I.
Nature of proceedings for violations of municipal ordinances, see Municipal Corporations, XVI, B.
Right to jury trial dependent on nature of proceeding, see also Jury, I.
Indictment or information as improper mode of prosecuting for penalty for highway obstruction, see Highways § 193.
Enforcement by indictment and information of duty to keep highways in repair, see also Highways ¶ 1027.

¶ 1. A proceeding to punish an officer as for contempt in omitting to perform his duty is a summary criminal, and not a civil, proceeding.—Schwab v. Coots, 44 Mich. 463.

¶ 2. Proceedings under the Fraudulent Debtor Act are not criminal.—Bromley v. People, 7 Mich. 472, affirming decision below by equal division of the court; Johnson v. Maxon, 23 Mich. 129.

§ 2. Parties to prosecution.

Admission by prosecuting witness as incompetent statements by one not party to prosecutions, see post ¶¶ 1266, 1267.

¶ 3. The fact that a criminal proceeding for adultery must be commenced by the husband or wife of one of the guilty parties does not make the complainant a party to the case; the people and the defendant are the only parties.—Parsons v. People, 21 Mich. 509.

§ 3. Proper mode and form of accusation; indictment or information.

Institution of prosecutions before minor courts and justices, see post § 645.
Complaints for prosecution before justices and minor courts, see post § 646.
Sameness of rules controlling sufficiency of the charging part in both informations and indictments, see post § 23.
Necessity and occasion for bill of particulars, see ante § 38.
Applicability to informations of statutes regulating trials on indictments, see Comp. L. 1915, § 15763.
Provisions for accusation by information, see Comp. L. 1915, § 15760 et seq.

¶ 4. Where a statute creates a new offense, by prohibiting and making unlawful anything which was lawful before and appoints a particular remedy against such new offense by a sanctioned method of proceeding, such method must be pursued and no other.—People v. Smith, 118 Mich. 73.

¶ 5. Keeping a house of ill-fame was a criminal offense within the meaning of the clause in Const. 1835 requiring presentment of a grand jury.—Slaughter v. People, 2 D. 334.

¶ 6. Indictment is the appropriate remedy for keeping disorderly houses, both at the common law and under the statute, for the suppression of houses of ill-fame.—Welch v. Stowell, 2 D. 332.

¶ 7. A penalty of $100 for selling liquor without license was, under R. S. 1846, chap. 41, § 1, How. St., § 8437, recoverable by indictment; the fact that the statute confers power on justices to entertain civil proceedings did not exclude the criminal remedy.—People v. Hart, 1 Mich. 467.

¶ 8. No indictment lies to recover a penalty or forfeiture not amounting to $100 or more (Comp. L. 1857, § 5120, How. St., § 8437).—Pettinger v. People, 20 Mich. 336.

¶ 9. Indictment is the proper method of procedure for a violation of the state liquor law (How St., § 2283e; Pub. Acts, 1887, No. 313), as that law does not appoint a particular remedy or provide a particular method of procedure and either method is left open.—People v. Smith, 118 Mich. 73.

§ 4. Preliminary accusation, arrest, examination, and commitment.

Averments and recitals in information as to examination or waiver, see post § 17.
Time for objections and waiver by delay, see post § 61.
Waiver of preliminary examination by plea to merits, see post § 117.
Admissibility of record of preliminary examination on trial, see post § 289.
Best evidence of preliminary proceedings, see post § 186.
Offer of evidence on defense not touched in preliminary hearing, see post § 345.
Objections to complaint for trial before justice that warrant or other preliminaries were defective, see post ¶ 2958.
Arraignment of accused to plead to indictment, see post § 104 et seq.
Authority and grounds for arrest without or with warrant, see Arrest, I.
Immunity and privilege from arrest for crime, see Arrest, II.
The warrant for arrest, see Arrest, IV.
Nature of the preliminary examination, its purpose and scope and conduct, and the commitment thereon, see Arrest, VII.
Waiver of preliminary examination before magistrate, see Arrest § 29.
Necessity of reducing examination to writing, see Arrest § 36.
Findings on examination, and commitment, see Arrest § 37.
Certificate of commitment and return, see Arrest § 38.

Description and specification of crime in commitment for trial, see Arrest § 38.
Who is "fugitive from justice" indictable without preliminary examination, see Arrest ¶ 79.
Description of the offense in recognizance or bond, see Arrest § 45.

¶ 10. Where the testimony of a witness without whose testimony respondent could not have been held was not signed by him, the examination was fatally defective and did not warrant filing of information.—People v. Brock, 64 Mich. 691.

¶ 11. The point that the trial court in a murder case, in proceeding with the trial without previous examination of the respondent or waiver of examination by him, committed error, comes too late when it is not urged until the motion for a new trial.—People v. Sartori, 168 Mich. 308.

¶ 12. A complaint for maliciously threatening to accuse of crime, contrary to How. St., § 9093, shows sufficiently that the threats were verbal where it charges that respondent did "wilfully and maliciously, verbally threaten to accuse," etc.—People v. Whittemore, 102 Mich. 519.

¶ 13. The omission in a complaint for threats to accuse of crime state to whom the threats were made is not fatal.—People v. Whittemore, 102 Mich. 519.

¶ 14. Where a complaint for threatening to accuse of crime charges that the threat was made with the intent and purpose of procuring the signature of the person threatened against his will to a deed of land, it sufficiently sets out the intent.—People v. Whittemore, 102 Mich. 519.

¶ 15. An information for murder should be quashed where, on preliminary examination, the magistrate refused a request to determine whether the evidence showed probable cause to believe the offense committed was murder or only manslaughter, and his return affirmatively showed such request and refusal.—Yaner v. People, 34 Mich. 286.

§ 5. ——As basis for information.

Necessity that information be in conformity to commitment, see post § 14.
Information where commitment is lost, see post § 6.
Sufficiency of preliminary proceedings, see ante § 4.
Presumptions as to preliminary proceedings on motion to quash or other objection, see post § 56 et seq.
Waiver of examination or defect in it by going to trial, see post § 65.
Want of preliminary examination cured by withdrawing portion of charge, see post ¶ 318.
Verdict for lesser offense under preliminary hearing and commitment for greater, see post § 472.

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§ 6. Information

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would show a preliminary examination, if the loss of such papers is sufficiently proved.—People v. Coffman, 59 Mich. 1.

§ 7. Grand jury and proceedings before it.

Time for objections or challenges and waiver by delay, see post § 60.
Immaterial defects in grand jury, see also post ¶ 314.
Pleas in abatement for defect in grand jury proceedings, see post § 109.
Calling and composition of the grand jury, see Grand Jury § 1.
Number composing grand jury, see Grand Jury § 1.
Effect of attorney at law sitting as grand juror, see Grand Jury ¶ 5.
Discharge and resummoning of grand jury, see Grand Jury § 3.
Invalidity of stipulation involving disclosure of grand jury proceedings, see Contracts § 53, ¶ 223.
Provisions as to proceedings before grand jury, see Comp. L. 1915, chap. 268.

¶ 23. An indictment cannot be found in a court where no grand jury can be summoned.—People v. Hart, 1 Mich. 467.

¶ 24. The action of a grand jury does not place the accused in jeopardy in any legal sense, and is merely preliminary to the trial upon the facts, and it is not in the interest of the justice that this proceeding should be treated in any captious or technical manner.—People v. Lay, 193 Mich. 476.

¶ 25. The mere fact that incompetent, improper, and irrelevant testimony was received and considered by the grand jury is not fatal to the indictment, unless such testimony is considered by them.—People v. Lay, 193 Mich. 17.

¶ 26. One who is not upon trial, but who is merely subpoenaed to appear before the grand jury, cannot take exception to his not having the assistance of counsel when interrogated.—People v. Lauder, 82 Mich. 109.

§ 8. Proper persons to make complaint.

For adultery, see post § 9.
Complaints for arrest, see also Arrest.
Competency of wife as complaining or ordinary witness against husband, or of husband against wife, see Witnesses, II, III.

¶ 27. Under the wife abandonment criminal statute, Act No. 144, Pub. Acts 1907, the provision that a superintendent of the poor or a county agent may make the complaint does not give them the exclusive power to do so, and a wife is competent to make the complaint.—People v. Stickle, 156 Mich. 557.

§ 9. ——Adultery.

Status of complainant in the prosecution, see also ante ¶ 3.
Averment as to person complaining, see post ¶ 145.
Dismissal for want of qualified informant, see post § 127.
Sufficiency of proof of relation of complaining witness to defendant in adultery, see post ¶ 1439.
Arrest for adultery on complaint by other than injured spouse or without such complaint as false arrest, see False Imprisonment ¶ 13.

¶ 28. Comp. L. 1871, § 7693 (How. St. § 9279), which forbids any prosecution for adultery except on complaint of the husband or wife, contemplates that the wife may proceed without her husband's consent.—People v. Knapp, 42 Mich. 267.

¶ 29. A complaint for adultery between a married woman and an unmarried man may be made by the woman's husband.—Bayliss v. People, 46 Mich. 221; People v. Davis, 52 Mich. 569.

¶ 30. Under How. St., § 9279, which provides that no prosecution for adultery shall be commenced but on the complaint of the husband or wife, a married man is subject to prosecution upon the complaint of the husband of the woman with whom he commits adultery.—Wilson v. Gratiot Circuit Judge, 104 Mich. 155.

§ 10. Signing and verifying informations.

Time for objections and waiver by delay, see post § 59.
Verification of informations, statutory requirements, see Comp. L. 1915, § 15762.

¶ 31. Whether, an information not signed by the prosecuting attorney, though verified by the affidavit signed by him, is valid, quære.—Mentor v. People, 30 Mich. 91.

¶ 32. In the absence of the prosecuting attorney in Wayne county the assistant prosecuting attorney may sign, verify and file criminal informations; since by Laws 1885, Act No. 109, p. 111, he is enabled to discharge all functions and perform all duties of his superior.—People v. Trombley, 62 Mich. 278.

¶ 33. An information filed by the prosecuting attorney in the recorder's court of the city of Detroit need not be verified (Charter & Laws of Detroit, 1886, p. 145).—People v. Graney, 91 Mich. 646.

§ 11. ——Sufficiency of verification.

Verification by deputy, see also ante ¶ 32.

¶ 34. The purpose of a verification of an information is merely to secure good faith and guard against groundless and vindictive prosecutions, and a verification by the affidavit of the prosecuting attorney that he knows its contents and "believes the same to be true as therein set forth" is sufficient.—Mentor v. People, 30 Mich. 91.

¶ 35. The prosecuting attorney's verification by oath that he "knows the contents of

the foregoing information, and that he has good reason to believe and does believe the same to be true as therein set forth," suffices.—Washburn v. People, 10 Mich. 372.

¶ 36. An affidavit attached to an information, and stating that affiant has good reasons to believe and does believe the contents of the information to be true, is not such verification as will warrant an arrest, especially where there has been no preliminary examination and a prima facie case made out. —Swart v. Kimball, 43 Mich. 443.

§ 12. ——Jurat and signature to same.

Amendment after verdict, see post § 72.

¶ 37. The officer administering the oath on the verification of an information need not sign his full Christian name. The initials are sufficient.—Rice v. People, 15 Mich. 9.

§ 13. Time and term for filing.

Limitations on prosecution, see post II.

Time for trial relatively to time of accusation, see post § 329.

Time for filing informations, see Comp. L. 1915, § 15761.

¶ 38. The statutes do not forbid the filing of an information at the same term in which complaint is made, and there is nothing to prevent filing it as soon as convenient, unless, perhaps, where respondent has given bail, there may be some question as to the time when his sureties must produce him.—People v. Haley, 48 Mich. 495.

§ 14. Conformity of information to examination and commitment.

Necessity of preliminary examination and commitment to support information, see ante §§ 4-6.

Variance in particulars of description or name of crime, see post § 15.

Addition of counts to meet different aspects and theories on the proofs, see post § 16.

Joint information against persons separately committed, see post § 18.

Separate informations against persons jointly bound over, see post § 18.

Presumptions on motion or objection to information, see post § 56 et seq.

¶ 39. An examination under a complaint cannot justify the filing of an information charging an offense distinct from and not included in the one charged in the complaint. —People v. Jones, 24 Mich. 215.

¶ 40. So long as the prosecuting officer does not undertake to proceed against a person for a different transaction than that to which the examination relates, it is competent for him to put the information in such form as, in his opinion, will enable him to try the offense upon the merits in the way most effectually to advance the ends of justice.—Annis v. People, 13 Mich. 511.

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¶ 49. The information under a continuando for keeping a disorderly house is not invalidated by the fact that the complaint before the justice charged the offense as having been committed upon the particular day only.—People v. Russell, 110 Mich. 46.

¶ 50. Where a warrant of arrest for forging, Nov. 18, 1890, a note signed "F. & Co.," contains a copy of the note so dated, and was issued on a complaint sworn to May 23, 1890, which described the note as signed by "F," and which alleged that the offense was committed Nov. 18, 1889, an information describing the note and giving the date as in the complaint could not be objected to as not following the warrant, if no objection has been made to the discrepancies between the complaint and the warrant, the date Nov. 18, 1890 being obviously impossible and a mere clerical error.—People v. Foote, 93 Mich. 38.

¶ 51. A plea in abatement for want of proof on the preliminary complaint which alleged a breaking and entering of the M. bank, whereas the evidence was given on the preliminary examination that the bank was a private one belonging to S., was properly overruled.—People v. Courtney, 178 Mich. 137.

¶ 52. A complaint for obtaining money under false pretenses alleged, in substance, that respondent represented that there was a house of the value of $1,200 upon certain lots which respondent mortgaged to secure a loan of money, whereas there was in fact no house on the lots. Held, on motion to quash the information for variance such that no preliminary examination was had of the crime charged, that the complaint set forth an offense of which the statement alleged to have been made by respondent respecting value, which might be regarded as a mere opinion, was not an essential element.—People v. Oscar, 105 Mich. 704.

¶ 53. On the preliminary examination, additional matter to that complained of as a false pretense, namely, "that the said lots were of the value of $1,200, and that there was then and there and at that time a new house of the value of $1,200 on said lots, and that said house was new, and that it cost more than $1,200 to build the same," was brought out. Held, that such new matter was a part of the same transaction, and properly set forth in the information.—People v. Oscar, 105 Mich. 704.

¶ 54. Where, on a complaint and information for perjury in certain pleadings, the complaint alleges all the facts necessary to show the respondent guilty of said crime, and the information follows the complaint verbatim, with the exception that it alleges in addition that the false oath of respondent was made "with intent to use the same on the hearing of said motion," there is no variance sufficient to support a motion to quash the information.—Hoffman v. Allegan Circuit Judge, 150 Mich. 58.

¶ 54a. Evidence adduced upon the preliminary examination of one charged with a violation of the local-option law, tending to show that respondent kept an ordinary saloon for the sale of intoxicating liquors, is prima facie sufficient to authorize the filing of an information containing the statutory exceptions in relation to druggists and registered pharmacists.—People v. Berry, 107 Mich. 256.

§ 16. ——Addition of counts for included or varying aspects of offense.

Counts properly joinable, see post § 45.

¶ 55. An information does not put the accused on trial for a different offense from that covered by the preliminary examination where it merely states the crime in varying aspects.—Brown v. People, 39 Mich. 37.

¶ 56. An examination on a complaint and warrant charging larceny is enough, if the accused is held for trial, to authorize the prosecuting attorney, under Comp. L. 1871, § 7935, How. St., § 9546, to add a count for receiving stolen goods. A separate examination on that charge is not necessary.—Brown v. People, 39 Mich. 37.

¶ 57. An information may be filed for an offense of a lower grade than that for which an examination was had if it is included within the higher offense.—Turner v. People, 33 Mich. 363.

¶ 58. An information cannot be filed for a crime of higher grade than that for which the preliminary examination was had.—Yaner v. People, 34 Mich. 286.

§ 17. Averments or recitals as to preliminary proceedings.

¶ 59. It is not necessary that the information should show on its face that a preliminary examination had been had or waived. If the defendant intends to insist upon the want of such examination he should take the objection by plea in abatement, or by motion to quash based upon affidavit.—Washburn v. People, 10 Mich. 372; Hicks v. People, 10 Mich. 395.

§ 18. Joint and separate indictments or informations.

Propriety of separate trials for crimes requiring two participators, see post § 326.

¶ 60. Where two or more are jointly complained of and bound over, separate informations may be filed against them in the circuit court.—Annis v. People, 13 Mich. 511.

¶ 61. Where persons held for trial for a joint offense were arrested on separate complaints and warrants, they may still be joined in the information and jointly tried unless they claim separate trials under Comp. L. 1871, § 7960 (How. St. § 9573).—Stuart v. People, 42 Mich. 255.

¶ 62. An information as for a joint offense may be filed even though it does not appear from the return of the examining magistrate that it was committed jointly.—Stuart v. People, 42 Mich. 255.

§ 19. Duplicates and copies of information or indictment.

Right to copy of indictment, see Comp. L. 1915, § 15723.

¶ 63. There cannot be two informations on file in the case, and, where copies are filed as a precaution but the record contains the defective one, the conviction is invalid.—Rice v. People, 15 Mich. 9.

§ 20. Indorsement of names of witnesses.

Adding or striking off names, see post § 21.
Competency of testimony of witnesses not named in indorsements, see post § 156.
Duty of state to call witnesses and calling of witnesses not named on information or indictment, see post §§ 349-352.
Postponement to procure witnesses, see post § 121.
Mode of objection to testimony of witness whose name is not indorsed, see post § 355.
Objection for first time on review that name of witness was not indorsed, see post § 511.
Statutory provisions as to indorsements, see Comp. L. 1915, § 15761.

¶ 64. The names of all witnesses for the prosecution in a criminal case must be indorsed on the information before the trial or as soon as discovered after it begins; the respondent is entitled to a chance to canvass their character, whether they are examined in the main case or on rebuttal.—People v. Quick, 58 Mich. 321.

¶ 65. The names of such witnesses as are known to the prosecutor when the information is filed must, under How. St., § 9549, be indorsed at that time, and failure to do so is not excused by his not knowing where they are or whether their attendance can be secured.—People v. Price, 74 Mich. 37.

¶ 66. In placing on the information the names of known witnesses there should be no needless delay, but the requirement is not absolute in cases where the witnesses are beyond the jurisdiction so that the prosecution cannot compel attendance.—People v. Perriman, 72 Mich. 184.

¶ 67. It was not incumbent upon the people in a prosecution for homicide to indorse upon the information the names of witnesses at the inquest whose only relation to the crime was that they claimed to have seen a man taller than respondent enter a store a mile from the scene of the affray, which they did not see, although the assaulter was traced by his tracks in the snow directly to the store.—People v. Savant, 112 Mich. 297.

¶ 68. A dying declaration is not within the provision of the statute requiring the names of witnesses to be indorsed upon the information.—People v. Beverly, 108 Mich. 509.

¶ 69. How. St. § 9549, providing that the prosecuting attorney shall indorse the names of witnesses on all informations at the time of filing, and at such times as the court may require, is not violated where names are indorsed seven days before a trial, the attorney for the accused being advised of the action and making no objection thereto.—People v. Williams, 118 Mich. 692.

¶ 70. In criminal prosecution, it is within the court's discretion to permit names to be indorsed on the information at the trial shortly before the jury is sworn.—People v. Luders, 126 Mich. 440.

¶ 71. Under section 11934, Comp. Laws, 1897, the prosecution is not permitted to indorse the name of a witness on the information during the trial unless a showing is made excusing the delay.—People v. Karamol, 173 Mich. 354.

¶ 72. In the absence of specific objection, an unsworn statement by the attorney for the people in a prosecution for seduction that he had only lately learned that a certain witness was material was held to justify permission to indorse the name of such witness on the information after the jury had been sworn and the complaining witness had partially given her testimony.—People v. Bollman, 178 Mich. 159.

¶ 73. Where the prosecution showed in the preliminary examination the nature of the evidence to be produced against defendant, it was held that the latter could not claim surprise because the court permitted the prosecution to indorse on the information the names of the witnesses to prove such facts.—People v. Segal, 180 Mich. 316.

¶ 74. An accused is not prejudiced by the prosecution's failure to indorse the name of a witness on the information, where it appears that such witness merely saw the accused strike a person, and then ran away.—People v. Williams, 118 Mich. 692.

¶ 75. Where, after making the complaint that the Sunday closing law has been vio-

lated, the complaining witness absconded, and the officers were unable, after making diligent search, to find him, or any trace of him, sufficient reason is shown for not producing him at the trial, and for leaving his name off the information.—People v. Boyd, 151 Mich. 577.

§ 21. ——Adding or striking off names.

Reception of testimony as tantamount to addition of omitted name, see post ¶ 702.

Tardy indorsement as harmless error, see post § 588.

¶ 76. In a criminal prosecution the names of witnesses cannot, against objection, be added to the information without a showing that they were not known earlier and in time to give defendant notice in season to anticipate their presence before trial.—People v. Hall, 48 Mich. 482.

¶ 77. A respondent's right under How St., § 9549, to have the names of witnesses known to the prosecuting attorney indorsed on the information before the trial, is a substantial one which courts cannot ignore; nor will the carelessness or neglect of the prosecuting officer warrant the court in permitting such indorsement on the trial.—People v. Howes, 81 Mich. 396.

¶ 78. The prosecuting attorney may be allowed, on a proper showing, to indorse the name of a witness on an information after the commencement of the trial.—People v. Baker, 112 Mich. 211.

¶ 79. It is not error, during a trial for larceny, to permit the prosecuting attorney to indorse upon the information the name of a witness whom he testified he has just learned to be a material witness.—People v. Machen, 101 Mich. 400.

¶ 80. Where it appears that the prosecuting attorney knew nothing about the testimony to be given by a witness, or in fact did not know that he was to be a witness until the day of trial, it was proper for the court to grant the prosecuting attorney leave to indorse his name upon the information, especially where the court offered to allow counsel for defendant time to investigate the testimony of the proposed witness.—People v. Moore, 155 Mich. 107.

¶ 81. Where the prosecuting attorney in a trial for assault, states that he knows nothing about a certain alleged witness, and no showing is made that the person was a witness of the transaction, the court properly refused a motion made during the progress of the trial to require the prosecution to indorse the person's name on the information.—People v. Hoffman, 154 Mich. 145.

¶ 82. The court may properly permit the prosecuting attorney to indorse the name of the complaining witness, whose testimony was taken on the preliminary examination, upon the information after the jury is sworn, he having failed to make such indorsement through inadvertence; but if the respondent makes a reasonable claim that he is not prepared to meet the testimony expected to be given by said witness, he should be allowed a reasonable time to prepare his defense.—People v. Evans, 72 Mich. 367.

¶ 83. The indorsement upon an information, after going to trial, of the names of additional witnesses, is ground for a new trial if done without leave of court.—People v. Moran, 48 Mich. 639.

¶ 84. Where the name of a well-known police officer conspicuously present during the trial had been frequently mentioned in the testimony, but was omitted by inadvertence from the information, it was proper to allow it to be indorsed, and to permit the officer to be examined as a witness.—People v. Mills, 94 Mich. 630.

¶ 85. It is within the discretion of the circuit judge to permit the indorsement on an information of the name of a material witness for the people, and to receive his testimony at the trial, where the affidavit of the prosecuting attorney, filed 13 days before the trial, shows a sufficient reason why the indorsement was not made before, and states that notice was immediately given to respondent's attorney.—People v. Isham, 109 Mich. 72.

¶ 86. Where in a criminal case 3 days before the trial the court entered an order for the subpoenaing of 13 witnesses for the defense at the expense of the state and in the same order without objection gave leave to the prosecuting attorney to add 3 names to the information, held that under the circumstances the leave to add such names was proper.—People v. Ecarius, 124 Mich. 616.

¶ 87. It is not error to permit the prosecuting attorney to indorse the names of two witnesses upon the information on the day of the trial but before the jury was sworn, where the prosecuting attorney gave notice to one of defendant's attorneys immediately upon learning that the witnesses were essential, which was eight days before the trial.—People v. Gregory, 130 Mich. 522.

¶ 88. The refusal of an application to require the prosecution to indorse upon the information the name of the defendant's wife as a witness for the people, was not error although it had been stated by counsel that defendant expressly waived his right to object to the calling of his wife as a witness against him.—People v. Hossler, 135 Mich. 384.

¶ 89. In a prosecution for rape, it is not error before filing information to cross out the name of a witness indorsed on it, where the only testimony the witness could give would be cumulative as to the physical and mental condition of the prosecutrix.—People v. Marrs, 125 Mich. 376.

¶ 90. Where, after the commencement of the trial of a criminal case, the prosecuting attorney stated to the court that he had just learned of two material witnesses whose names were not indorsed on the information, and the respondent's counsel thereupon waived any further showing, the indorsement of such names is not error.—People v. Howes, 81 Mich. 396.

¶ 91. Where a prosecuting attorney in open court states his reasons for leaving the name of the complaining witness off the information, and for not producing him at the trial, counsel for defendant, by asking the trial court to dismiss the case on the ground that the showing was insufficient generally, waives the formality that his showing be made under oath.—People v. Boyd, 151 Mich. 577.

B. SUBSTANCE AND REQUISITES OF ACCUSING PART.

§ 22. In general; matters presumed or judicially known.

What matters are judicially known, see post §§ 128, 129.
Plea of former acquittal in same court, see also post ¶ 568.

¶ 92. An information cannot be made better or worse for inserting or omitting a matter judicially noticed.—Keator v. People, 32 Mich. 484.

§ 23. Requisites and sufficiency of averments.

As to venue, place, time, feloniousness, unlawfulness, knowledge, or intent, see post §§ 24-26.
Descriptive averments, see post §§ 27-31.
Negative averments, see post § 32.
As to aiding and abetting, see post § 33.
As to crimes in prison, see post § 34.
As to previous convictions of accused, see post § 35.
Concluding words, see post § 36.
Particularity and details and bills of particulars, see post §§ 37, 38.
As to statutory offenses and statutory forms, see post §§ 39-42.
Averring elements of particular crimes, see post §§ 43-43u.
As to the preliminary proceedings, see ante § 17.
Variances from commitment, see ante §§ 14-16.
Description of crime in the record, see post § 500.
What is regarded as surplusage, see post § 54.
When regarded as double, see post § 76.
Construction of common-law averments by common-law rules, see post § 75.
Construction of averments questioned for duplicity, see post § 76.
Averment of conclusion of law as to crime committed, see post ¶ 124.
Proper and permissible amendments, see post § 69 et seq.
Averments requisite to specific crimes, see post §§ 43a-43u.
As to manner and means of arson, see also post ¶ 147.
Manner or means
§ 168 et seq.
Requisites and suffi
§ 109 et seq.
Complaints before ju
see post § 647.
Constitutional right
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§ 24. Averments of

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Detroit, charging the respondent with fraudulently removing, embezzling and concealing certain chattel-mortgaged property generally, without stating that such offense was committed in the city of Detroit, confers jurisdiction upon said court, under How. St. § 9533, which provides that the county, city, or other jurisdiction named in the margin of any indictment (information) shall be taken to be the venue for all of the facts stated in the body thereof.—People v. Schultz, 85 Mich. 114.

¶ 98. An indictment charging the commission of an offense "at to-wit said township, county and state" where the parties charged had been described as late of a named township, county and state, sufficiently describes an offense to have been committed within the jurisdiction of such county.—People v. Turney, 124 Mich. 542.

¶ 99. An information alleging that "on the 5th day of February, A. D. 1904, at the city of Detroit, in the county of Wayne" accused "then and there" obtained money by false pretenses, sufficiently shows that the Recorder's Court of Detroit has jurisdiction of the crime.—People v. Hoffman, 142 Mich. 531.

§ 25. Averments as to time.

Specifications requisite to particular crimes, see post §§ 43a-43u.
Materiality of errors in date, see post § 53.
Amendable matters, see post § 70.
Variance of information from commitment, see ante § 15.

¶ 100. For the requirements as to the statement of time in indictments and informations, see People ex rel. Benoit v. Miller, 15 Mich. 354.

¶ 101. Some specific date must be fixed by the people in a prosecution for adultery since the respondents have a right to know the date relied on to enable them to meet the charge.—People v. Davis, 175 Mich. 594.

§ 26. Averment as to feloniousness or unlawfulness, knowledge, and intent.

Averments of specific intent or knowledge requisite to particular crimes, see post §§ 43a-43u.
Averments as to intent in complaints for trials before justices and minor courts, see post § 647.

¶ 102. Comp. L. 1857, § 6043, How. St., § 9523, dispenses with the necessity of employing the words "feloniously" or "with force and arms," or "any words of similar import," which last phrase means words employed for similar technical reasons, as the words mentioned and which are not necessary to a clear understanding of the charge.—Rice v. People, 15 Mich. 9.

¶ 103. Because of the statute dispensing with use of the word "feloniously" an information charging defendants with an assault "with intent to kill and murder," omitting the words "feloniously, wilfully and of malice aforethought," was held sufficient.—Rice v. People, 15 Mich. 9.

¶ 104. Under Comp. L. 1897, §§ 11604, 11605, an information for unlawfully interfering with the registration of a city water meter was held sufficient although it was not alleged that the act was wilful and fraudulent.—People v. Driessen, 178 Mich. 118.

¶ 105. Where scienter is made an ingredient of an offense it is necessary to charge and prove it.—People v. Frederighi, 192 Mich. 165.

§ 27. Describing persons and corporations.

In charging conspiracy, see post § 43c.
In charging embezzlement and agency of accused, see post § 43e.
In charging relation of parties in incest, see post § 431.
Variances of information from commitment, see ante § 15.
Materiality of misnomer, see post § 51.
Amendment to meet proofs, see post § 71.

¶ 106. An averment in the indictment that the bank whose bills are counterfeited is an incorporated company, in a place and state mentioned, is equivalent to an averment that it is established in such state.—People v. Stewart, 4 Mich. 655.

¶ 107. In an indictment under How. St. § 9140, it is not necessary to set out the act of incorporation of the bank by which the bills purport to have been issued, or that they were issued by a corporation having power to issue them.—People v. Kent, 1 D. 42.

§ 28. Describing and laying title to property.

In charging conspiracy, see post § 43c.
Describing money or property embezzled, see post § 43e.
Averments requisite to arson, larceny and other specific crimes, see post §§ 43a-43u: Larceny, II.
Amendment to meet proofs, see post § 71.
Mode of describing money or instruments for payment of money, see Comp. L. 1915, § 15753.

¶ 108. Where the owner of land enlisted 1861 and was reported to have died in the army, leaving a wife and one child, who never saw him or heard from him during the twenty-three years thereafter, the ownership of the land was properly alleged to be in the wife and child in an information for arson.—People v. Eaton, 59 Mich. 559.

¶ 109. How. St. § 9347, making it a misdemeanor to wrongfully remove books, papers or records from certain public offices, makes such books, papers and records the property of the state, and an allegation of such ownership in an information filed under said section, which describes the papers alleged to have been removed, is unnecessary but not objectionable.—People v. Bussey, 82 Mich. 49.

§ 29. Describing papers and documents.

See also post ¶ 151.

In charging forgery and uttering, see post § 43f.

Immateriality of misdescription, see post § 51.

Amendments to meet proofs, see post § 71.

Variance of information from commitment, see ante § 15.

Mode of pleading records and official papers and process, see Comp. L. 1915, § 15748.

Mode of pleading judgments, see Comp. L. 1915, § 15755.

¶ 110. A contract is complete as such without subscribing witnesses, and in setting out its purport in an information the names of witnesses need not be given.—People v. Sharp, 53 Mich. 523.

§ 30. Averments as to foreign or technical words.

¶ 111. An information setting forth an alleged forged note to which one of the signatures was shown to have been written in German, should have set forth that the name was written in that language and have given its English equivalent.—People v. Bennett, 122 Mich. 281.

¶ 112. An innuendo in an indictment is bad when there is nothing previous to which it can refer.—People v. Collier, 1 Mich. 137.

§ 31. Description of crime collateral to that charged.

Description of crime which is the object of conspiracy, see post § 43c (conspiracy).

In charging escapes, see post § 43e.

Sufficiency of indictment and conviction thereon to show a crime in subsequent prosecution for escape, see Crimes ¶ 309.

Averments as to collateral intended crimes in indictments for murder in attempted felonies, see Homicide § 34.

¶ 113. An information for resisting an officer while attempting to preserve the peace charges no offense if it fails to state the acts or facts constituting the offense or of the officer's acts which respondent obstructed.—People v. Hamilton, 71 Mich. 340.

§ 32. Negativing exceptions.

In charging bigamy, see post ¶ 154.

In charging crimes under liquor law, see Intoxicating Liquors, VI, D.

Negativing exceptions in complaints before justices for trial of misdemeanors, see post § 647.

Under intoxicating liquor laws, see Intoxicating Liquors, VI, B.

¶ 114. Where an information for unlawfully disinterring a human body alleges, besides the essential elements of the statutory offense, that "the body was taken for the purpose of dissection, and with intent to sell and dispose of the same for that purpose for gain and profit," it need not negative the possibility of leave authorizing health render the dead are required to be under certain circ dissection.—McNa

¶ 115. A compl No. 167, charging and held himself and did practice qualified by law t respondent is not dentistry is not i medicine. Nor ne that respondent v under the instru qualified, or that mit from the cour statement with Phippin, 70 Mich.

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¶ 117. In a pr without a city l illegal interest i Pub. Acts of 1 that respondent, loan company, c the offense charg the complaint as did not allege t spondent was ac agent of the loa clude the possib some person wh objection was no ing requires ar directly charge statute with a s ing in some cas lawful.—People

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§ 33. Averments

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commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, may be indicted, tried and punished as principals, as in case of misdemeanor. Held, that in all cases where only persons of a certain class, or standing in a certain relation, are competent to commit the offense, the indictment against aiders and abettors, not belonging to such class, or standing in such relations, must set out the aiding and abetting, in which alone the crime consists, and which, in such case, is the only principal offense within the meaning of this statute.—Shannon v. People, 5 Mich. 71.

¶ 120. Where an offense can be committed only by a specified class, aiders and abettors cannot be charged as principals if they are outside the statute designation.—People v. Meisner, 178 Mich. 115.

§ 34. Crimes by convicts in prison.

¶ 121. Under Pub. Acts 1893, No. 118, § 64, making convicts in prison for any term other than life, who commit any crime, subject to the same punishment as if the crime had been committed elsewhere, and section 65, providing that the warrant issued in such case shall be made in the ordinary form, and be directed to the warden of such prison, and that it shall set forth that the accused is imprisoned by authority of the laws of the state, an information against a convict for assault with intent to kill, which contains all the averments required by the statute to be set forth in the warrant, is sufficient; it being unnecessary to allege in detail the prior conviction and sentence of respondent, and the lawfulness of his detention.—People v. Huntley, 112 Mich. 569.

§ 35. Averments as to previous convictions.

¶ 122. An information for a third offense under the act in relation to disorderly persons (How. St. § 1997a et seq.) must allege that convictions were had for such previous offenses, and, properly, it should also state the date and occasion of such convictions.—People v. Buck, 109 Mich. 687.

¶ 123. An information, for refusal and neglect to support an accused's family which charges that the accused was "heretofore duly convicted of the same offense," stating two dates, and charging a third offense, sufficiently states the former convictions to warrant the third conviction. Pub. Acts 1895, No. 190, § 1, requiring punishment by imprisonment in the Detroit House of Correction, for a third and subsequent conviction, does not require, in the prosecution for a third offense, that the complaints and warrants in the former conviction shall have stated that they were for first and second offenses, but simply that the offense shall be "charged as a third or subsequent conviction," etc.—People v. Booth, 121 Mich. 131.

§ 36. Concluding words.

Omission of formal conclusion as immaterial defect, see also post ¶ 311.

¶ 124. Under Comp. L. 1857, § 6047, How. St. § 9534, relative to indictments, if an indictment or information contains direct unequivocal averments of such facts—not being mere evidence—as lead immediately and of necessity to a single and inevitable conclusion, the omission to draw that conclusion will not vitiate the pleading.—Evans v. People, 12 Mich. 27.

¶ 125. The conclusion "against the form of the statute in such case made and provided" is mere surplusage, and does not determine that the information is for felony rather than a misdemeanor.—People v. Arnold, 46 Mich. 268.

¶ 126. An indictment for violating the laws of this state against counterfeiting properly charges the offense to have been committed against the sovereignty of the people of this state, instead of charging it to have been committed against the sovereignty of the people of the United States.—Harlan v. People, 1 D. 207.

§ 37. Particularity and details.

Specifications requisite to particular crimes, see post §§ 43a-43u.

Bills of particulars, see post § 38.

Necessity of proof of particulars as pleaded needlessly, see post § 73.

¶ 127. In charging a criminal offense, a detailed recital of the evidence by which it will be established is not required; such facts must be averred that, if admitted, would constitute the offense and establish the guilt of the accused. The elements of the offense must be so stated that he can know what he is to meet and prepare for his defense, and the particular transaction must be so identified that his acquittal or conviction will be a bar to a subsequent prosecution for the same offense.—People v. Quider, 172 Mich. 280.

§ 38. Bills of particulars.

Waiver of right to particulars, see post ¶ 368.

Reviewableness of discretionary ruling on motion for bill of particulars, see post § 628.

¶ 128. It is not erroneous for the court to refuse to order the prosecution to furnish a bill of particulars under the general charge contained in an information for embezzlement by the state treasurer, where it appears that a preliminary examination has been had, and the prosecuting officer states that he shall confine himself to the same charges as on such examination.—People v. McKinney, 10 Mich. 54.

¶ 129. An order for a bill of particulars ought never to be refused where the court

can see any reason to believe the particulars necessary to inform the defendant of the particular transactions intended to be proved against him, so as to enable him to meet them.—People v. McKinney, 10 Mich. 54.

¶ 130. Where one is charged with the statutory offense of keeping a place where intoxicating liquors are sold as a beverage, the prosecutor is not obliged to furnish a bill of particulars of the testimony upon which he will rely to prove the charge.—People v. Congdon, 137 Mich. 133. Writ of error dismissed in 200 U. S. 612, 50 L. ed. 619, 26 Sup. Ct. Rep. 753.

§ 39. Statutory offenses.

Averments of substance or description peculiar to given statutory crimes, see post §§ 43a-43u.

Negativing exceptions, see ante § 32.

Averments in words of statutes, see post §§ 40-42.

Reference to incorrect section in pleading statute as surplusage, see post ¶ 329.

Addition of matter beyond statute as surplusage, see post ¶ 328.

Use of common-law phrases as implying common-law accusation, see post § 75.

¶ 131. In statutory offenses every essential element of the crime as defined by the statute must be averred in the information, either in the words of the statute or in language substantially equivalent.—People v. McLean, 68 Mich. 480.

¶ 132. Where an information is filed under section 11488, Comp. Laws 1897, relative to written threats of injury for the purpose of extorting money, it need not be in the exact language of the statute as under section 11908, Comp. Laws 1897, a substantial compliance with the statute as to form is sufficient.—People v. Campbell, 173 Mich. 381.

¶ 133. Whenever an ordinance or statute fixes a classification and creates an offense which can be committed only by persons within the class, it is necessary not only to allege but to prove that the accused person belongs to the class described.—People v. Meisner, 178 Mich. 115.

§ 40. Averments in words of statute.

Sufficiency and completeness of statutory description of crime, see post §§ 41, 42.

¶ 134. A statutory offense is sufficiently described by charging it in the words of the statute.—People v. Kent, 1 D. 42; Rice v. People, 15 Mich. 9.

¶ 135. As a general rule an information for an offense created by statute is sufficient if it charges the offense in the words of the statute.—People v. Taylor, 96 Mich. 576.

¶ 136. When a statute creates an offense and sets out the facts which constitute it, the offense may b
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§ 41. Sufficiency a averments

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§ 42. ——Crime statutes.

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§ 43. For spec crimes.

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which follow numbered 43a to 43u inclusive. The alphabetical order follows the usual and common names of the crimes. It will be observed that the names of some of the crimes are missing from this list. This does not mean that there are no precedents of indictments on such crimes, but merely that none have been found which were distinctive to the specific crime rather than general to all crimes. For precedents on the general law of criminal pleading, see the sections preceding this.]

Body stealing and disturbance of sepulture, see ante ¶ 114.
Information for disinterring corpse, see also post ¶ 414.
Interfering with water meters, see ante ¶ 104.
Sufficiency of informations in prosecutions under pure food laws, see Food § 5.
Violations of liquor laws, see Intoxicating Liquors, VI, B.
Carrying weapons, see also ante ¶ 118.
General requisites and averments not pertaining to any one crime, see ante §§ 22-36.
General rules as to statutory averments and forms, see ante §§ 39-42.
Joinder of counts for several offenses in same indictment or information, see post § 45.
Construction and intendment of averments to ascertain issues presented, see post § 74 et seq.
When regarded as double, see post § 76.
Sufficiency of charge to accuse of lessor included degrees and offenses, see post § 80.

§ 43a. Abandonment and desertion.

Who may make complaint for abandonment, see ante § 8.
Averment as to previous conviction for abandonment, see ante § 35.
Cruelty to children, see post ¶ 187.

¶ 142. Whether the omission to name a bastard child eight months old is a valid objection to a count in an indictment, under Comp. L. 1857, § 5741, for exposing such child with intent to abandon it, quære.—Shannon v. People, 5 Mich. 71.

¶ 143. An indictment under Comp. L. 1857, § 5741, which provided that "If the father or mother of any child, or any other person to whom any such child shall have been confided, shall expose such child," etc., must allege either that the defendant was the father or mother of the child, or that it has been confided to him or her; and this allegation must be sustained by the proof.—Shannon v. People, 5 Mich. 71.

§ 43a. Adultery.

Lewd and lascivious cohabitation, see post ¶¶ 237, 238.

¶ 144. The respondent in a prosecution for adultery is entitled to a specification of the times and places of the acts relied on for conviction in any case in which he might otherwise be misled in preparing for defense.—People v. Davis, 52 Mich. 569.

¶ 145. A complaint against a woman for adultery need not show that it is made by her husband; nor is it necessary that the information should contain such an averment.—People v. Payment, 109 Mich. 553.

§ 43a. Arson and statutory burnings, attempts and solicitations.

¶ 146. An information for arson is sufficiently exact if it describes the dwelling-house as that of the occupant.—People v. Fairchild, 48 Mich. 31.

¶ 147. An information for burning a dwelling-house by setting fire to another building, whereby the dwelling is burned, should set forth the firing of the one building, and that by means of the burning of such building the particular dwelling-house was burned.—People v. Fairchild, 48 Mich. 31.

¶ 148. Comp. L. 1871, § 7552 (How. St. § 9123), describes two distinct offenses, one of which is the burning of another dwelling, and the other the setting fire to some building whereby another's dwelling has been burned. An information under this statute must set forth the facts with such particularity that it shall judicially appear which offense has been committed.—People v. Fairchild, 48 Mich. 31.

¶ 149. An information for procuring another person to set fire to a building, held to be sufficiently specific.—People v. Thompson, 37 Mich. 118.

¶ 150. An information charging the respondent with hiring a certain person named to burn a certain building is supported by evidence that he had hired the person named, and another person, jointly.—People v. Thompson, 37 Mich. 118.

§ 43a. Assault and battery.

For precedents on the substantive averments in indictments or informations for simple assaults, see Assault § 8.
Assault with specific felonious intent, see post § 43r (robbery); Homicide §§ 38, 39; Rape.
Prize fighting, see post § 43p.

§ 43b. Banking crimes.

Embezzlement from banks, see post § 43e.

¶ 151. Where an information against a bank clerk for drawing a draft with intent to injure or defraud the bank follows the language of the statute and includes a copy of the draft, it describes the offense with sufficient particularity.—People v. Comstock, 115 Mich. 305.

§ 43b. Bigamy and polygamy.

Issues under allegations in bigamy, see post ¶ 405.

¶ 152. Cohabitation within the state with the second spouse must be alleged in an information for bigamy.—People v. Devine, 185 Mich. 50.

¶ 153. Failure to allege cohabitation with second wife within the state of Michigan is a fatal defect in an information for bigamy committed by marrying in a foreign state while having a living wife in this state.—People v. Devine, 185 Mich. 50.

¶ 154. An information for bigamy is not bad for merely omitting to allege the exceptions to the statute and negative their existence, if it avers both marriages and sets forth that the first wife was living when the second marriage took place.—Kopke v. People, 43 Mich. 41.

§ 43b. Bribery, embracery and corruption of agents.

See also post ¶¶ 309, 310.

¶ 155. In a prosecution under Comp. L. 1897, sec. 11311, for attempting to corrupt a prosecuting attorney the people must charge and prove a corrupt intent in offering the bribe and defendant is entitled to an instruction to that effect.—People v. Bilitzke, 174 Mich. 329.

§ 43b. Burglary, breakings and attempts.

Possession of burglars' tools, see post ¶¶ 166, 167.

¶ 156. The various breakings resembling burglary and made criminal by our statutes are distinguishable from the common-law offense of burglary, and informations therefor must set forth in substance all their statutory elements.—Harris v. People, 44 Mich. 305.

¶ 157. Burglary is a common-law offense, and not a statutory crime; but our statutes distinguish between the degrees of punishment for simple and for aggravated burglary, and if all the incidents warranting the severer penalties are not alleged in the information, but the offense is stated as at the common law, the smaller punishment only can be inflicted.—Harris v. People, 44 Mich. 305.

¶ 158. How. St. §§ 9132, 9133, merely prescribe different degrees of punishment for burglary, and do not create new offenses. An information for burglary, therefore, may still be laid as at the common law.—People v. Shaver, 107 Mich. 562.

¶ 159. Under the statute which punishes "every person who shall break and enter, in the night-time, any office, shop, railroad depot or warehouse, not adjoining to or occupied with a dwe commit a felony, to describe the t joining to or occ is fatally defec Mich. 431; Byrn Bickford v. Peo

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§ 43c. Conspi

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Describing bank whose bills are counterfeited or forged, see ante ¶¶ 106, 107.

¶ 168. In the indictment the agreement or combination must be set out, but the means to be used in executing the conspiracy need not be set forth unless they are a component part of the offense; as where the combination and the object to be attained are not in themselves unlawful, but the means to be used to effect the object are unlawful.—People v. Richards, 1 Mich. 216; People v. Arnold, 46 Mich. 268.

¶ 169. If a conspiracy be to commit an offense known as such at the common law, so that by describing it by the term by which it is generally known the nature of the offense is clearly indicated, then it will only be necessary to use such term in describing the object of the conspiracy.—Alderman v. People, 4 Mich. 414.

¶ 170. If there be a combination to do an act not in itself unlawful, but which it is agreed to accomplish by criminal or unlawful means, those means must be particularly set forth, and be such as constitute an offense, either at common law or by statute.—Alderman v. People, 4 Mich. 414.

¶ 171. In a case of conspiracy if the combination be to do an unlawful act the indictment must set forth the unlawful thing agreed upon, but need not specify the means to be resorted to for the purpose.—People v. Clark, 10 Mich. 310; People v. Petheram, 64 Mich. 252.

¶ 172. An indictment for conspiracy to cheat an individual of his lands and goods need not state the means by which it is to be accomplished.—People v. Richards, 1 Mich. 216.

¶ 173. Cheating and defrauding are punishable only when effected by false tokens and pretenses, and the words of themselves do not import an offense. An indictment for conspiracy to cheat and defraud must, therefore, set out the false tokens to be used in effecting the contemplated fraud.—Alderman v. People, 4 Mich. 414.

¶ 174. An information for a conspiracy to obtain money by false pretenses need not set forth the pretenses by which it was accomplished.—People v. Winslow, 39 Mich. 505.

¶ 175. An information for cheating and defrauding by false pretenses must specify the pretenses used; but an information for conspiracy thereto need not allege the means, and the offense may be complete even though the pretenses or the victims are not agreed on.—People v. Arnold, 46 Mich. 268.

¶ 176. An information charged a conspiracy to cheat and defraud certain persons by false pretenses and by certain other means, not in themselves necessarily criminal, but it did not show which of the victims of the fraud, if either, was to be defrauded by false pretenses. Held bad, because of the ambiguity, and because, when means are alleged that may create a crime, though in themselves they fall outside of any legal definition of one, the information must show just what they are, so that the court may ascertain what crime they create.—People v. Barkelow, 37 Mich. 455.

¶ 177. An information for conspiracy need not allege an overt act in pursuance of it; and such an allegation, if made, does not aid a defective allegation of the conspiracy itself.—People v. Arnold, 46 Mich. 268.

¶ 178. Where a conspiracy to obtain property by false pretenses has been carried into effect, an information therefor should state against whom the conspiracy was directed.—People v. Arnold, 46 Mich. 268.

¶ 179. An information for conspiracy to obtain property by false pretenses should aver that the property belonged to some other person or persons than the conspirators.—People v. Arnold, 46 Mich. 268.

¶ 180. An allegation that the parties conspired, "by divers false pretenses, subtle means and devices, to obtain and acquire to themselves, of and from one W., a sum of money, to wit, ten dollars of the moneys of said W., and to cheat and defraud him, the said W., thereof," is sufficient.—People v. Clark, 10 Mich. 310.

¶ 181. An information charging the defendants with conspiring to falsely charge a person with arson or larceny sufficiently states an offense.—People v. Dyer, 79 Mich. 480.

¶ 182. An information under How. St. § 9275, for conspiring to obstruct the business of a corporation, need not allege specific acts done in furtherance of the conspiracy.—People v. Petheram, 64 Mich. 252.

¶ 183. An information alleging that respondents fraudulently conspired together, by false pretenses, to acquire from a given county a certain sum of money, and to cheat and defraud the said county thereof, sufficiently charges a conspiracy to cheat and defraud.—People v. Butler, 111 Mich. 483.

¶ 184. An information charging a conspiracy to obtain a note by false pretenses need not set out the means by which the end was to be accomplished; the end itself being unlawful.—People v. Summers, 115 Mich. 537.

¶ 185. An information charging a conspiracy to commit extortion, is not invalidated by the failure to use the words "the offense of" or "the crime of" immediately preceding the word "extortion."—People v. Lamb, 153 Mich. 675. (Hooker, Moore and Carpenter, JJ., dissenting.)

¶ 186. A conspiracy to defraud on the part of a materializing medium, who gives a "seance," where a collection of one dollar is taken up before the proceedings begin, is sufficiently charged although a named person is alleged as being defrauded, instead of the general public, because although no particular person was intended as a victim, if the conspiracy has been carried out and the money obtained from some person in consequence of it, the overt act is shown and the person whom it was the conspirators' intention to defraud, is made certain.—People v. Gilman, 121 Mich. 187.

§ 43c. Cruelty.

¶ 187. An information under Act No. 213, Pub. Acts 1897, providing a penalty for cruelty to children charged in the words of the statute that the defendant "did cruelly and unlawfully punish" the child in question. Held, the charge was sufficiently specific.—People v. Loomis, 161 Mich. 651.

§ 43d. Disorderly conduct and persons.

Complaint against husband for nonsupport as disorderly person, allegation as to family becoming public burden, see also Crimes ¶ 255.

Averments as to previous convictions for disorderly conduct, see ante § 35.

Complaint for trial before justice on charge of keeping disorderly house, see post ¶ 2953.

Keeping gaming houses, see post § 43g.

Indecency and obscenity, see post § 43i.

Abandonment of wife or child, see ante § 43a.

Drunkenness as a crime, see Intoxicating Liquors, VIII.

§ 43d. Disorderly houses.

¶ 188. An information for letting a house meant to be used for prostitution and lewdness need not describe the locality with more precision than would be required in a case of arson or burglary.—People v. Saunders, 29 Mich. 269.

¶ 189. In an information for keeping a house of ill fame, the offense may be charged as having been committed on a day certain, and on divers other days and times between that day and a previous day specified, it being a continuing offense.—People v. Russell, 110 Mich. 46.

§ 43e. Election crimes.

Official malfeasance in refusing vote or oath to voter, see post ¶¶ 241-243.

§ 43e. Embezzlements.

Statutory requisites and particularity in charge of embezzlement, see Comp. L. 1915, § 15609 et seq.

¶ 190. A general allegation of embezzlement is sufficient under Comp. L. 1871, § 7811, How. St. § 9421.—People v. Bringard, 39 Mich. 22.

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§ 43e. Escape
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statute (How. St. § 9246), with a statement of the facts out of which the offense arose; any other fact needed to convict is necessarily implied.—People v. Murray, 57 Mich. 396.

¶ 199. An information under How. St. § 9245, for aiding escape from prison of any prisoner "there lawfully committed or detained," must set forth some offense known to the law for which such prisoner was so committed or detained.—People v. Hamaker, 92 Mich. 11.

¶ 200. Under Comp. L. 1897, § 11315, an information is sufficient which recites in substance the confinement of prisoners under due process, charged with a felony, which is fully described, and charges the defendant with feloniously conveying into the jail two steel files and two steel saws, the same being adapted and useful to aid any prisoner in making his escape, with intent to facilitate the escape, and to aid in the escape, of said prisoners.—People v. Webb, 127 Mich. 29.

¶ 201. The use of the word "unto," instead of the word "into," in an information for a violation of How. St. § 9245, which provides that "every person who shall convey into any jail, prison, or other like place of confinement, any disguise, or any instrument, tool, weapon, or other thing, adapted or useful to aid any prisoner in making his escape, with intent to facilitate the escape of any prisoner there lawfully committed or detained, * * * shall be punished," etc., is a fatal defect, and may be taken advantage of by a motion in arrest of judgment.—People v. Rathbun, 105 Mich. 699.

§ 43f. False personations and disguises.

¶ 202. An information which charges respondent with assuming to be, without also alleging that he took upon himself to act as, a member of the metropolitan police force of Detroit, is fatally defective under How. St. § 9252.—People v. Cronin, 80 Mich. 646.

§ 43f. False pretenses and cheats.

Conspiracy to cheat and defraud, description of purposed fraud, see ante ¶ 173 et seq.
Obtaining signature to obligation or instrument by trick or fraud, see post ¶ 231 et seq.
Statutory form for false pretenses, see Comp. L. 1915, § 15740.

¶ 203. An information for obtaining money under false pretenses is fatally defective if it fails to allege that respondent knew that the representations charged to have been made by him were false.—People v. Behee, 90 Mich. 356; People v. Fitzgerald, 92 Mich. 328.

¶ 204. An information for obtaining goods by false pretenses must aver that the pretenses were false in fact, and an allegation that respondent knew them to be false is insufficient.—People v. Reynolds, 71 Mich. 343.

¶ 205. An information for obtaining property by false pretenses set forth that defendant did designedly and falsely represent and pretend that he was collecting money for a woman whose son, her only means of support, had been killed on a specified day on a certain railroad. Held, that falsity of the representations was not sufficiently alleged by an averment that respondent was not authorized to collect the money, and that no such accident as that described by him had occurred.—People v. Behee, 90 Mich. 356.

¶ 206. The falsity of respondent's pretense that he was authorized by a certain society to collect money for a charity is sufficiently averred where the information states that he was not at any time authorized by such society to collect any money, etc.—People v. Fitzgerald, 92 Mich. 328.

¶ 207. An information for obtaining goods by false pretenses may properly allege that the representations were made to an agent, if he had authority to transfer the goods; and this is so though the principal acted through the agent only.—People v. Wakely, 62 Mich. 297.

¶ 208. The averment in an information for obtaining money under false pretenses, that certain representations as to the quantity and value of the land which the accused was about to sell to the party to whom the representations were made were false, "by means of which said false pretenses" the money was obtained, is essentially defective if no facts are averred showing a connection between the representations and the alleged result.—Enders v. People, 20 Mich. 233.

¶ 209. In an information for obtaining money by false pretenses it is not necessary to allege in express words that the person defrauded relied on the representations made, but this is a necessary implication from the allegation that he was induced by the representations to part with his money.—People v. Jacobs, 35 Mich. 36.

¶ 210. An information for obtaining property by false pretenses concerning a mortgage assigned to the defrauded party is sufficient if it alleges in effect that the mortgage was assigned to him directly, that the false representations were made to induce him to purchase it, and that, in reliance upon the statements and representations made, he did purchase it and parted with his property thereafter.—People v. Cline, 44 Mich. 290.

¶ 211. Where the representations set forth in an information for obtaining money by false pretenses are of such a nature as to negative any possible hypothesis of respondent's ignorance of their falsity, an averment that respondent knew them to be false is not necessary. An information, therefore, alleging that respondent designedly falsely represented and pretended that he had received

from a certain person a subscription for a specified amount, with payment in full thereon, whereas such person had subscribed and paid only a specified smaller amount, is sufficient.—People v. Lennox, 106 Mich. 625.

¶ 212. An information for obtaining money belonging to a certain corporation by means of false pretenses made to a third person is fatally defective if it fails to aver that the third person was the agent of the corporation, or was authorized to pay out its money, or was so related to it as to warrant the inference that he was so authorized.—People v. Behee, 90 Mich. 356.

¶ 213. An information charging respondent with obtaining a person's signature to two promissory notes on false and fraudulent representations as to a certain corporation of which respondent claimed to be agent did not state the consideration of the notes, or to whom they were payable, or whether they were negotiable or not, nor did it in any way connect the notes with the corporation, or the corporation with the signer or with respondent. Held, that no offense was charged.—People v. Brown, 71 Mich. 296.

¶ 214. An information for obtaining from a certain firm, under false pretenses, money for a charity, sufficiently shows the authority of the person who gave the money where it avers him to be a partner.—People v. Fitzgerald, 92 Mich. 328.

¶ 215. An information for obtaining money by false pretenses showed a natural connection between the false pretenses and the obtaining of the money, where it was alleged that the respondent, a justice of the peace and member of a township board, made use of the orders for the payment of certain claims, to fraudulently obtain money of the township for greater amounts than the correct amounts of such orders.—People v. Luttermoser, 122 Mich. 562.

¶ 216. An information for obtaining money under false pretenses under Comp. L. 1897, § 11575, How. 2nd Ed., § 14624, alleging that accused and another person claimed to be agents of a certain corporation; that they designedly and falsely represented and pretended to have accurate information as to the financial condition of the company; that they prepared and presented to a certain bank for the purpose of obtaining credit a false financial statement of the assets and liabilities of the company, and that such bank relied upon such false statement and received from accused a certain promissory note and thereupon paid to the company and to accused a certain sum for such note, held sufficient.—People v. Johnson, 190 Mich. 170. (Stone, C. J., Bird and Kuhn, JJ., dissenting.)

§ 43f. Forgery and counterfeiting and uttering.

Describing forged papers, see also ante §§ 29, 30.

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show that the instrument published was one which, if genuine, would be binding.—People v. Parker, 114 Mich. 442.

¶ 226. Under Comp. L. 1897, § 11631, making it a crime to sell or offer to sell or have in possession any false, forged or counterfeit railroad passenger ticket, an information which alleges that the respondent had in his possession a certain false, forged and counterfeit ticket with intent to injure and defraud is in strict compliance with the statute in regard to charging intent to injure and defraud in connection with the alleged forgery.—People v. Smith, 125 Mich. 556.

¶ 227. In a prosecution under Comp. L. 1897, § 11631, making it a crime to sell or offer to sell or have in possession any false, forged or counterfeit railroad passenger tickets, an information charging that the ticket sold was false, forged and counterfeit and that the respondent knowingly, willingly and feloniously had it in his possession with intent to injure and defraud, need not allege the necessity of taking the ticket to the railroad office for signing and stamping for return passage although such requirement does not appear on the face of the ticket.—People v. Smith, 125 Mich. 566.

¶ 228. The words "as true," as used in Comp. L. 1857, § 5809, How. St. § 9220, in defining certain counterfeiting offenses, refer both to "the intent to pass" and to "render the same current"; and an indictment charging the possession of such bills "with intent to utter and pass the same," omitting the words "as true," is insufficient.—People v. Stewart, 4 Mich. 655.

¶ 229. An indictment for knowingly having in possession instruments adapted and designed for making counterfeit coin, to wit, Mexican dollars, with intent to use the same, need not allege that the defendant was not employed in the mint of the United States.—Harlan v. People, 1 D. 207.

§ 43f. Criminal frauds and obtaining signatures.

Obtaining signatures, see also ante ¶ 213.
Threats and false accusations to extort money, see post § 43t.

¶ 230. On a prosecution under Pub. Acts 1913, No. 276, for inserting fraudulent advertisements in a newspaper, an information setting out the newspaper advertisement and charging defendant with making therein "certain assertions, representations, and statements of facts which were untrue, deceptive, and misleading," and setting out in detail the statements, etc., relied upon, held sufficient.—Jasnowski v. Detroit Recorder's Court Judge, 192 Mich. 139.

¶ 231. An information for fraudulently obtaining a signature to a promissory note (How. St. § 9353) is not defective in failing to allege that the note was delivered to respondent.—People v. Kinney, 110 Mich. 97.

¶ 232. An information under How. St. § 9353, for fraudulently obtaining the signature of another to a promissory note, which sets up facts necessarily leading to the single and inevitable conclusion that the note was signed in consideration of the alleged false representations, is not invalid because it does not expressly aver such to have been the fact.—People v. Kinney, 110 Mich. 97.

§ 43g. Gaming and betting.

¶ 233. An information under How. St. § 2029, which charges that the respondent did knowingly suffer a gaming room and gaming table to be kept and maintained and played on premises occupied and controlled by him (describing them), contrary to the form of the statute in such case made and provided, is fatally defective, in that it fails to charge that the gaming room and gaming table suffered to be kept were maintained for hire, gain, or reward.—People v. Wiethoff, 100 Mich. 393.

§ 43h. Homicides and assaults to murder or do great bodily harm.

Matters wherein homicide accusations are subject to same general rules as other indictments, see ante I, B, post I, C-E.
Averments of substance in indictments for homicide, see Homicide, VI.
Averments of substance in indictments for homicidal assaults and assaults with intent to do great bodily harm, see Homicide, VI.
Averments as to degree in indictment for murder, see Homicide § 35.

§ 43i. Incest.

¶ 234. An information for incest, which charges the crime to have been committed with one H., "she, the said H., being then and there the daughter" of the accused, is sufficient without also averring, in the words of the statute, that the parties were "within the degrees of consanguinity within which marriages are prohibited," etc.—Hicks v. People, 10 Mich. 395.

¶ 235. An information for incest under How. St. § 9291, which charges respondent, a married man, with having had sexual intercourse with his daughter, need not allege that he committed the crime of adultery; nor is it defective because he is charged with having committed the crime of fornication in so doing.—People v. Cease, 80 Mich. 576.

§ 43i. Indecency and obscenity.

Lewd and lascivious cohabitation, see post § 431.

¶ 236. In an indictment for publishing a lawdy and obscene paper, it is not necessary to set forth the obscene matter on which the

people rely for a conviction.—People v. Girardin, 1 Mich. 90.

§ 43l. Larceny and statutory stealings.

General requisites wherein larceny indictments are same as others, see ante I, B, post I, C-E.

Substantial requisites and sufficiency of averments, see Larceny, II.

Receiving stolen goods, see post § 43r.

§ 43l. Lewd and lascivious cohabitation.

Keeping disorderly houses, see ante § 43d.

¶ 237. Both parties must be joined as defendants in the same information or indictment for lewd and lascivious cohabitation unless one of the parties be unknown or since dead.—Delany v. People, 10 Mich. 241.

¶ 238. An information which charged that one T. "did lewdly and lasciviously associate and cohabit with one M., he, the said T., being then and there a man, and she, the said M., being then and there a woman, and they, the said T. and M., not being then and there married to each other," does not charge the parties with a joint offense, but is a charge against the man alone and therefore bad.—Delany v. People, 10 Mich. 241.

§ 43m. Malicious mischief or injury to property.

¶ 239. An information charging that the defendant, on a day and at a place named, in the county, "a certain harness, of the value of fifty dollars, of the personal property of one Edwin R. Wilson, then and there being found, feloniously, wilfully and maliciously did then and there injure and destroy, by then and there cutting the lines and martingales of said harness, and taking the rings from said martingales, contrary to the statute," etc., is held a good information for the malicious destruction of personal property of the value of $50.—McKinney v. People, 32 Mich. 284.

§ 43o. Obstructing justice and contempts.

Escapes, prison breach, and aiding escapes, see ante § 43e.

Resisting officers and obstructing them in performance of duty, see post ¶ 263 et seq.

¶ 240. In a prosecution for the obstruction of justice, and information which charges that respondent "well knowing the premises" and "with intent to obstruct and hinder the due course of justice" unlawfully dissuaded and carried away a certain witness for the purpose of preventing him from appearing to testify, sufficiently charges a substantive offense and not an attempt.—People v. Boyd, 174 Mich. 321.

§ 43o. Official malfeasance or misconduct.

¶ 241. An indictment for non-performance of an official act, to wit, refusal to register a voter, must set f
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witness on behalf of the people, and was sworn touching the matter in controversy, etc., is held sufficient to identify the court and the occasion as constituting such a tribunal and hearing as would render false swearing perjury within Comp. L. 1871, § 7918, How. St., § 9539.—Flint v. People, 35 Mich. 491.

¶ 248. Where an information for perjury alleges that the respondent appeared as a witness "on his own behalf," no other statement that he had been allowed to testify "at his own request" (How. St., § 7544) is necessary.—People v. Brown, 54 Mich. 15.

¶ 249. The indictment for perjury must aver that the false allegation was material to the matter in question, or it must clearly appear by the indictment to have been so from the statement alleged to be false.—People v. Collier, 1 Mich. 137.

¶ 250. Where the indictment for perjury stated that "it became and was material to ascertain the truth of the matters hereinafter alleged to have been sworn to"—stating what the defendant swore to—the averment was held insufficient.—People v. Collier, 1 Mich. 137.

¶ 251. A general allegation of the materiality of testimony mentioned in the indictment for perjury is sufficient, and it is not necessary to set forth so much of the proceedings as will show it to be material.—Hoch v. People, 3 Mich. 552; Flint v. People, 35 Mich. 491.

¶ 252. In an information for perjury committed in an examination before a justice, an allegation "that it then and there, upon said examination, became a material question whether" certain matters of fact set forth were true when taken, with the averment that the respondent swore to them as being true, and that they were false, and with the necessary averments which render false swearing perjury, is held a sufficient averment of materiality to the issue, and not to be ambiguous.—Flint v. People, 35 Mich. 491.

¶ 253. Where an information alleging perjury in swearing to a bill in equity does not show that the bill is of a character required by law to be verified by oath, it is insufficient, both at common law and under Comp. L. 1857, § 5821; a general allegation that the defendant was "lawfully required to declare and depose," etc., the oath not being taken upon a trial of the cause, is not sufficient; the information should set forth the facts, or show enough of the nature of the proceedings, and of the purposes for which the oath was taken, or to be used, to show that it was authorized by law. Where the bill is not one whose allegations can be treated as evidence on the trial, an allegation in the information that "it then and there became a material question in said bill of complaint and in said judicial proceeding whether the claim referred to existed, etc., is wholly insufficient and variant from the truth; such an oath could become material only on some motion based upon it, and then its materiality to such motion must be alleged. Such a defect in the information cannot be cured by the proofs introduced.—People v. Gaige, 26 Mich. 30.

¶ 254. An information for perjury, alleging that it became material, on a trial for larceny, to know whether or not certain moneys were paid to the accused therein by the respondent on September 11, 1894, and that the respondent testified upon such trial that he "paid it on the 11th of September," at the accused's place, and obtained a receipt, may properly set forth, by innuendo, that by such testimony the respondent meant that he paid a specified amount of money on September 11, 1894, it being for the jury to say whether such was in fact the meaning intended to be conveyed.—People v. German, 110 Mich. 244.

¶ 255. The information for perjury, committed on a prosecution for larceny, need not allege that the person accused of larceny owned or had a place, to support proof that the statement that the money was paid by respondent at the former's "place" was false.—People v. German, 110 Mich. 244.

¶ 256. An information under Comp. L. § 11308, making it a felony to endeavor to incite or procure perjury though no perjury be committed need not aver that the testimony would be false and that the witness knew it to be false.—People v. Clement, 127 Mich. 130.

¶ 257. Defendant was convicted of perjury in giving testimony in a divorce suit in which he was complainant. The complaint alleged only in general terms that the question on which defendant testified falsely was material and that defendant swore falsely. It averred that defendant in reply to a question as to how long he had lived in Detroit answered "about two years and a couple of months"; and that in fact the defendant had not lived in Michigan for as much as two years prior to the time of filing the divorce bill. Held, the complaint was bad: (1) Because it did not set out facts showing the materiality of the alleged false testimony; (2) because, by failing to name the date of filing of the divorce suit, it did not set out facts showing defendant's statement to be false nor did it expressly negative his statement.—People v. Vogt, 156 Mich. 594.

§ 43p. Prize fighting.

¶ 258. Since How. St., § 9306, which provides that any person who shall be a party to or engage in a prize-fight, "or any other fight in the nature of a prize-fight," shall be punished, etc., defines but one offense, a count

charging that respondent engaged in a fight in the nature of a prize-fight charges no offense additional to one charging a "prize-fight."—People v. Taylor, 96 Mich. 576.

¶ 259. Under How St., § 9306, defining as a crime the being a party to or engaging in a "prize-fight, or any other fight in the nature of a prize-fight," an information charging that respondent did "unlawfully engage in a prize-fight with one B., and did then and there fight a prize-fight with said B. contrary to the statutes," and not setting out the particular acts constituting the offense charged, is sufficient.—People v. Taylor, 96 Mich. 576.

§ 43r. Rape and assaults and attempts thereat.

Matters and requisites common to all indictments, see ante I, B, post I, C-E.

Substantial averments in rape and assaults of carnal nature included therein, see Rape.

§ 43r. Receiving stolen goods.

¶ 260. An information for receiving stolen goods need not allege the time and place of the theft.—People v. Goldberg, 39 Mich. 545; People v. Smith, 94 Mich. 644.

¶ 261. An information for receiving stolen property, knowing, etc., need not allege that the prosecution is for a first offense, or that the act of stealing was not a simple larceny, or that respondent has made no restitution or satisfaction.—People v. Caulkins, 67 Mich. 488.

§43r. Removal or spoliation of records.

Laying title to public record books, see ante ¶ 109.

¶ 262. An information under How. St., § 9347, charging the respondent with carrying away "an enrolled decree, containing the bill of complaint, pleadings and other papers" filed in and belonging to a designated chancery case, need not describe "the other papers" more specifically, it appearing that they were a part of the enrolled decree.—People v. Bussey, 82 Mich. 49.

§ 43r. Resisting or obstructing officers.

Description of crime for which arrest was being made, see also ante ¶ 113.

¶ 263. An information charging respondent with obstructing an officer in his effort to maintain the peace is bad if it fails to show the acts of the officer in the performance of which he was obstructed, and the acts of respondent constituting the obstruction.—People v. Hamilton, 71 Mich. 340.

¶ 264. An information for resisting an officer in attempting to serve a warrant issued by a justice of the peace must set out all the facts which gave the justice jurisdiction to issue the warrant.—People v. McLean, 68 Mich. 480.

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§ 43s. Seduction.

Matters and requisites common to all crimes, see ante I, B, post I, C-E.
Substantial averments of the crime, see Seduction, II.

§ 43t. Threats.

Averment in words of statute of crime of threats to extort money, see also ante ¶ 132.
Conspiracy to extort by threats, see ante § 43c.

¶ 271. In an information under How. St., § 9093, relating to threats and threatening letters, the character of the threat should be set out so that it may be seen whether a substantial threat was made.—People v. Jones, 62 Mich. 304.

¶ 272. An information in the language of the statute (How. St., § 9093), that respondent maliciously threatened to "accuse" a designated person of a specified crime, with intent to extort money, sufficiently shows a threat to prefer charges against such person in some court.—People v. Frey, 112 Mich. 251.

¶ 273. An information charging the offense of obtaining a note by means of a false accusation that a certain person was the father of an unborn child of a certain woman, the respondent knowing the accusation to be false, and that it was represented that such note would operate as a full satisfaction of all claims of said woman, and that such representation was relied on, was sufficient as against the objection that the information failed to allege respondent was or claimed to be authorized to act as agent of said woman. —People v. Stockwell, 135 Mich. 341.

§ 43u. Unlawful practice of profession or unlicensed business.

Negativing exceptions, see also ante § 32.

¶ 274. A complaint under Laws 1883, Act No. 167, for practicing medicine without statutory license and qualifications, need not allege by what means or on whom accused so practiced.—People v. Phippin, 70 Mich. 6.

¶ 275. A complaint for unlawfully practicing medicine under Pub. Acts 1899, Act 237, was sufficient which was stated in the language of the statute, without specifying the particular acts or means by which the defendant practiced medicine.—White v. Lapeer Circuit Judge, 133 Mich. 93.

¶ 276. On a prosecution of a physician for having unlawfully procured himself to be registered as a physician under Pub. Acts 1899, Act No. 237, How. 2nd Ed., § 5108 et seq., as amended by Pub. Acts 1913, Act No. 368, an information charging the offense in the language of the statute, held sufficient.—People v. Maczulski, 194 Mich. 193.

¶ 277. Information charging the respondent "unlawfully did engage in the business of practice of medicine and did practice medicine within the meaning of Act 237 of the Public Acts of the state of Michigan for the year 1899 and the amendments thereto without before so doing having complied with the provisions of said Act and its amendments, that is to say, without being then and there the lawful possessor of a certificate of registration or license issued by a board of registration in medicine," etc., held bad under Pub. Acts 1899, No. 237, How. 2nd Ed. § 5108 et seq., as amended by Pub. Acts 1913. No. 368, because the general words employed do not fully set forth all of the assignments necessary to constitute the offense, and as the subject-matter is defined by the statute by descriptive words not employed in the information, and as a person may innocently do things embraced in the definition given in the statute.—People v. Watson, 196 Mich. 36.

¶ 278. In a criminal prosecution brought under Comp. Laws 1897, § 5324, for traveling from place to place and selling goods by sample without having obtained a peddler's license, it is not necessary to negative in the complaint the exceptions set out in a separate section of the statute.—People v. Stewart, 167 Mich. 417. Reversed in 232 U. S. 665, 58 L. ed. 786, 34 Sup. Ct. Rep. 476.

¶ 279. A complaint charged defendant with loaning twenty-five dollars to a specified person in a given city at a named date, at a rate of interest exceeding seven per cent per annum without having obtained a license as required by statute. Held, there being sufficient identification to bar any subsequent prosecution for the same offense, and the charge being sufficiently plain and definite that defendant, without professional aid, was informed as to the nature and cause of the accusation against him, the complaint was sufficient even though not ideal in form. —People v. Quider, 172 Mich. 280.

C. JOINDER AND SEPARATION; COUNTS AND ELECTION.

§ 44. Joint indictment of several persons.

Joint information on separate preliminary hearings and commitments, and separate information on joint commitment, see ante § 18.
Joinder of counts in same indictment or information, see post § 45.
Separate or joint trials, see post § 326.
Sufficiency of proofs against each of defendants, see post § 308.
Necessity of joint charge for lewd and lascivious cohabitation, see ante ¶¶ 237, 238, post ¶ 1515.
Indictment of accessaries without indictment or joinder of principal, see Comp. L. 1915. § 15743.

¶ 280. One or more respondents may be informed against for an assault upon two persons with intent to do great bodily harm, less than the crime of murder, if the assault complained of was made by the same act or acts.—People v. Ellsworth, 90 Mich. 442.

§ 45. Propriety of joinder of counts and charges.

Indictment of two or more persons jointly, see ante § 44.
Adding counts to cover commitment in varying aspects, see ante § 16.
Objections for improper joinder and effect of misjoinder, see post I, D.
Mode of objection for misjoinder, see post § 59.
Construction respecting duplicity, see post § 76.
Charging on different counts according to diverse theories of case, see post § 423.
Verdict on the several counts, see post § 472.
Validity of law for joining counts, see Constitutional Law, § 198, ¶ 846.
Offenses and degrees joinable in information, see Comp. L. 1915, § 15762.
Proper counts to be joined with larceny counts, see Comp. L. 1915, § 15758.

¶ 281. Counts may be joined if they relate to one and the same transaction, so that on the trial one of them will suffice to meet the proof; but if the object is to prosecute separate felonies under one information they cannot be joined.—People v. Aikin, 66 Mich. 460.

¶ 282. Defendant state treasurer was indicted under Comp. Laws 1897, § 11614, for embezzlement for depositing funds in a bank for his own personal profit. The indictment contained twenty-eight counts, alleging various deposits made during the course of two years. Held, these counts were not improperly joined in view of the fact that defendant's general plan and purpose made all these offenses a part of the same transaction.—People v. Glazier, 159 Mich. 528.

¶ 283. An information may charge, in different counts, the obtaining of a note by false pretenses, and a conspiracy to commit that crime, founded on the same transaction.—People v. Summers, 115 Mich. 537.

¶ 284. The forgery and uttering of a bond or note, and of the mortgage which secures it, are connected transactions, and can be joined in the same information.—People v. Sharp, 53 Mich. 523.

¶ 285. An information contained four counts. The first, based on the complaint and warrant, charged manslaughter in the usual statutory terms; the second and third charged statutory manslaughter resulting from an abortion, the second alleging the administration of drugs, the third the use of an instrument; and the fourth count charged manslaughter resulting from the respondent's neglect while acting as a physician after the deceased had g
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law, spring out of substantially the same transaction, or are so connected in their facts as to make substantially parts of the same transaction or connected series of facts, the defendant cannot be prejudiced in his defense by the joinder, and the court will neither quash nor compel an election.—People v. McKinney, 10 Mich. 54.

¶ 293. The joinder, as separate counts in one information, of several offenses which, though distinct in point of law, spring from substantially the same transaction, as the forgery of a mortgage, its certificate of acknowledgment and the accompanying bond, and the uttering of each, cannot operate to the legal prejudice of the accused, and he is not entitled, as a matter of right, to compel an election between them.—Van Sickle v. People, 29 Mich. 61.

¶ 294. On information in several counts for manslaughter, manslaughter by abortion with drugs, manslaughter by abortion with instruments, and manslaughter by negligence as attending physician, the prosecution is put to an election.—People v. Aikin, 66 Mich. 460.

¶ 295. Election should be compelled where some counts charge sale of intoxicating liquors, while others charge keeping of saloon where such liquors are sold, those being distinct offenses.—People v. Keefer, 97 Mich. 15.

¶ 296. The prosecutor should not be required to elect upon which count he would claim a conviction, where all the counts were for the forging and for uttering the same indorsement upon a check, and the same check and indorsements were set out in each count of the information.—People v. Kemp, 76 Mich. 410.

¶ 297. Where one count in an information charged respondents with conspiring to falsely accuse a person of arson, and the second count of larceny, and the whole case was originally charged as a single conspiring to make both charges, and the testimony all related to one transaction, or set of connected transactions, an election of counts is not required.—People v. Dyer, 79 Mich. 480.

¶ 298. A respondent informed against in one count for keeping his saloon open on Sunday, and in a second count for keeping the windows of his saloon curtained during the same day, is entitled to an election of counts. —People v. Rohrer, 100 Mich. 126.

¶ 299. Where an information charges the forgery of an order for the payment of money, and also the uttering of the forged order, the prosecution cannot be required to elect upon which count it will rely for conviction. (The syllabus in the official report states that each count set forth the order.)—People v. Warner, 104 Mich. 337.

¶ 300. Where a respondent is charged with pretending to tell fortunes as a continuing offense, and several instances of such disorderly conduct are shown upon the trial, the prosecution cannot be compelled to elect upon which of these specific acts conviction is asked, all being admissible under the general charge.—People v. Elmer, 109 Mich. 493.

¶ 301. Where an information based on Pub. Acts 1911, Act No. 62, How. 2nd Ed., § 5299, prohibiting certain classes of immoral advertising, contains a count charging the advertising of the treatment of venereal diseases and sexual ailments and a second count charges that defendant advertised that he was a specialist in diseases of the sexual organs, etc., an election between the counts will not be compelled.—People v. Kennedy, 176 Mich. 384.

§ 47. Time for election.

¶ 302. Where an information for manslaughter in procuring an abortion contains three counts, charging, respectively, the use of drugs, the use of an instrument, and the employment of means unknown, an election by the prosecution of the count relied upon for a conviction, made upon the submission of the case to the jury, sufficiently protects the rights of the respondent.—People v. Seaman, 107 Mich. 348.

¶ 303. Where, in a criminal trial, the defendant asks at the beginning that the prosecution be compelled to elect between two counts, it is not error for the court not to compel this election until the end of the case, where the trial proceeded in the same manner as if the election had been directed at the first.—People v. Burman, 154 Mich. 150.

§ 48. Manner and indicia of election.

¶ 304. On trial of an information for incest the prosecutor may, before the evidence is introduced, select any one act of criminal intercourse which occurred within the jurisdiction of the court, and within the period of the statute of limitations applicable to the offense, as the one upon which a conviction will be sought. But when evidence has been introduced tending directly to the proof of one act, and for the purpose of procuring a conviction upon it, the prosecutor is deemed to have made his election, and that act must thereafter be considered the one charged against the defendant, and for which alone he can be found guilty.—People v. Jenness, 5 Mich. 305.

¶ 305. The introduction of evidence upon any one count in an information for seduction is a sufficient election of that count as the one on which the prosecutrix relies, and evidence of subsequent acts is not admissible for the purpose of securing a conviction on them.—People v. Clark, 33 Mich. 112.

¶ 306. In an indictment for rape the information alleged the date of the crime under a videlicet as July 18th. In his opening statement to the jury the prosecutor stated

that the act was committed about a week before July 18th. Held, the prosecutor did not thereby elect to fix the crime as of July 11th, and might prove it as of a date two weeks before July 18th.—People v. Nichols, 159 Mich. 355.

¶ 307. In an indictment for rape the information alleged the date of the crime as July 18th. In his opening statement to the jury the prosecutor stated that the act relied on was committed about a week prior to July 18th. He then proceeded to prove an act of intercourse in June, but immediately disclaimed that he relied on such act. Held, he did not thereby elect to rely on the act in June, and the proof was for the purpose offered admissible.—People v. Nichols, 159 Mich. 355.

D. DEFECTS, OBJECTIONS AND AMENDMENTS.

§ 49. Grounds and materiality of objections.

[Note. The requisites and sufficiency of indictments are treated, ante I, B, that is to say, if the precedent arose on a question whether the indictment was good or defective, it has been there treated; but where the question is as to the materiality or importance of what is concededly a defect, the matter is treated here.]

Defects in preliminary proceedings, see post § 50.

Misnomer or misdescription, see post § 51.

Grammatical or verbal defects, see post § 52.

Impossible dates and clerical errors of time, see post § 53.

Good and bad counts in same indictment, see post § 55.

Surplusage, see post § 54.

Construction and intendment of averments on objection to them, see post §§ 56-58.

Materiality of variance of information from commitment, see ante § 14.

Materiality of variances of proofs from averments, see post § 77 et seq.

Abatement of prosecution by pardon, see also post ¶ 2724.

Destruction of indictment, effect to discharge bail, see Arrest ¶ 147.

Defects in prosecution affecting liability for malicious prosecution, see Malicious Prosecution, II.

Person entitled to object that he was denied counsel before grand jury, see ante ¶ 26.

Proper modes of making objections, see post § 59.

Amendments to meet objections, see post § 69 et seq.

Sufficiency of indictment or information as law question for court alone, see post § 396, ¶ 1820.

Effect of omissions, misdescriptions and imperfections in indictments, matters made immaterial by statute, see Comp. L. 1915, § 15735.

Imperfections enumerated as immaterial by statute, see Comp. L. 1915, § 15746.

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¶ 314. The indictments of a grand jury which held over to the term succeeding the one to which it was summoned and thus was a de facto jury, being valid, they could not be set aside on a motion to quash, or by challenge to the array.—People v. Morgan, 133 Mich. 550.

¶ 315. How. St. §§ 9496, 9497, specifying as the only challenge to a grand jury that a member is prosecutor or complainant, expressly precludes other grounds; and such being then excluded are also excluded if made on trial of the indictment.—People v. Smith, 118 Mich. 73.

¶ 316. In a prosecution for rape, where respondent objected to any witnesses being sworn, on the ground that the complaint before the justice was made upon information and belief, and that a warrant issued thereon was invalid, it was not error to receive such testimony, where the objection was not made in the justice court where an examination was had, and where it appeared at the trial in the circuit court, that before the warrant was issued, the girl was examined orally.—People v. Row, 135 Mich. 505.

¶ 317. On prosecution of an extradited prisoner the question of the authority of the clerk to issue a warrant of arrest was immaterial, where the warrant of the governor empowering the sheriff to receive respondent from the proper authorities of a sister state and convey him to this state to be dealt with according to law, contained authority to authorize the sheriff to produce respondent before the court in which the information was filed.—People v. Stockwell, 135 Mich. 341.

¶ 318. An objection that accused has had no preliminary examination on a criminal charge is immaterial where the charge upon which he is alleged to have had no examination is withdrawn and the jury was limited to the consideration of the charge upon which he had had an examination.—People v. Harris, 144 Mich. 12.

§ 51. ——Misnomer or misdescription.

Omission of name of abandoned child, see also ante ¶ 142.

Sufficiency of name or description, see ante § 27 et seq.

¶ 319. The omission in a complaint and warrant for larceny of the Christian name of the owner of the stolen property is an irregularity which respondent might waive, and which could be cured by amendment under How. St. § 9537.—People v. Pline, 61 Mich. 247.

¶ 320. A conviction in a forgery case will not be set aside because the instrument in question was improperly described in the information as a promissory note, where such instrument was a note which is the subject of forgery at common law.—People v. Bennett, 122 Mich. 281.

¶ 321. Although an instrument promising to pay a sum at a time stated with interest, and agreeing to the inclusion of attorneys' fees in any judgment in the case, and waiving relief from valuation and appraisement laws, is not a negotiable promissory note, the designation of such instrument as a promissory note in an information for uttering a forged note did not render the information invalid; the instrument as set out being one which is the subject of forgery at common law.—People v. Bennett, 122 Mich. 281.

¶ 322. The omission of the word "liquors" from an information charging the respondent with failing to keep his saloon, where spirituous, brewed, fermented, and intoxicating [omitted word] were sold at retail, closed on Sunday, said word appearing in the complaint, warrant, and recognizance certified to the circuit court by the examining magistrate, should be disregarded as a clerical error, which the record furnishes the means of correcting.—People v. Case, 105 Mich. 92.

§ 52. ——Grammatical and verbal defects.

¶ 323. The substitution, in an information for arson, of the word "was" for "did" in the phrase "did wilfully, etc., set fire to," should be regarded as a clerical mistake which did not mislead nor prejudice respondent, especially as the complaint contained the charge correctly stated; and the defect should have been objected to by demurrer or on motion to quash, not on motion in arrest of judgment.—People v. Duford, 66 Mich. 90.

§ 53. ——Clerical errors of time and impossible dates.

¶ 324. An information filed September 26, 1876, alleged an offense of breaking and entering a store as committed December 25, 1876. Held, that the defect was cured by the statute of amendments (Comp. L. 1871, §§ 7923, 7940, How. St. §§ 9534, 9551).—Cole v. People, 37 Mich. 544.

¶ 325. How. St., § 9421, provides that, in a prosecution for embezzlement, proof of any embezzlement committed within six months next after the time stated in the indictment shall be sufficient to maintain the charge. An information charged embezzlement between two dates not more than six months apart. Held, that the defect, if any, in failing to allege a day certain, would be disregarded, under How. St., §§ 9534, 9535, where the objection was not raised until after the jury had been sworn.—People v. Hawkins, 106 Mich. 479.

¶ 326. An information charging larceny as a third offense in the language of Comp. L. 1897, § 11786, which provides in such cases for imprisonment for life or for not less than seven years in addition to the term prescribed for the last offense, even if de-

fective for failing to state the times and places of the prior convictions, was good after verdict, under Comp. L. 1897, § 11924, making the words of the statute sufficient, after verdict.—People v. Butler, 122 Mich. 35.

§ 54. Surplusage, what constitutes.

Immateriality of needless allegations, see also ante ¶ 312.

Continuando as surplusage, see also post ¶ 408.

In information for burglary with arms, see also ante ¶ 165.

¶ 327. The fact that a portion of the matters of fact set forth in an information as falsely sworn to appears not to have been material will not vitiate the information as to the remainder, even if it could be assumed, where all the facts are not spread out, that that which appeared to be immaterial was so in fact.—Flint v. People, 35 Mich. 491.

¶ 328. If an information founded upon a statute contains allegations covering all the terms of the statute and making a complete offense, and then adds something by way of making the offense appear greater, such latter matter may be disregarded as mere surplusage, and does not vitiate, nor need it be proved.—People v. Aldrich, 104 Mich. 455.

¶ 329. A general reference to an offense as "contrary to the statutes in such case made and provided" is sufficient in an information and the reference to a wrong section of the statute is mere surplusage.—People v. Lane, 124 Mich. 271.

§ 55. Good and bad counts in same indictment.

Necessity of objection and exception to evidence on bad count, see post § 511.

¶ 330. Where an indictment contains two counts, each for the same offense, one of which is bad, the other being good is sufficient to warrant a general verdict of guilty and judgment thereon.—Shannon v. People, 5 Mich. 71; People v. McKinney, 10 Mich. 54.

¶ 331. A good count will sustain a conviction even though the information contains another that is defective.—People v. Haley, 48 Mich. 495.

¶ 332. In a criminal prosecution, one good count is sufficient to support a general verdict.—People v. Bird, 126 Mich. 631.

¶ 333. An information for murder was in the full common-law form of indictments, except that in the conclusion, where it was averred that the respondent "did kill and murder," the name of the person killed was omitted. The respondent was convicted of manslaughter; and it was held that, under How. St. § 9534, the information was sufficient to sustain the conviction, regardless whether or not it would have been technically sufficient to sustain a conviction for murder.—Evans v. People, 12 Mich. 27.

§ 56. Intendments and presumptions in aid of indictment or information.

As to preliminary proceedings, see post § 57.

Conclusiveness of matters returned by magistrate, see post § 58.

Sufficiency of one good count to sustain conviction, see ante § 55.

Permissible assumption as to materiality, see also ante ¶ 327.

¶ 334. An uncertain or ambiguous criminal charge cannot be supported by intendments.—People v. Arnold, 46 Mich. 268.

¶ 335. An information charging bribery in procuring a village clerk to issue "false sparrow certificates" under a statute providing bounties for English sparrows, is not fatally defective because of the omission of the word "English" before the sparrow, where it shows upon its face by reference to the statute that the certificates contemplated were such as could refer only to English sparrows and there was no possibility of a mistake as to its meaning.—People v. Gorsline, 132 Mich. 549.

¶ 336. On a trial for unlawfully rejecting a vote, whether a distinct allegation that the person offering to take an oath under Comp. L. 1857, pp. 107, 108, § 25, How. St. § 161, was, at the time, a duly qualified elector, could be held, after verdict, to include the fact of registry, so that the verdict could cure the defective allegation of registry, or whether such defective allegations would be amendable under How. St., § 9535, quære.—Wattles v. People, 13 Mich. 446.

§ 57. ——As to preliminary proceedings.

Presumption on the record as to conformity to preliminary hearing and commitment, see post § 618.

In actions for malicious prosecution, see Malicious Prosecution, VI.

¶ 337. On a motion to quash, a complaint for murder is sufficient if its allegations are positive and there is nothing in the record to show that there was no examination of witnesses under oath before the warrant issued.—People v. Hare, 57 Mich. 505.

¶ 338. A complaint and warrant charged both rape and incest, but the evidence adduced upon the preliminary examination tended to establish the former crime only. The magistrate returned that it appeared that "the offense charged" had been committed, and that there was probable cause to believe respondent guilty thereof. An information was filed which followed the complaint and warrant, but the prosecution elected to proceed to trial upon the count for rape. Held, that a motion to quash the information on the ground that no preliminary examination had been had upon such charge was properly overruled.—People v. Burwell, 106 Mich. 27.

¶ 339. The court will presume that the police justice examined the complainant and his witnesses orally, where such fact is recited in the warrant purporting to have issued upon such complaint and examination. —People v. Bechtel, 80 Mich. 623.

¶ 340. The complaint and examination preliminary to the issue of a warrant of arrest for an offense not cognizable by a justice of the peace need not be reduced to writing, and, therefore, in the absence of a contrary showing, it will be presumed that the magistrate had sufficient proof before him to confer jurisdiction to issue the warrant.—People v. Berry, 107 Mich. 256; People v. Caldwell, 107 Mich. 374; People v. Bennett, 107 Mich. 430; People v. Rush, 113 Mich. 539.

¶ 341. Sufficiency of proof to issue a warrant is presumed in a prosecution under the Local Option Law, where it is contended that the return of the justice failed to disclose that, at the time of issuing his warrant, there was any competent evidence before him tending to establish the fact that the law was in force within the county.—People v. Berry, 107 Mich. 256.

¶ 342. The presumption of sufficient evidence to issue the warrant, where the record does not show it, is not affected by the fact that a written complaint was taken, the averments of which were insufficient to authorize the issuing of a warrant, where it does not appear that no other evidence was adduced.—People v. Caldwell, 107 Mich. 374.

¶ 343. The mere fact that a written complaint was taken, which was insufficient to authorize the issuing of the warrant, does not preclude the inference that a valid oral complaint was made.—People v. Bennett, 107 Mich. 430.

¶ 344. Where the warrant issued in a case beyond the magistrate's jurisdiction recites the examination of the complaining witness on oath, but does not show to what he testified, it will be presumed that the evidence was sufficient to authorize the issue of the warrant, although the written complaint purports to have been made on information and belief.—People v. Whipple, 108 Mich. 587; People v. Rush, 113 Mich. 539.

¶ 345. Whether it is competent for the circuit court, in any case, to review the evidence taken by a justice, to ascertain whether it was legally sufficient to establish the commission of the offense for which the warrant issued, quære.—People v. Bennett, 107 Mich. 430.

§ 58. ——Conclusiveness of magistrate's return.

¶ 346. A justice's jurisdiction to issue a warrant upon a written complaint that is sufficient on its face cannot afterward be destroyed by the justice's affidavit that the oral examination of the complaining witness did not agree with or support his complaint, or by the testimony of such witness on the trial that he did not have personal knowledge of all the facts stated in the complaint.—People v. Haas, 79 Mich. 449.

¶ 347. Parol evidence to show that no other testimony was taken than that contained in the complaint is inadmissible—at least upon motion to quash the information, made after the jury has been impaneled to try the cause.—People v. Whipple, 108 Mich. 587.

¶ 348. Where a complaint and warrant for an offense not cognizable by a justice of the peace are valid in form, the question whether the evidence taken before him justified his conclusion to issue the warrant is not triable at the circuit.—People v. Payment, 109 Mich. 553.

§ 59. Mode of objecting and time for objection.

To defects in grand jury proceedings or in preliminary hearing and commitment, see post §§ 60, 61.
Office and scope of motion to quash, see post § 63.
Office and scope of pleas in abatement and demurrers, see post §§ 109, 111.
Pleas in abatement or bar, see post §§ 109, 110.
Demurrer or replication to pleas, see post § 111.
Demurrer to reception of any evidence, see post § 401.
Necessity of objection below to raise question on review, see post § 511.
Defect in information available on motion in arrest, see also ante ¶ 201.
Exclusion of objections first made on review to defects in preliminary proceedings, see post § 511.
Necessity of demurrer or motion to quash, see also post § 511.
Necessity of exceptions for defect appearing extraneously to the record, see post ¶ 2472.
Demurrer or motion to quash as mode of objection for defects of form, see Comp. L. 1915, § 15747.

¶ 348a. A complaint for the violation of the Local Option Law, which upon its face purports to be made upon the knowledge of affiant, sufficiently complies with Comp. Laws 1897, §§ 11839, 11840, and is not subject to impeachment by the respondent on arraignment by showing lack of requisite knowledge on the part of the complaining witness.—Potter v. Barry Circuit Judge, 156 Mich. 183.

¶ 349. A misjoinder of counts is not ground of demurrer, but may be of a motion to quash. Such a motion should be granted when otherwise the defense would be subjected to serious danger of surprise or perplexity in preparing for trial. But in cases

where all the counts may refer to one transaction, the respondent can be sufficiently protected by confining the proof on the tria to such matters as relate to that, and whic he may be expected to be prepared to meet —Hamilton v. People, 29 Mich. 173.

¶ 350. By express provisions of How St.. § 9535, objections to an information for any formal defects apparent on its face must be taken advantage of by demurrer or motion to quash before the jury are sworn and no afterwards.—People v. Schultz, 85 Mich. 114.

¶ 351. It is too late to object to the verification of an information after the jury is sworn.—Lambert v. People, 29 Mich. 71; People v. Gardner, 62 Mich. 307.

§ 60. ——Defects in grand jury or proceedings before it.

Defects open for objection on trial, see ante § 50.

Challenging grand jurors or array, see Grand Jury § 2.

¶ 352. An objection to the drawing of the grand jury which is prohibited by the statute when the grand jury is impaneled cannot be valid when the party indicted is put upon trial; and How. St. §§ 9496, 9497, restricting the challenge to the sole ground that a juror was prosecutor or complainant, excludes objections to irregularities in the drawing of the jury.—People v. Smith, 118 Mich. 73.

¶ 353. Only such objections to the composition of the grand jury are available in support of a motion to quash an indictment, as are available to sustain a challenge of a grand juror, to wit, that a juror is prosecutor or complainant; How. St. §§ 9496, 9497.—People v. Reigel, 120 Mich. 78.

¶ 354. There must be legal and competent evidence before the grand jury to sustain an indictment, but the mere reception of incompetent testimony does not require the indictment to be quashed.—People v. Lauder, 82 Mich. 109.

¶ 355. An indictment found against one who had been subpoenaed to appear before the grand jury, and who had testified in answer to interrogatories not knowing that an indictment was pending against himself, was sustained where there was competent testimony against him from other witnesses. —People v. Lauder, 82 Mich. 109.

¶ 356. The constitution of the grand jury cannot be inquired into by a court like the Recorder's Court of Detroit, which must take the indictments sent to it by the circuit court as valid, if on their face they appear to be valid.—People ex rel. Robison v. Swift, 59 Mich. 529.

¶ 357. A plea in abatement to an indictment for embezzlement containing averments that a member of been excused, a c called as a talesm was not in the gran then acted as a gr outside of Comp. I How. 2nd Ed., § 982 considered as a rea ment..—People v. La

§ 61. ——Defects an liminary exa

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¶ 358. Objections or warrant cannot be when the respondent to an information f therein, if he was ex contained in them v being bound over.—P 488.

¶ 359. The sufficie before a justice to cannot be challenged the examination is r sion of the offense v in the complaint.—P 505.

¶ 360. The objecti and warrant against in the business of liq ing tax do not negati etc., cannot be raise the information conts ment, but should b quash the informat People v. Drennan, 8

¶ 361. The trial c properly refuses to d a motion to quash o testimony before where the justice w out his attention be and where on the sworn before the p Brott, 163 Mich. 150

¶ 362. The quest a justice of the pe cause of a defecti raised in the circ held for trial, aft defendant, the ent by the court, and ing of the jury, a raised before the Curran, 191 Mich.

§ 62. Specification tions.

¶ 363. A motio mation for want tion as to a part

granted. It should be confined to counts plainly specified.—Hamilton v. People, 29 Mich. 173.

§ 63. Grounds and office of motion to quash.

See also ante ¶ 314.
Proper matter for motion, see also ante ¶ 59.
Specification of grounds, see ante § 62.
Materiality of objections in general, see ante § 49 et seq.
Presumptions and intendments on motion or other objection, see also ante § 56 et seq.
Available objections to grand jury or proceedings before it or to preliminary examination and commitment, see ante §§ 60, 61.
Discretion to require election instead of quashing, see post § 66.
Effect of quashal, see post § 67.
Motion made after plea, see post § 64.
Reviewableness of discretionary rulings on motions to quash, see post § 628.

¶ 364. Whether objections to the formation of the grand jury can be made by motion to quash and on affidavits, quære; it is not usual to quash indictments on motion of defendant, in cases of importance, for defects reviewable on error.—People ex rel. Robison v. Swift, 59 Mich. 529.

§ 64. Motion to quash after plea to merits.

Withdrawal of plea to move to quash, see post § 120.
Variance of information from commitment, see ante § 14 et seq.

¶ 365. One who has pleaded not guilty to an information cannot afterwards regularly move to quash it; the court, however, might in its discretion permit such motion, and the effect of it would be a withdrawal of the plea with a right to renew it in case the motion were denied; where such motion prevails, whether rightly or not, the defendant cannot be said to have been in jeopardy upon the information.—Mentor v. People, 30 Mich. 91.

§ 65. Waiver and cure of defects and objections.

Waiver and cure of errors in general, see post XIV, XV.
Waiver of objections by plea or trial to merits, see post § 117.
Waiver of matters of abatement by pleading over, see post § 118.
Withdrawal of portion of information as curing want of preliminary hearing thereon, see ante ¶ 318.
Misdescription neutralized by other description, see also ante ¶ 310.

¶ 366. No error in a murder case is committed in proceeding with the trial without previous examination of the respondent, where respondent in open court waives such examination.—People v. Sartori, 168 Mich. 308.

¶ 367. The omission of the words "knowingly and wilfully" in a complaint before a justice for the offense of resisting an officer was held not material where the complaint distinctly charged unlawful resistance to an officer in his attempt to keep the peace, and defendant, without objecting to its form, waived examination and treated it as an offense not triable before the justice, but gave bail to the higher court.—People v. Haley, 48 Mich. 495.

¶ 368. In a criminal prosecution against an officer of a corporation for the alleged embezzlement of money of the corporation by receiving an excessive salary where it appeared that there were two indictments, one of which alleged embezzlement during the period when the accused received a certain salary and the other when he received an alleged salary of over twice such amount received during the previous year, and accused was tried under the one which alleged embezzlement of the company's money during the period when he was receiving a larger salary, held that the accused waived all right to rely upon a bill of particulars which alleged only the embezzlement of the smaller salary where he did not call such error to the attention of the court until after the arguments were completed.—People v. Lay, 193 Mich. 476.

¶ 369. Where an election is made between two counts, though it was not compellable, and the court charges restricting the issue to that count chosen by the prosecutor, the accused cannot complain.—People v. Kennedy, 176 Mich. 384.

¶ 370. An objection, in a prosecution for violating the Local Option Law, raised for the first time as the case is about to be submitted to the jury, that the information charges two distinct offenses, has no force where the prosecuting attorney is required to claim a conviction for but one of such offenses and so elects.—People v. Rice, 103 Mich. 350.

¶ 371. In a prosecution for an illegal sale of intoxicating liquor in violation of Comp. L. 1897, § 8391, How. 2nd Ed., § 9387, under two counts, the facts that the justice did not specify in his return to the circuit court upon which count the accused was bound over is harmless, where the prosecution elected between the counts in the circuit court.—People v. Smith, 177 Mich. 358.

¶ 372. Respondent was informed against under How. St. § 9122a, which provides that any person who shall assault another with intent to do great bodily harm less than the crime of murder shall be punished, etc. The words "the crime of" were omitted from the complaint, warrant, and information. No objection was made during the trial to their omission. Held, that had the attention of the court been called to the defect, it would

have been amended under How. St. § 9535, and that it must, after verdict, be disregarded.—People v. Sutherland, 104 Mich. 468.

¶ 373. Error in allowing a count of an information to be amended is of no consequence where the court subsequently charges against conviction under that count.—People v. Goulette, 82 Mich. 36.

¶ 374. The respondent cannot be said to have been prejudiced by the addition to an information of a count under which he was not convicted.—People v. Goulette, 82 Mich. 36.

§ 66. Discretion to quash or put to election.

See also ante ¶ 291 et seq.

Necessity and occasion for election, see ante § 46.

Propriety of certiorari to review decision on motion to quash, see post § 571, ¶ 2700, § 572, ¶ 2701.

Mandamus to compel vacation of order refusing to quash, see Mandamus, II.

¶ 375. Where an information charges two separate and distinct offenses in one count the court has the discretionary power either to quash or to compel the prosecuting attorney to elect upon which offense he will proceed to trial.—Chase v. Van Buren Circuit Judge, 148 Mich. 149.

§ 67. Effect of quashal; discharge or repleader.

Propriety of leave to amend, see post § 69 et seq.

Proceedings on motion to quash as proper part of bill of exceptions, see post ¶ 2748.

Quashal as bar to further prosecution, see Crimes § 24.

¶ 376. On quashing an information, upon the defendant's motion, as no information, the court does not lose jurisdiction of the prisoner, but the case stands in all respects as if no information had been filed, and the complaint before the justice and the latter's warrant, commitment and return would still remain of the same force as before as the basis for an information.—Mentor v. People, 30 Mich. 91.

§ 68. Power to ask and make amendments.

¶ 377. An assistant prosecuting attorney has power, in the necessary absence of his superior and with permission of the court, to make such amendments to an information as are authorized by statute.—People v. Henssler, 48 Mich. 49.

§ 69. Proper and permissible amendments.

As to time, place or venue, see post § 70.

To meet or conform to proofs, see post § 71.

Amending after verdict, see post § 72.

Amendment after verdict to describe crime, see also post ¶ 401.

Additional return by committing magistrate to afford basis for information where he has previou
ante ¶ 20.

Provision as to
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¶ 386. In a prosecution for breaking and entering a named bank, an amendment was properly permitted alleging the nature of the institution to be a private bank doing business in that name.—People v. Courtney, 178 Mich. 137.

¶ 386a. Where a respondent charged with keeping intoxicating liquors for sale waives examination and goes to trial, the information cannot be amended after the evidence is all in by substituting the word "fermented" in place of intoxicating.—People v. Hickman, 164 Mich. 672.

§ 70. ——As to time, place or venue.

¶ 387. It is proper but not necessary to allow amendment of an indictment for larceny in a township, so as to lay it in another township in the same county.—People v. Waller, 70 Mich. 237.

¶ 388. Amendment of an information for bigamy as to the county where the first marriage is alleged to have taken place may be allowed on calling the case for trial, it not necessitating a continuance to enable respondent to go to trial safely.—People v. Perriman, 72 Mich. 184.

¶ 389. The fact that on the day alleged the crime of false pretenses charged might have been made out in another county does not make time of the essence, so as to prevent an amendment of the information stating a day later when the crime was made out in the county where the prosecution was had; and since it is not of the essence and material the amendment may be allowed under Comp. L. 1897, §§ 11919, 11922.—People v. Hoffmann, 142 Mich. 531.

¶ 390. An information alleged the commission of the crime of rape under a videlicet clause on August 18th. Held, under Comp. L. 1897, §§ 11919, 11936, the date might be amended so as to read July 18th.—People v. Nichols, 159 Mich. 355.

§ 71. ——Amendments to meet or conform to proofs.

Permissible amendments to meet variance, see Comp. L. 1915, §§ 15749, 15750.
Amendment after verdict to include lesser assault, see also Homicide ¶ 106.

¶ 391. An information alleging no offense of which the court has jurisdiction cannot be so amended after the proofs are in as to charge a cognizable offense.—Byrnes v. People, 37 Mich. 515; Bickford v. People, 39 Mich. 209.

¶ 392. An information for fraudulently obtaining a signature may be amended to meet the objection, for instance, that the paper described in it varies from the original, as offered in evidence, in omitting the name of the place prefixed to the date. But whether amendment is necessary, quære.—People v. Mott, 34 Mich. 81.

¶ 393. While an information for keeping a saloon open contrary to the statute need not state that the place kept open was not a drug store and the accused a druggist, it was not error for the court at the trial to permit an amendment to that effect.—People v. Sullivan, 83 Mich. 355.

¶ 394. Under How. St. § 9537, providing that any court of record in which the trial of an indictment is had may forthwith allow an amendment in case of variance, an information charging respondent with fraudulently removing, etc., chattel-mortgaged property may, when objected to on the trial, be amended so as to state that the person therein named as intended to be defrauded is the mortgagee.—People v. Schultz, 85 Mich. 114.

¶ 395. Where an information charged the uttering of a forged check payable to G. W. B., and the check introduced upon the trial was payable to G. M. B., held, that it was proper, under How. St. § 9537, to permit an amendment of the information to conform to the proof.—People v. Brown, 110 Mich. 168.

¶ 396. In a prosecution for breaking and entering a bank, after the people had put in their case, it was not erroneous to permit an amendment showing the ownership of the building.—People v. Courtney, 178 Mich. 137.

¶ 397. Where an information charged respondent with murder in the short, statutory form, and on the trial it appeared that the time of the killing was stated as of a date three days prior to the death of the injured party, it further appearing that the information followed the complaint and warrant as to such allegation, and that the variance appeared on the preliminary examination, which disclosed the fact that death was the result of a series of whippings administered to the deceased, an amendment of the information was properly allowed showing the true date of the death.—People v. Hamilton, 76 Mich. 212.

¶ 398. An information charging that respondent did, at a certain time and place, with force and arms, feloniously kill and slay the deceased, charges a felonious killing, and may at the trial be amended so as to charge an assault upon, and the beating, bruising and wounding with force and arms of deceased by respondent; since the original information charges a felonious killing, under which evidence could be introduced showing that death resulted from an assault or wound inflicted.—People v. McCullough, 81 Mich. 25.

¶ 399. Where respondent was convicted of conveying a weapon adapted to aid a prisoner to escape in violation of Comp. L. 1897, § 11315, and the information charged that the prisoner named was confined in the jail

upon the charge of burglary, while as a matter of fact he was awaiting trial for feloniously breaking and entering, there is only a technical variance which may be avoided by an amendment of the information under Comp. L. 1897, § 11922.—People v. Fox, 142 Mich. 528.

§ 72. ——Formal amendments after verdict.

¶ 400. It is competent, upon motion to set aside the verdict, to permit the information to be amended by allowing the clerk to sign the jurat which had been left unsigned by a clerical omission.—People v. Roat, 117 Mich. 578.

¶ 401. An information charging the statutory offense of "assault with intent to do great bodily harm less than the crime of murder" cannot be amended after verdict so as to include a battery.—Turner v. Muskegon Circuit Judge, 88 Mich. 359.

E. ISSUES, PROOF AND VARIANCE; LESSER DEGREES AND INCLUDED OFFENSES.

§ 73. Material issues and necessary proofs.

Relevancy of facts and conditions before or after times averred, see post §§ 162-164.

Matters put in issue by pleas in bar or abatement, see post §§ 115, 116.

Issues and variance in indictments for homicide, see Homicide § 40 et seq.

Admissibility of matters preliminary to false pretense alleged, see also post ¶¶ 858, 859.

In prosecution for abandoning child, see also ante ¶ 143.

On charge of having burglars' tools, see also ante ¶¶ 166, 167.

Scope of issues on retrial after reversal, see post § 641.

Particularity required in averments, see ante § 37.

Sufficiency of the proofs, see post VIII, C.

Necessary items of proof, see also post §§ 324a-324u.

Construction as to issues presented, see post § 74 et seq.

Variances of proofs from issues presented, see post § 77 et seq.

Election between inconsistent counts, see ante § 46.

Admissibility of alibi on date unnecessarily averred, see post ¶ 844.

¶ 402. As a general rule, any allegation necessary to bring an offense or an offender within a statute must be substantially proved as alleged.—Shannon v. People, 5 Mich. 71.

¶ 403. Although it is not technically allowable to charge an offense as a continuous one, the continuando may properly be rejected as surplusage, and the case tried upon such particular charge as the prosecutor may elect.—People v. Loomis, 161 Mich. 651.

¶ 404. A prosecution for adultery is not like a case of seduction, in which the previous chastity of th issue.—People v. K

¶ 405. In an inf averment of the firs intend a lawful ma tion must prove; a second marriage w without also chargi ful.—Kopke v. Peo

¶ 406. Where a an information to consists he must s mislead the defend —People v. Marion,

¶ 407. An allega attesting officers a ment of an instru scriptive of the pa obliged to prove i that one or both Marion, 28 Mich.

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¶ 411. In a p 1897, § 5865, proh to take fish with named, an averm ing in "the water not require the more than the sta were waters of t the excepted wat prove that the river.—People v.

¶ 412. An inf 1911, Art. 62, Ho ing certain clas charging an of pamphlet the tr and sexual ailme ute, and annexin the information, of the matters in the offense char plusage.—People

¶ 413. In a prosecution where defendant is charged with obstructing justice, the guilt or innocence of the respondent in the main case, the sufficiency of the information or the jurisdiction of the court are not considered in the case on trial.—People v. Boyd, 174 Mich. 321.

§ 74. Construction and intendment of averments.

Of common-law forms of averment, see post § 75.
As to duplicity, see post § 76.
What regarded as averment of fact or conclusion, see also ante ¶ 245.
Pleas to issues tendered, see post V.

¶ 414. As the statutory offense of unlawfully disinterring a human body embraces every unlawful invasion of the rights of burial, including those acts done for purposes of dissection, as well as for any other unlawful purpose, the clause in the information as to the purpose of the taking does not make the offense charged a common-law misdemeanor, not punishable as a felony under the statute.—McNamee v. People, 31 Mich. 473.

¶ 415. Where an information charges respondents with conspiring to commit a certain crime, and unnecessarily mentions overt acts committed in furtherance of the conspiracy, it is not to be treated as charging the commission of such acts, but if so treated the error cannot prejudice respondents. The acts, whether enumerated or not, are admissible to show the existence of the conspiracy.—People v. Petheram, 64 Mich. 252.

§ 75. ——Of common-law forms of accusation.

¶ 416. When an information contains common-law phrases and references it may be assumed that a description contained in it is meant to have its common-law interpretation.—Chapman v. People, 39 Mich. 357.

¶ 417. An indictment purporting to set out the crimes specifically and substantially in the common-law method must be construed by common-law rules.—People v. Carr, 64 Mich. 702.

§ 76. ——As to duplicity.

Duplicity in plea of abatement, see post ¶¶ 557, 560.
Doubleness in informations for liquor offenses, see also Intoxicating Liquors, VI, B.

¶ 418. An information is not bad for duplicity in charging a felonious assault on two persons at the same time, and is supported by proof of assault on one only.—People v. Durham, 170 Mich. 598.

¶ 419. Where the accused obtained money from the prosecuting witness for the purpose of purchasing state tax lands and sent the money to the auditor general by whom it was returned to the accused in the form of a treasurer's draft payable to the order of the accused and he thereupon converted the draft into money and converted it to his own use, two counts, one charging embezzlement of the money and another charging the embezzlement of the draft, charged the same offense, both counts being based upon Comp. L. 1897, § 11570.—People v. Peck, 147 Mich. 84.

¶ 420. Where the facts showed that the respondent obtained money from the prosecuting witness to purchase state tax lands and this money was sent to the auditor general, but was returned by him to respondent in the form of a draft of the state treasurer payable to respondent, and this draft was cashed and the money converted to his own use, two counts, one charging the embezzlement of the money and another the embezzlement of the draft, charge the same offense under Comp. L. 1897, § 11570, defining larceny.—People v. Peck, 147 Mich. 84.

¶ 421. There is duplicity in charging forgery and the utterance thereof in the same count, but not in charging joint respondents with forging a deed, and one of them with causing it to be recorded; the act of recording bears upon the intent and is not of itself an utterance.—People v. Van Alstine, 57 Mich. 69.

¶ 422. A count in an information under the Local Option Law is bad for duplicity if it alleges that respondent "did then and there run a saloon and bar" and "at said bar did then and there sell and furnish" intoxicating liquors to a named person, and also that respondent knowingly kept a saloon where such liquors were sold.—People v. Keefer, 97 Mich. 15.

¶ 423. In a count charging a supervisor with wilfully neglecting to procure statements from tax-payers, as required by Pub. Acts 1891, No. 200, § 12, a further charge that he neglected to deliver such statement to the township clerk does not render the information bad for duplicity, but must be regarded as surplusage where the information alleges that respondent never received the statement.—Turner v. Muskegon Circuit Judge, 95 Mich. 1.

¶ 424. How. St. § 9347, punishing the wrongful removal of books, papers or records from certain public offices, creates three offenses: (a) Wilful carrying away; (b) refusing to deliver on demand; (c) destroying or mutilating; and an information which alleges a wilful carrying away without alleging a demand sufficiently charges the first offense.—People v. Bussey, 82 Mich. 49.

¶ 425. An information under How. St. § 9367, which provides that "if any officer on whom any duty is enjoined by law relative to general, special, township, or charter elections, or the canvassing or return of votes given at any election, shall be guilty of any

wilful neglect of such duty, or of any corrupt conduct in the execution of the same, he shall, on conviction thereof, be deemed guilty of a misdemeanor," etc., alleging that respondent, while a member of the board of county canvassers, was guilty of wilful neglect of duty "and" of corrupt conduct in the execution of his duty enjoined by law upon him as a member of said board, is not bad for duplicity in using a conjunctive, the reference being to a single transaction.—People v. Clarke, 105 Mich. 169.

¶ 426. An indictment was not bad for duplicity where, the gist of the offense charged being the obtaining of money by the presentation of false or invalid orders, several distinct petty offenses consisting of obtaining these several orders were alleged, but the averment as to obtaining the money was single.—People v. Luttermoser, 122 Mich. 562.

¶ 427. An indictment under the Local Option Law (Pub. Acts 1899, No. 183) which charges the keeping of a place where liquors are "stored, sold, given away and furnished" is not bad as charging more than one offense since the offense charged is "keeping a place."—Anderson v. Van Buren Circuit Judge, 130 Mich. 697.

¶ 428. An information for obtaining money by false pretenses, consisting in rendering a false statement of facts in a claim for fees and expenses of an inquest, charges only one false pretense, where it alleges that accused, intending to cheat and defraud the state, did designedly by means of a false pretense or by means of false pretenses, obtain from the state a sum of money, though it then sets out the means to have been the presentation to the state of a false statement, which under the law is the basis of action by several officers in sequence according to official methods.—People v. Hoffmann, 142 Mich. 531.

¶ 429. An information in one count against a druggist who sold liquor in a local option territory, alleging that he did not make any record or report "in any blank book (that being an offense under Comp. L. 1897, § 5381) of the name of the said" purchaser, and that he did not make and swear to a report of said sale and mail the same to the prosecuting attorney (that being a crime under Pub. Acts 1899, No. 183, § 25), is double and may be quashed as such.—Chase v. Van Buren Circuit Judge, 148 Mich. 149.

§ 77. Variance of averments and proofs.

[Note. The question of variance often turns on an investigation of the essential elements of the crime. For precedents on such a question, see Crimes, II; Assault, I; Homicide; Larceny; Rape; Seduction.]

As to time, see post § 78.

As to participation and principalship, see post § 79.

Proof of lesser or included offense as part of that charged, see post § 80.

Proof of great
post § 81.
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People v. Mix,

¶ 434. Where an information for polygamy alleges that the first marriage took place at Brooklyn, N. Y., evidence that it took place in New York city is not objectionable for variance where it does not appear that the defendant was misled.—People v. Calder, 30 Mich. 85.

¶ 435. It is not necessary that a sum of money laid under a videlicet in an indictment for bribery, be adhered to in the proof.—People v. Salsbury, 134 Mich. 537.

¶ 436. Where one is charged with the statutory burglary of breaking and entering a store not adjoining to or occupied with a dwelling-house, with felonious intent, if it turns out that the store does adjoin or is occupied with a dwelling-house there can be no conviction.—Moore v. People, 47 Mich. 639; People v. Calderwood, 66 Mich. 92.

¶ 437. The evidence on a charge of statutory burglary showed that the store entered was the first story of a building; that the proprietors were a copartnership, composed of two persons who leased the building; that one of the partners occupied the upper part of the building as a dwelling-house and the other partner lodged with him. Held, that the evidence did not support the information.—Moore v. People, 47 Mich. 639.

¶ 438. Inasmuch as the term dwelling-house includes the adjoining outbuildings, an information charging that respondent feloniously and burglariously, in the nighttime, entered a dwelling-house and stole certain wool, is sustained by proof that he entered the barn of complainant, etc., which was a part of the outbuildings used by the family for domestic purposes.—Pitcher v. People, 16 Mich. 142.

¶ 439. How St. § 9421, which provides that under an information charging embezzlement of money only, conviction may be had for embezzling any check, draft, etc., does not violate respondent's constitutional right to be informed of the nature of the accusation against him, since in such case he may have the charge made certain by examination or by bill of particulars.—People v. Hanaw, 107 Mich. 337.

¶ 440. An information for obtaining goods under false pretenses was not sustained where the pretense charged was that respondent owned a house and lot in a certain locality, and was building an addition to the house, and wished to buy the articles for use in the building, while the proofs did not show how the pretense operated as a fraud, or what good the fact would have done the complaining witness, or that respondent had been given to understand that the question asked him about his building was put for the purpose of learning whether it was safe to trust him.—People v. McAllister, 49 Mich. 12.

¶ 441. In a prosecution for false pretenses it appeared that respondent referred the complaining witness to a bank, where he had filed a financial statement. The bank informed the latter that according to the statement respondent was worth $18,000, whereas in fact the statement was that he was worth $18,900. Held, that respondent's liability was not affected by this variance.—People v. Andre, 157 Mich. 362.

¶ 442. On an allegation in an indictment that the names of the attesting officers attached to the acknowledgment of a power of attorney were forged, proof of the forgery of other names will not support a conviction.—People v. Marion, 28 Mich. 255.

¶ 443. Proof that the names forged were fictitious is sufficient proof of the forgery to sustain a charge of uttering a forged instrument.—People v. Marion, 29 Mich. 31.

¶ 444. Forgery and uttering a forgery are two distinct offenses; and a person cannot be convicted under an information for forgery when the complaint on which he was examined only charged him with uttering the forgery.—People v. McMillan, 52 Mich. 627.

¶ 445. When, in an indictment for forging a mortgage, it is charged that the sum mentioned as the consideration is altered, the prosecution may also show that the sum set forth in the condition has also been altered, since the sums usually correspond.—Perkins v. People, 27 Mich. 386.

¶ 446. In a prosecution under Comp. L. 1897, § 11631, making it a crime to sell or offer to sell or have in possession any false, forged or counterfeit railroad passenger ticket, that the information charges the sale of a forged ticket purporting to have been issued by a railroad company while proof shows that the respondent himself caused the return part of a round trip ticket to be stamped and a signature forged after it was sold by the railroad company does not disclose a variance.—People v. Smith, 125 Mich. 566.

¶ 447. Under Comp. L. 1897, § 5861 et seq., where a complaint charges the locus to be the waters of Grand river in the township of Grand Haven, county of Ottawa, a conviction for illegal fishing is sustained by evidence that the act was done in the county of Ottawa.—People v. Van Maren, 126 Mich. 103.

¶ 448. The word "from" used in an information charging larceny under Comp. L. 1897, § 11551, which provides for the punishment of larceny "in" any building that is on fire, is not such variance as to affect the validity of the information.—People v. Klammer, 137 Mich. 399.

¶ 449. An information in a prosecution for maliciously injuring a fence, was not

fatally defective for variance in omitting the word "society" in designating the owner, as How. St. § 9534, provides that no indictment shall be insufficient for designating any person mentioned therein by a name of office or other descriptive appellation, instead of his proper name, and How. St. § 2, subd. 12, provides that the word "person" may be applied to corporations.—People v. Ferguson, 119 Mich. 373.

§ 78. ——As to time.

Offer of evidence relating to one date as election against counts laying other dates, see ante § 48.

Variance as to time in rape and especially statutory rape on girls below age, see also Rape.

¶ 450. Time is not an ingredient of a criminal offense in any such sense as to make it necessary to charge it precisely according to the truth; but the information or indictment may state one time and the proof show another, without involving an objectionable variance.—Turner v. People, 33 Mich. 363.

¶ 451. Where a date in an information is not given as matter of description, pratica has allowed the time to be alleged without reference to the truth; a date unreasonably remote from the truth should not be given, however, although the variance might not support a reversal for receiving the proof.—People v. Saunders, 29 Mich. 269.

¶ 452. An information in a criminal case is presumed to have been framed with reference to the facts disclosed on the preliminary examination; and the date of the offense as given therein is supposed to correspond fairly with the facts then stated.—People v. Davis, 52 Mich. 569.

¶ 453. If a crime is charged of which time is not of the essence under a videlicit as occurring "heretofore to wit" and a date is specified, one time may be stated in the information and the proof may show another. —People v. Swift, 172 Mich. 473.

¶ 454. Where a misdemeanor charged in a complaint and warrant is alleged with a videlicit, the prosecution is not confined to proving that the offense was committed on the exact date alleged, especially where the defendant does not ask at the trial that the prosecutor be compelled to elect as to the date upon which he relies.—People v. Stewart, 167 Mich. 417. Reversed in 232 U. S. 665, 58 L. ed. 786, 34 Sup. Ct. Rep. 476.

¶ 455. On trial of an information for incest the prosecutor may, before the evidence is introduced, select any one act of criminal intercourse which occurred within the jurisdiction of the court and within the period of the statute of limitations applicable to the offense as the one upon which a conviction will be sought. But when evidence has been introduced tending one act, and for th conviction upon it, to have made his el thereafter be cons against the defend alone can be found 5 Mich. 305.

¶ 456. While the statutory rape is in fixing the time should not be comp before the transac to select a partic once done so the fall by such electi Mich. 241.

¶ 457. Where a No. 213, Pub. Acts fendant on a certa fully punished a c acts of punishmer minating in the pu cified, cannot be 161 Mich. 651.

¶ 458. On a pr 1897, § 5865 for ta fish with nets the the commission of fense alleged upor but where the ent occurrences on ce to justify a convi be proved on the c 143 Mich. 271.

¶ 459. On a pr tempting to take f L. 1897, § 5865, th made out where t stand that he v "about" the date People v. Neal, 14

¶¶ 460, 461. Co St. § 9421, provid embezzlement evi such embezzleme months next afte dictment." Held, information for e tained by evidenc the time stated.— 491.

¶ 462. On a p the statutory cr his bank under prosecution need act to which the section 11782, a ments committe the time stated such a crime and embezzlements b People v. Messer

¶ 463. Evidence of other acts of embezzlement, committed within six months next after the time stated in the indictment for a "bank" embezzlement, may be properly admitted under Comp. L. 1897, § 11782, which includes a bank cashier in the terms, a clerk, agent or servant.—People v. Messer, 148 Mich. 168.

¶ 464. Since the rendition by the coroner of a statement showing necessary facts in order to be paid by the state for expenses of an inquest is essential in addition to a certificate of the court showing an audit by the circuit judge, and since the issuance of a warrant by the auditor general upon the state treasurer is based not wholly on the judicial audit but also on the statement and the facts therein shown, it cannot be contended that, by receiving and cashing a check issued pursuant to a regular warrant in the known and customary manner of the office, a false pretense in the statement of facts in the coroner's bill was one by which a warrant and not money was procured, and that the pretense was imposed on the circuit judge who audited the bill rather than on the auditor general as alleged.—People v. Hoffmann, 142 Mich. 531.

¶ 465. Where the information charges the offense of seduction to have been committed on a certain date and evidence is introduced to show the commission of the offense on that date, the jury cannot be permitted to convict on testimony of an offense committed on an earlier date.—People v. Bressler, 131 Mich. 390.

§ 79. ——As to principalship or accessary part.

Averment of procuring one to commit crime and proof that he and another were procured to do it, see also ante ¶ 150.

Conviction of sole crime feasor on indictment as joint criminal, see Comp. L. 1915, § 15744.

¶ 466. Where a new felony is created by statute, it depends somewhat on the terms of the statute whether it reaches accessaries or not. Unless by virtue of some statutory provision, no one who is indicted as principal can be convicted as accessary, or vice versa.—Meister v. People, 31 Mich. 99.

¶ 467. Under an information charging a defendant respondent with keeping a house of ill-fame, proof that she aided or assisted others in the commission of the offense is admissible.—People v. Wright, 90 Mich. 362.

§ 80. Proof of lessor or included crime.

Adding count to charge lower grade than described in commitment, see ante ¶ 57.

Sufficiency of proofs to support conviction of the lesser offense, see post § 323.

Sufficiency of proof of the lesser offenses, see post § 323; Homicide § 64 et seq.

Verdicts on the several counts and on included offenses, see post § 472.

Proof of greater crime, see post § 81.

Sufficiency of indictment for homicide or for homicidal assault to support conviction for lesser crime or degree, see Homicide §§ 41, 42.

Sufficiency to support conviction for lesser assaults and crimes, included in rape, see also Rape.

Provision for conviction of lesser degrees, see Comp. L. 1915, § 15616.

¶ 468. There can be no conviction of a lighter offense than is charged in the information unless it is one that is included in that which is charged; thus a statutory information for murder will not sustain a conviction for a mere assault, especially if it does not set out a murder by assault.—People v. Adams, 52 Mich. 24.

¶ 469. A common-law information for robbery sustains a conviction for larceny from the person.—People v. Calvin, 60 Mich. 113.

¶ 470. An attempt to commit a crime is necessarily charged in every information reciting the commission of a crime and there is nothing in Comp. L. 1897, § 11784, providing for punishment for an attempt to commit an offense prohibited by law, which will prevent a conviction for attempt on a complaint charging the completed offense when the proofs fail to show the crime but to show an act toward the commission thereof.—People v. Webb, 127 Mich. 29.

¶ 471. A person charged under Comp. L. 1897, § 11484 with assault with intent to rob "with intent if resisted to kill" may be convicted of assault with intent to rob under § 11486.—People v. Powler, 142 Mich. 225.

¶ 472. An assault and battery is necessarily involved in the crime of taking indecent and improper liberties with a female child under the age of 14 years, as provided in Comp. L. 1898, § 11719, and a conviction of such assault and battery may properly be had on an information charging the other offense.—People v. Sanford, 149 Mich. 266.

§ 81. ——Proof of greater crime than charged.

Impropriety of adding count for higher degree than commitment describes, see ante ¶ 58.

¶ 473. Evidence of the details of a completed act of sexual intercourse, although there was but slight penetration, cannot sustain a conviction on the charge of taking indecent liberties with the person of a female child under the age of 14 without the intent to commit the crime of rape.—People v. Rivers, 147 Mich. 643.

II. TIME FOR PROSECUTION; LIMITATIONS.

§ 82. In general.

Commencement and computation of period, see post § 83.

Suspension because of absence or flight, see post § 84.

Timeliness of commencement as jury question, see post § 398, ¶ 1834.
Time and term for filing informations, see ante § 13.
Time for trial with respect to time of indictment returned or information filed, see post § 329.
Time for procedure for review, see post § 580 et seq.
Postponements and continuances of trials, see post VI.
Indictments for larceny, see Larceny, II.
Constitutional provision for speedy trial, see Constitutional Law § 199.
Time after crime within which indictments may be found, see Comp. L. 1915, § 15719.

¶ 474. Where a woman was seduced on a promise of marriage, and the intercourse was afterwards broken off, but was renewed again on the promise of marriage being renewed, and only in consequence of such promise, it was held that a prosecution might be commenced for the seduction at any time within one year from such last intercourse.—People v. Millspaugh, 11 Mich. 278.

¶ 475. Comp. Laws 1897, § 5331b, providing that no prosecution for the recovery of any penalty imposed for a violation of the statute relating to hawkers and peddlers shall be maintained unless brought within sixty days after the commission of the offense, applies only to prosecutions for the recovery of the penalty specified in section 5331 of said act, and does not apply to the prosecution for misdemeanor specified in section 5329 of said act.—People v. Stewart, 167 Mich. 417. Reversed in 232 U. S. 665, 58 L. ed. 786, 34 Sup. Ct. Rep. 476.

§ 83. Commencement of prosecution and computation of time.

¶ 476. The issue of a warrant in good faith, and delivery to an officer to deliver, where defendant was afterwards arrested upon that warrant and bound over for trial, is a sufficient commencement of the prosecution to satisfy the statute of limitations.—People v. Clark, 33 Mich. 112.

¶ 477. Making a complaint before a justice of the peace in a criminal case is not such a commencement of prosecution as prevents the running of the statute of limitations; there must not only be a sworn complaint, but a warrant must be issued and delivered to an officer for service; and whether a warrant was so issued and delivered within the time in which the prosecution could be commenced is for the jury if in dispute.—People v. Clement, 72 Mich. 116.

§ 84. Suspension of limitations.

¶ 478. The absence which is to be deducted from the six years' limitation of criminal prosecution (How. St. § 9507) is not mere absence from the state, but such absence as destroys residence.—People v. McCausey, 65 Mich. 72.

¶ 479. How. St. "any period during was not usually an in this state shall the six years" duri to be commenced, tions for seduction for the prosecuti fugitives from just beginning a prosec the statutory yea from justice.—Peo 116.

III. JURISDICT PROSECUTION;

§ 85. Jurisdiction i
General law of j
Relative jurisdicti minor courts 90.
Extent and subje trates' jurisdi
Venue or place fo
Transfer from on trial, see post
As dependent on p pletion of the
Courts in which see ante § 7.
Amount of penalt or propriety
Territorial jurisd istrates, see
Effect of quasha ante ¶ 376.
Abatement of cas ¶ 2724.
Jurisdictional av § 24.
Jurisdictional tim see post § 48
Propriety of cer jurisdiction,
Jurisdiction of p dinances, se XVI, B.
Sufficiency of th viction or ac ecution, see
Power of courts prisons, see
Power to admit indictment, s

¶ 480. In crin confer jurisdictio 351.

¶ 481. Jurisdi of a criminal offe cannot be confer of another coun Mich. 536.

¶ 482. As a g laws of no natio ritorial limits; the right to puni

a crime it must have occurred within those limits.—People v. Tyler, 7 Mich. 161.

¶ 483. The courts of this state have jurisdiction to punish only such offenses as are committed therein.—People v. Devine, 185 Mich. 50.

¶ 484. Bastardy proceedings are not regarded as dealing with a crime or misdemeanor, and they do not fall within a statute giving a court jurisdiction over "crimes, misdemeanors and offenses."—People v. Harty, 49 Mich. 490.

§ 86. ——Transitory and continuing crimes.

Venue of crime begun in one county and completed in other, see post § 96.

Venue where offense was not wholly within one county, see post § 96.

Bigamous residence within state to sustain jurisdiction of crime, see also Crimes ¶ 209.

Power of state to punish crime begun or consummated within state but otherwise outside of it, see Constitutional Law § 114.

Giving jurisdiction of transitory crime as denial of jury of vicinage, see Constitutional Law § 210.

Validity of law making act criminal when done partly outside of state, see Constitutional Law § 195.

§ 87. ——Federal crimes and offenses on international waters.

Venue for prosecution of crimes on Great Lakes, see post § 97.

Acts amounting to both federal and state crimes, see post § 88.

Jurisdiction between circuit courts and municipal courts, see post ¶ 497.

¶ 485. State courts have no jurisdiction of a criminal prosecution against a clerk or agent of a national bank for the embezzlement of its funds, such offense being exclusively punishable in the United States courts under U. S. Rev. Stat. §§ 5209, defining the crime, and § 711, conferring jurisdiction.—People v. Fonda, 62 Mich. 401.

¶ 486. The open, uninclosed waters of the Great Lakes, between which the Detroit river is a connecting stream, are "high seas" within the meaning of U. S. Rev. Stat. § 5346.—United States v. Rodgers, 150 U. S. 249, 37 L. ed. 1071, 14 Sup. Ct. 109.

¶ 487. Under the U. S. Rev. Stat. § 5346, the federal court has jurisdiction of an assault committed with dangerous weapons by a person on an American vessel in the Detroit river out of the jurisdiction of any particular state and within the territorial limits of the Dominion of Canada.—United States v. Rodgers, 150 U. S. 249, 37 L. ed. 1071, 14 Sup. Ct. Rep. 109, disapproving, contra, People v. Tyler, 7 Mich. 161; Ex parte Byers, 32 Fed. 404.

¶ 488. In the absence of a treaty with England allowing execution of process of United States admiralty courts the federal courts in Michigan have no jurisdiction over a prosecution for manslaughter committed by a mortal blow given on the St. Clair river (though on an American vessel), in Canadian waters, from which blow death resulted on land.—People v. Tyler, 7 Mich. 161; Tyler v. People, 8 Mich. 320. (Disapproved, see preceding paragraph.)

¶ 489. Upon the high seas, every vessel, public or private, is, for jurisdictional purposes, a part of the territory of the nation where it belongs; and an offense committed on board of it is an offense committed against the sovereignty of that nation.—People v. Tyler, 7 Mich. 161.

¶ 490. Where a private ship enters a foreign jurisdiction it becomes, with all on board, in the absence of treaty stipulations to the contrary, subject to the municipal laws and control of the country it visits.—People v. Tyler, 7 Mich. 161.

¶ 491. Manslaughter, committed by a mortal blow given on the River St. Clair, beyond the boundary line between the United States and Canada, and within a county of that province, from which blow death ensues in Michigan, is, under Comp. L. 1857, § 5944, How. St. § 9420, punishable in the courts of this state.—People v. Tyler, 7 Mich. 161; Tyler v. People, 8 Mich. 320.

§ 88. ——Acts amounting to both federal and state crimes.

Bank embezzlement from national bank, see also ante ¶ 485.

¶ 492. The jurisdiction of the federal courts over offenses against the laws of congress, providing for the punishment of counterfeiting the current coin of the United States, is not exclusive of the jurisdiction of the state courts over offenses against state laws making it punishable to counterfeit such coin.—Harlan v. People, 1 D. 207.

¶ 493. Defendant was tried on information under Comp. L. 1897, § 11547, for the breaking and entering of a building used as a post office. Section 5478 of the Revised Statutes of the United States provides for the punishment of persons forcibly breaking into any post office or any building used as a post office. Held, the federal courts did not have exclusive jurisdiction to try defendant, but he might be tried in the state court.—People v. Burke, 161 Mich. 397.

§ 89. Jurisdiction between circuit and minor courts.

Disability of superior or recorder's court to question indictment or information transferred to it for trial, see ante § 60.

Limit of punishment in circuit court for offenses within justice's jurisdiction, see post § 484.

Recorder's Court of Detroit as inferior court, see Courts ¶ 307.
Jurisdiction of Recorder's Court of Detroit and other city courts, see also Municipal Courts, II.
Power of legislature to give jurisdiction to municipal or inferior courts, see Constitutional Law § 56.
Provisions fixing jurisdiction of recorder's court in Detroit, see Comp. L. 1915, § 14643 et seq.
Provisions respecting jurisdiction of Superior Court of Grand Rapids, see Comp. L. 1915, § 14694.

¶ 494. Where articles belonging to two different owners and having different values are stolen from the same place at the same time, and an information charges the larceny in a single count, the circuit court has jurisdiction if the aggregate value exceeds $25.—People v. Johnson, 81 Mich. 573.

¶ 495. Jurisdiction in a criminal case is measured by the offense charged in the information, and is not lost by a verdict for a minor offense included therein.—People v. Schoenth, 44 Mich. 489.

¶ 496. The only statutory methods whereby one may be prosecuted in the Recorder's Court of the city of Detroit are upon an indictment returned by a grand jury sitting in the Circuit Court for the county of Wayne and duly certified and transmitted by the clerk of the circuit court to the recorder's court, and upon an information signed by the prosecuting attorney of the county of Wayne, upon which shall be indorsed the names of the witnesses known to him, and which may be filed during the term in the recorder's court.—Jasnowski v. Connolly, 197 Mich. 257.

¶ 497. The courts of Charlevoix county have, under Comp. L. 1897, § 2448, concurrent jurisdiction with other counties upon the eastern shore of Lake Michigan of all offenses committed on that part of Lake Michigan which lies within the limits of this state, and they are not ousted of such jurisdiction by Act No. 277, Local Acts 1885, giving to the village of Manistique jurisdiction of offenses committed on that part of the lake south of and adjacent to the village for a distance of one mile from the shore line.—People v. Coffey, 155 Mich. 103.

§ 90. ——Between police and recorder's courts.

¶ 498. The police court of Detroit has, and the recorder's court has not, jurisdiction to try offenders against the game laws, they being punishable only by fine of $50, which How. St. § 2203 imposes.—Robison v. Recorder's Court Judge, 69 Mich. 608.

§ 91. Extent and subjects of magistrates' jurisdiction.

Necessity of approval of prosecution by prosecuting attorney, see post § 92.
Necessity of security for costs, see post § 93.
Jurisdiction on appeal from justice, see post § 662.
Defects in warrant or preliminaries affecting jurisdiction of justice, see post § 648.
Nature and origin of police court of Detroit, see Municipal Courts, I.
Statutory provisions as to criminal jurisdiction of justices of the peace, see Comp. L. 1915, § 15769.
Provisions respecting jurisdiction and powers of police justices and magistrates, see Comp. L. 1915, §§ 14715, 14737.

¶ 499. A justice who lives in a village that lies in two townships can be authorized by statute to hold court in criminal cases in that part of the village that lies in the township he does not live in.—Faulks v. People. 39 Mich. 200.

¶ 500. Justices of the peace in Detroit have power under the general laws of the state to dispose of all criminal business arising in Wayne county outside of the city.—Allor v. Wayne County Auditors, 43 Mich. 76.

¶ 501. Assault with intent to commit rape is a felony, and not triable by a justice of the peace.—People v. Lynch, 29 Mich. 274.

¶ 502. A justice has no jurisdiction in cases of assault and battery except when the offense was committed in his county.—People v. Gregory, 30 Mich. 371.

¶ 503. The embezzlement of county funds by a city collector is cognizable by the police justice of Detroit as an offense within his general criminal jurisdiction.—Attorney General ex rel. Crosby v. Detroit Police Justice, 40 Mich. 631.

¶ 504. The Act of April 16, 1887, § 161, revising and amending the charter of Bay City, and conferring on the police court jurisdiction of crime is prospective, and does not give the police court jurisdiction of offenses committed before the act took effect, but leaves them to be tried by justices of the peace.—People v. Pond, 67 Mich. 98.

¶ 505. Under Pub. Acts 1887, No. 28, § 2, authorizing the game and fish warden to enforce all laws for the protection of fish "now in force or hereafter enacted," and to bring suit for the violation of such laws, the warden may institute prosecutions before a justice of the peace under Pub. Acts 1897, No. 151, § 4, which regulates the taking of fish with nets, and makes infractions of the statute misdemeanors.—Osborn v. Charlevoix Circuit Judge, 114 Mich. 655.

¶ 506. Justices of the peace, under the statute giving them jurisdiction of criminal offenses where the punishment does not exceed a fine of $100 or three months' imprisonment, have no jurisdiction of cases where the maximum punishment allowed by law exceeds that sum.—In re Berry, 7 Mich. 467.

¶ 507. A justice has jurisdiction to punish by fine to the amount of $100 and to impose costs in addition thereto.—Faulks v. People, 39 Mich. 200.

¶ 508. The authority of a justice of the peace, under Comp. L. 1871, § 5525, subd. 8, to hear and determine charges for offenses punishable by $100 fine or three months' imprisonment, or both, did not include the offense prohibited in Comp. L. 1871, § 1988, of keeping billiard-tables, cards and dice for gaming.—Pardee v. Smith, 27 Mich. 33.

¶ 509. The police court of Detroit has no jurisdiction of a criminal case where the maximum punishment allowed by law exceeds a fine of $100 or three months' imprisonment, or both such fine and imprisonment. —In re Berry, 7 Mich. 467.

¶ 510. The police court of Grand Rapids cannot try a party for misdemeanor that is punishable by fine and imprisonment beyond a justice's jurisdiction.—People v. Mangold, 71 Mich. 335.

¶ 511. Violations of Laws 1887, Act No. 129, against carrying concealed weapons, being punishable by fine not exceeding $100 or imprisonment not exceeding ninety days, or both, are under the jurisdiction of the police justices of Detroit.—Robison v. Recorder's Court Judge, 69 Mich. 607.

¶ 512. How. St. § 2203 provides that violators of the game laws "shall be guilty of a misdemeanor, and shall likewise be liable to a penalty of $50," etc. Section 9261 prescribes a punishment for persons convicted of misdemeanors for which punishment is not provided by any statute. Held, that section 2203 does not contemplate a double punishlaws can only be punished by a fine of $50. ment, and that offenders against the game Therefore the police court of Detroit has jurisdiction of prosecutions.—Robison v. Recorder's Court Judge, 69 Mich. 608.

¶ 513. The statutory provision as to the general criminal jurisdiction of justices did not operate as a limit to their jurisdiction as expressly given under the prohibitory liquor law; the jurisdiction conferred is sustained as within the constitutional limits.—In re Buddington, 29 Mich. 472.

¶ 514. Justices of the peace have jurisdiction of the offense of selling drink to minors, although the sum of the penalty and costs exceeds $100.—Faulks v. People, 39 Mich. 200.

§ 92. ——Approval of prosecution by public prosecutor.

Powers and functions of prosecuting attorney, see also post § 649.

Provisions as to approval by prosecuting attorney or security by complainant before justice, see Comp. L. 1915, § 15811.

¶ 515. A justice's omission to secure an order from the prosecuting attorney before issuing process in a criminal case does not deprive him of jurisdiction, though it might subject him to censure and official embarrassment. The appearance of the prosecuting attorney and his prosecution of the case are sufficient approval.—People v. Griswold, 64 Mich. 722.

§ 93. ——Security for costs by complainant.

¶ 516. Whether the complaining party has given to the people security for costs, as required by How. St. § 7135a, does not concern the respondent, and the omission to do so does not deprive the justice of jurisdiction.—People v. Griswold, 64 Mich. 722.

§ 94. Venue of crime and prosecution.

Where offense was committed near to boundary line, see post § 95.

Where offense was partly in two or more counties, see post § 96.

Where offense was committed on Great Lakes, see post § 97.

Territorial jurisdiction of justices, see ante § 91.

Change of venue, see post §§ 98, 99.

Averments of place or venue, see ante § 24.

Amendable averments of venue or place, see ante § 70.

Sufficiency of proof of place of crime, see post § 307.

Showing of venue in record, see post § 500.

Venue of bastardy proceedings, see Bastards § 4.

¶ 517. Persons charged with crime must be prosecuted in the county where the crime was either actually or in contemplation of law perpetrated.—Swart v. Kimball, 43 Mich. 443; Hill v. Taylor, 50 Mich. 549.

§ 95. ——Offenses committed on or near boundary lines.

Provisions for laying venue in either county where offense was committed near line, see Comp. L. 1915, § 15606.

¶ 518. Offenses committed at or within a point one hundred rods from the boundary between two counties may be prosecuted and punished in either county under Comp. L. § 7808.—Bayliss v. People, 46 Mich. 221.

¶ 519. Where a larceny is committed in one county and the stolen property is delivered to a receiver in an adjoining county within 100 rods of the line between the two counties, the receiver may be prosecuted in the county where the larceny was committed. —People v. Hubbard, 86 Mich. 440.

§ 96. ——Offenses not begun and completed in same county.

Bringing stolen property into state as larceny therein, see also Larceny, II.

Provisions for laying venue for killing where blow in one county is followed by death

in other, or blow on Great Lakes by death on land, see Comp. L. 1915, §§ 15607, 15608.

Indictment in any county where stolen property was taken or had in possession, see Comp. L. 1915, §§ 15732, 15733.

¶ 520. The misdemeanor of conspiring to obtain property by false pretenses may be tried wherever an overt act in pursuance of the conspiracy has been committed.—People v. Arnold, 46 Mich. 268.

¶ 521. The venue of a crime of obtaining the money of the state by a false pretense of presenting a false statement of claim to the state is rightly laid in Wayne county, where the money was obtained by presenting a check on a Detroit bank issued by the state treasurer on a warrant from the state auditor to whom the false statement had been sent by mail from Detroit.—People v. Hoffmann, 142 Mich. 531.

¶ 522. The county where the application for the license to practice as a physician is filled out and filed and issued and not the county where the examination is held has jurisdiction of a prosecution for the unlawful procurement of registration as a physician under Pub. Acts 1899, No. 237, How. 2nd Ed., § 5108 et seq., as amended by Pub. Acts 1913, No. 368.—People v. Maczulski, 194 Mich. 193.

¶ 523. Defendant was convicted of wife abandonment under an information charging the period of abandonment to be from April 2, 1911, to July 3, 1911. The information was filed and the trial had in the county of the wife's residence, where she had gone in September, 1910. Defendant never became a resident of said county and married his wife in another county. Held, under Act No. 144, Pub. Acts of 1907, § 4, complaint was filed and the trial had in the proper county so as to give the court jurisdiction.—In re Price, 168 Mich. 527.

§ 97. ——Offenses committed on Great Lakes.

Extent of justices' jurisdiction over offenses on Great Lakes, see ante ¶¶ 497, 505.

¶ 524. Comp. L. 1897, § 2450, How. 2nd Ed., § 917, giving to organized or subsequently organized counties bordering on Lake Huron concurrent jurisdiction of all offenses committed on that part of the lake lying within the limits of the state, and providing that such offenses may be tried in the county in which process against the offender shall first be issued, applies not only to transitory but also to local offenses.—Andrews v. Ellsworth, 190 Mich. 157.

§ 98. Change of venue.

Application and procedure for change, see post § 99.

Transfer of cases to other courts for trial, see post § 100.

Denial of change as harmless error where fair jury was obtained without peremptory challenges, see post § 538.

Sufficiency of record to show error and harm in denying change, see post § 595.

Irreviewableness of discretionary rulings on motions for change, see post § 629.

¶ 525. Though criminal cases must generally be tried in the county where the crime is charged to have been committed the court may change the venue where justice demands it or statutes so provide.—People v. Swift, 172 Mich. 473.

¶ 526. Defendant in a criminal case has no absolute right to a change of venue.—Glazier v. Ingham Circuit Judge, 153 Mich. 481.

¶ 527. Act 157 of the Laws of 1851 is construed as giving the circuit courts right to change venue on applications of the people as well as on application of the defendant.—Glinnan v. Detroit Recorder's Court Judge, 173 Mich. 674.

¶ 528. Jurisdiction of the subject-matter of a criminal offense committed in one county cannot be conferred by consent on the courts of another county.—People v. Meloche, 186 Mich. 536.

¶ 529. The granting of a change of venue is discretionary with the trial court.—People v. Gage, 188 Mich. 635.

¶ 530. The discretion lodged in a trial court relative to granting or refusing a change of venue is not a private, arbitrary, or personal, but a legal, discretion, to be exercised according to well-known principles of law.—People v. Gage, 188 Mich. 635.

¶ 531. The power of the circuit court to order a change of venue under Act 157 of the Laws of 1851 should be exercised with great care and deliberation.—Glinnan v. Detroit Recorder's Court Judge, 173 Mich. 674.

¶ 532. A change of venue may be ordered on the application of the people on the ground of local prejudice where two trials have resulted in a disagreement.—People v. Peterson, 93 Mich. 27.

¶ 533. Change of venue may be ordered in criminal case for cause shown on application by prosecution.—People v. Fuhrmann, 103 Mich. 593.

¶ 534. It is proper for the court acting on his own knowledge of conditions, to refuse to pass on a motion for change of venue until after the examination of the jurors, where the ground of the motion is that prejudicial newspaper reports were circulated and that at a former trial there was prejudicial conduct by officers of the court.—People v. Swift, 172 Mich. 473.

¶ 535. The trial court abuses its discretion in refusing to grant a change of venue in a criminal case in which the defendant was charged with defrauding the depositors of a large bank nine months after the doors of the bank were closed, where the bank failure was somewhat sensational, and stirred up ill feeling and bitter discussion to such an extent as to become one of the issues of the political campaign up to within two months of the time the motion for change of venue was made.—People v. Gage, 188 Mich. 635.

§ 99. ——Application, showing and procedure thereon.

Grounds for change, see ante § 98.

Mandamus to compel action on motion for change, see Mandamus, II.

¶ 536. Change of venue may be ordered on application of prosecution.—People v. Peterson, 93 Mich. 27; People v. Fuhrmann, 103 Mich. 593.

¶ 537. Affidavits in support of a motion by the prosecution for a change of venue in a criminal cause from the Recorder's Court of Detroit must, under Circuit Court Rule 19, subdiv. b, be served on the attorney of the opposite party.—Glinnan v. Detroit Recorder's Court Judge, 181 Mich. 192.

¶ 538. Under Circuit Court Rule 37 affidavits in support of a motion for the change of venue of a criminal cause from the Recorder's Court of Detroit must be entitled in the court and cause.—Glinnan v. Detroit Recorder's Court Judge, 181 Mich. 192.

¶ 539. A motion for a change of venue in a criminal case was properly denied when supported by two affidavits only, and the respondent at the trial announced himself satisfied with the jury, without exhausting his peremptory challenges.—People v. Fitzsimmons, 183 Mich. 284.

§ 100. Transfer and certification to other court for trial.

Transfer of preliminary examination to another magistrate or association of another in the hearing, see Arrest § 31.

Provisions for transfer of indictment from Kent Circuit to Grand Rapids Superior Court, see Comp. L. 1915, § 14694.

¶ 540. Both civil and criminal cases can be transferred from courts of original to courts of concurrent jurisdiction unless so far advanced as to involve conflict.—People v. Hurst, 41 Mich. 328.

¶ 541. The provision of the Detroit charter that indictments shall be "forthwith" certified to the recorder's court, which court is given full power to take all further proceedings thereon, must be construed as only authorizing proceedings under indictments that have been legally presented; and when defendant desires to plead in abatement to an indictment so certified, which he cannot do in the recorder's court, the circuit court may by summary order or by certiorari recall the record that the pleas may be passed upon.—Lauder v. Wayne Circuit Judge, 79 Mich. 602.

¶ 542. In proceedings for a writ of certiorari for the recall of an indictment from the Recorder's Court of Detroit, the proper practice is to have the parties arraigned and issue joined on the merits before the record is certified down.—Lauder v. Wayne Circuit Judge, 79 Mich. 602.

IV. PREPARATORY AND PRELIMINARY MATTER.

§ 101. In general.

Finding, filing and formal requisites of the accusation, see ante I, A.

Indorsement of names of witnesses on information, see ante §§ 20, 21.

In prosecutions before justices or minor courts, see post § 645.

[Note. The preliminaries of arrest, examination and commitment, and extradition of fugitives are treated in separate topics. See Arrest; Extradition.

The calling and formation of the grand jury and the preparation and service of the venire list are treated in Grand Jury and Jury respectively.]

Bail pending arrest and trial, see Arrest, Commitment and Bail.

Relaxation of technical rules and practice on preliminary examination, see Arrest § 27.

Proceedings to determine sanity of accused person, see Insane Person, I.

Order to prosecuting attorney holding public records for evidence to surrender them to proper custody subject to call, see Records.

Statutory proceedings for examination of persons in order to discover crime, see Pub. Acts 1917, No. 196.

§ 102. Appointment of counsel and objections for disqualification.

Power of assistant prosecutor to make amendments, see ante § 68.

Fixing amount of fee, see post § 509.

Objecting to qualifications for first time on review, see post § 512.

Withdrawal of prosecutor as curing objection to qualifications, see post ¶ 2600.

Attendance and functions of attorneys, see post §§ 330, 649.

Counsel on preliminary examination, see Arrest § 32.

Appointment of assistants to and substitutes for prosecuting attorney, see Attorney § 65.

¶ 543. A court cannot act upon unsworn allegations of impartiality of counsel retained to assist in a criminal prosecution, if

any question is made as to the fact and the defense objects.—People v. Hurst, 41 Mich. 328.

¶ 544. It is error to exclude evidence that counsel assisting in a prosecution were employed by the complaining witness or by private parties, even though the prosecuting attorney consented or requested that they should act.—Meister v. People, 31 Mich. 99; Sneed v. People, 38 Mich. 248.

§ 103. Production and inspection of documents.

¶ 545. The refusal of the trial court on a prosecution for embezzlement from a bank, to require the prosecuting attorney to deliver to the respondent and his attorneys memoranda prepared by an accountant of the bank, was not an abuse of discretion, where the respondent and his attorneys had been previously given the fullest access to the papers and books of the bank.—People v. Fitzsimmons, 183 Mich. 284.

V. ARRAIGNMENT AND PLEAS.

§ 104. In general; necessity of arraignment and plea.

Effect of failure to plead, see post §§ 105-107.
Time for plea or entry of plea, see post § 108.
Subjects and grounds for various pleas and scope of issues under them, see post §§ 109-119.
Withdrawal of plea and pleading anew, see post § 120.
Plea on trial as admission receivable in later trial, see post § 249.
Record showing as to pleas, see post § 500 et seq.
Arraignment and pleas before justice on trial for misdemeanor, see post § 650.

¶ 546. On the trial of a felony an arraignment upon the information and a plea are necessary to a valid conviction, and the record must show them; if the return to a writ of error in such case does not show that they were taken, the omission cannot be supplied by a presumption of regularity.—Grigg v. People, 31 Mich. 471.

§ 105. Effect of failure to plead or absence of plea.

Entry of plea of not guilty by court, see post § 106.
Plea of not guilty implied from going to trial, see post § 107.

¶ 547. A party who had pleaded not guilty to an information was allowed to withdraw his plea for the purpose of making a motion to quash. The motion was overruled, and, without having again pleaded, respondent was convicted after a trial on the merits. Conviction held valid.—Hensche v. People, 16 Mich. 46.

¶ 548. Where the merits without any defect is matter of the statute will not viction.—Hensche v.

¶ 549. After a tr criminal case, a wan a conviction invalid Mich. 362.

¶ 550. Defendant a felony. He filed charge under oath a a meritorious defen delay caused by a j and when tried he the jury that he h the charge. He was a trial of the cau represented by his c attention to the om and plea. Held, ground for invalida ment.—People v. W

§ 106. ——Entry of

Nunc pro tunc entr
Record showing a
prisoner stood
¶ 2384.
Provision for entry
court on refus
Comp. L. 1915,

¶ 551. A plea o entered without re on his arraignmen information, and made no attempt t plea in bar (Comp § 9518).—People v

§ 107. ——Plea im

¶ 552. By anno trial a defendant People v. Weeks,

§ 108. Time for pl

¶ 553. A plea of by the court to b any time.—Hensch

§ 109. Pleas in ab

Proper mode of
§ 59.
Defects in prelimi
of abatement
¶ 59.
Matters in issue
Waiver of object
by pleading
see post §§
Matters abating
Amendment and
misnomer, se
Verification of di
evidence, see

¶ 554. Whether a plea in abatement to an indictment is the proper method rather than a motion to quash or raising the objections that incompetent testimony was admitted by the grand jury, and that defendant's constitutional privilege was violated in compelling him to testify against himself, quære.—People v. Lauder, 82 Mich. 109.

¶ 555. A plea in abatement to an indictment should be certain to every intent and consistent, and conclude by praying judgment of the indictment and that it may be quashed; and it must be verified by affidavit. —Findley v. People, 1 Mich. 234.

¶ 556. A party interposing a dilatory plea of abatement to an indictment in a criminal prosecution invites the most rigid scrutiny of its sufficiency under the established rules of pleading.—People v. Lay, 193 Mich. 476.

¶ 557. A plea in abatement is bad for duplicity if it states several distinct facts having no relation to or dependence upon each other.—Findley v. People, 1 Mich. 234; People v. Lay, 193 Mich. 17.

¶ 558. A plea in abatement to an indictment based upon the fact that defendant was subpoenaed and testified in answer to interrogatories before the grand jury was held bad for uncertainty, because not showing whether it was based upon the reception of incompetent testimony, or upon the violation of defendant's constitutional privilege against self-crimination.—People v. Lauder, 82 Mich. 109.

¶ 559. A plea in abatement to an indictment based upon the fact that defendant was subpoenaed and testified in answer to interrogatories before the grand jury is insufficient where it does not show that some material fact without which an indictment could not have been found, was testified to by the defendant only and not by independent testimony.—People v. Lauder, 82 Mich. 109.

¶ 560. In a prosecution for embezzlement, averment in a plea in abatement that minutes of testimony taken before one who served as stenographer in bankruptcy proceedings were used and read before the grand jury as evidence against accused by such stenographer, who was also a member of the grand jury which afterwards indicted accused, does not properly charge that such stenographer and grand juror was a "prosecutor" within the meaning of Comp. L. 1897, § 11881, How. St. 2nd Ed. § 15052, and if it was intended by such averment to charge that the indictment was founded upon incompetent testimony, such plea becomes bad for duplicity, it appearing that in another portion of the same plea it was charged that such grand juror was a prosecutor.—People v. Lay, 193 Mich. 17.

¶ 561. In a criminal prosecution of an officer of a corporation for the alleged embezzlement of money of the corporation by the receipt of an excessive salary, a plea in abatement to the indictment which alleged that the trial judge who called the jury, before he ordered such jury convened and before his appointment had been employed as attorney by certain creditors of the corporation to procure the allowance of their claims against such corporation held not to show that such trial judge had a pecuniary interest in the indictment or conviction of the accused so as to disqualify him to act.—People v. Lay, 193 Mich. 476.

¶ 562. In a criminal prosecution of an officer of a corporation for the alleged embezzlement of the money of the corporation by the receipt of an excessive salary a plea in abatement to the indictment which alleged that when the trial judge ordered the convening of the grand jury he was a stockholder in various corporations to which such corporation was debtor held not to show that such trial judge had a pecuniary interest in the indictment or conviction of the defendant so as to disqualify him.—People v. Lay, 193 Mich. 476.

¶ 563. A plea in abatement to an indictment for embezzlement that the accused was required to give testimony before the grand jury and that without testimony so obtained, no indictment would have been obtained against him, but which did not allege that accused declined to so testify on grounds of personal privilege, or that there was not sufficient legal and competent testimony without his own to support the indictment, held not sufficient.—People v. Lay, 193 Mich. 17.

¶ 564. In a criminal prosecution of an officer of a corporation for the alleged embezzlement of money of the corporation by receiving an excessive salary, a plea to the indictment which charged that several of the grand jurors were stockholders in banks which were creditors of the corporation and held commercial papers guaranteed by defendant, held insufficient to show that such grand jurors had a pecuniary interest in the indictment or conviction of the defendant so as to render them incompetent to serve in such body.—People v. Lay, 193 Mich. 476.

¶ 565. Where a civil and a criminal action both lie, neither can be pleaded in abatement of the other.—Elliott v. Van Buren, 33 Mich. 49.

§ 110. Pleas of former jeopardy or bar.

What constitutes former jeopardy or bar, see Crimes, I, D.

Right to plead former acquittal had on defective indictment, see Comp. L. 1915, § 15625.

¶ 566. A plea of former acquittal is prima facie sufficient if it shows that a jury had been impaneled, and that the prosecution went into proofs by witnesses until they

rested their case. This would entitle defendant to a verdict for or against him, and a discharge of the jury without a verdict would discharge the respondent unless there was some overruling necessity, and, if there had been, it should be set up by replication to the plea.—People v. Jones, 48 Mich. 554.

¶ 567. A plea of former jeopardy is bad upon its face if it shows that the cause was dismissed and the jury discharged by the court upon respondent's motion.—People v. White, 68 Mich. 648.

¶ 568. The defense of a former acquittal in the same court need not be raised by plea, as what occurred is before the court upon its own record.—People v. Taylor, 117 Mich. 583.

§ 111. Demurrer and replication to pleas.

Proper mode of objection for defects in general, see ante § 59.

¶ 569. The prosecution may reply to the merits of a plea in abatement after demurrer thereto is overruled.—People v. O'Neill, 107 Mich. 556.

§ 112. Pleas of guilty.

Matters in issue, proof of former acquittal, see post ¶ 582.

Necessary averments or recitals in judgment on plea of guilty, see post § 491.

Power to vacate plea of guilty and order plea of not guilty when former plea appears to have been of doubtful truth, see Comp. L. 1915, § 15830.

¶ 570. Where a respondent was informed against for the embezzlement of money alleged to have been received by him in the course of his employment as agent of the owners, and pleaded that as an attorney at law he was guilty of embezzlement of a less sum collected and received by him, less his reasonable fees as such attorney for making the collection, such plea amounts to a plea of guilty as charged.—People v. Converse, 74 Mich. 478.

¶ 571. Where the defendant was charged under Comp. L. 1897, § 11484, with assault and robbery "with intent if resisted to kill," etc., and upon arraignment pleaded guilty but in his examination by the court denied that he had an intent to kill if resisted, he cannot be sentenced under the offense charged, and the court must supplant his plea of guilty by one of not guilty, and put him on trial for the crime charged.—People v. Scofield, 142 Mich. 221.

§ 113. ——Voluntariness and coercion or inducement.

Examination to ascertain voluntariness and propriety of plea, see post § 114.

Duty of judge to investigate facts on plea of guilty, see Comp. L. 1915, § 15830.

¶ 572. When a court gives a prisoner the alternative of either submitting to a severe sentence or withdrawing a plea of not guilty, pleading guilty, paying a heavy fine and estopping himself from bringing error, a plea of guilty so extorted will not sustain a conviction.—O'Hara v. People, 41 Mich. 623.

¶ 573. A prisoner who lets his plea of guilty stand after a full examination by the judge as to whether it was voluntary, and a frank assurance from him that he must inflict some punishment by way of example, cannot complain that his plea was obtained by raising false hopes of leniency.—People v. Brown, 54 Mich. 15.

¶ 574. Judgment on a plea of guilty should be set aside if the plea was made in consequence of any intimation from the judge that the sentence would be more severe in case of conviction upon a trial. And it should be set aside even if the intimation was not by way of threat, but the punishment was severe. It need not be, however, if the judge, in answer to importunities, has only shown a disposition to inflict a milder punishment on confession of guilt, and has done so. But no such intimation, however guarded, is proper.—People v. Brown, 54 Mich. 15.

§ 114. ——Examination as to voluntariness of plea.

Examination as to voluntariness of plea of guilty before sentence, see post § 486.

Duty to set aside plea of guilty and enter plea of not guilty on facts elicited by examination, see ante ¶ 571.

Record of examination and findings on plea of guilty, see post § 504.

¶ 575. How. St. § 9558, requiring it to be ascertained whether a plea of guilty is voluntary or not, applies to appealed cases begun on a warrant, as well as to cases on information or indictment.—People v. Richmond, 57 Mich. 399.

¶ 576. An examination by a judge to ascertain whether a plea of guilty is voluntary or not involves a search into the depositions or similar evidence, and a personal and private examination of the accused outside of the routine business of the court, and apart from the prosecuting attorney; and the record should show the performance of this duty, or at least show such an interval between plea and sentence as will justify the presumption that it has been performed.—Edwards v. People, 39 Mich. 760.

¶ 577. The statute does not require a private examination of a prisoner to ascertain whether his plea of guilty is a voluntary one, and an investigation made by the trial judge in open court in the presence of the prosecuting attorney and an officer of the court is not a fatal defect. There may be cases where a private examination should be had, yet such cannot be held to be abso-

lutely necessary.—Bayliss v. People, 46 Mich. 221.

¶ 578. On examination of accused for the purpose of passing sentence after he had pleaded guilty, it suffices to ask him if he has any reason to urge why judgment should not be passed against him, and for him to answer "None," without making other examination to ascertain whether his plea was voluntary, the judge being satisfied that it was so, and making return of that fact.—People v. Lewis, 51 Mich. 172.

¶ 579. Where a prisoner has changed his plea from not guilty to guilty, the statutory judicial duty of examining him to see that the change was not procured by undue influence is sufficiently performed if the judge makes full inquiry by interviews with the prisoner's counsel and friends, satisfies himself in advance that the plea may be properly received, and is satisfied that it is voluntary, free from undue influence, and made with every circumstance of fairness and deliberation.—Henning v. People, 40 Mich. 733.

¶ 580. Judgment on a plea of guilty was reversed and the prisoner discharged, where the record showed that the information was sworn to and the accused was arraigned, pleaded guilty, and was sentenced on the same day, and did not show anything from which it could be inferred that he was examined under L. 1875, Act No. 99 (How. St. § 9558), as to whether his plea of guilty was voluntary.—Clark v. People, 44 Mich. 308.

¶ 581. A person accused of grand larceny pleaded guilty on arraignment. The judge told him that if his plea was entered he could have no trial and must be sentenced. The prisoner said he understood that. He was then remanded to the sheriff's custody for two days before sentence. Meanwhile the judge inquired of the under-sheriff, in whose charge the prisoner had been, as to what statement he had made to him, and he also talked with the sheriff and with the prisoner's wife, and was satisfied that the plea was voluntary. When the prisoner was brought into court to be sentenced the judge asked him if he had any reason to urge why judgment should not be passed upon him, and the prisoner said he knew of none. He was accordingly sentenced. Held, that the statutory requirement that the judge satisfy himself that a plea of guilty is voluntary was substantially fulfilled (Pub. L. 1875, p. 140).—People v. Lepper, 51 Mich. 196.

§ 115. Matters in issue under plea in bar.

See also post ¶ 595.

Matters admitted by plea of guilty, see post § 119.

¶ 582. If an information is filed for the same offense, after examination and discharge, the defendant may prove those facts in bar of the prosecution under the plea of not guilty.—Morissey v. People, 11 Mich. 327.

§ 116. ——Under plea in abatement.

Modes of presenting particular objections and defects, see ante § 59 et seq.

¶ 583. Under a plea in abatement to an indictment, no other objections to a grand jury can be made than those a person under accusation at the time that it was impaneled might have interposed, viz., that a juror is the prosecutor or complainant in a charge against such accused person. (How. St. §§ 9496, 9497.)—People v. Thompson, 122 Mich. 411.

§ 117. Matters waived by plea or trial to merits.

Admissions and waivers by plea in prosecution before justice, see post § 650.

Moving to quash after plea, see ante § 64.

¶ 584. Plea of not guilty is a waiver of examination.—People v. Jones, 24 Mich. 215.

¶ 585. Pleading to an information is a waiver of any objection that might otherwise be made to its containing a charge of an offense not specified in the warrant for arrest.—People v. Clark, 33 Mich. 112.

¶ 586. By waiving a preliminary examination, and pleading not guilty to the information filed upon the return of the magistrate showing such waiver, a respondent waives the objection that no witnesses having knowledge of the facts were examined prior to the issuing of the warrant.—People v. Harris, 103 Mich. 473.

¶ 587. By pleading not guilty to an information for bigamy respondent waives objection that her husband made the complaint on which information was based, and the circuit court acquires jurisdiction to try the case.—People v. Turner, 116 Mich. 390.

¶ 588. By pleading to an information the objection that an accused has had no preliminary examination is waived.—People v. Harris, 144 Mich. 12.

¶ 589. Assignments of error based on the court's refusal to charge the jury, at the request of respondent, that it does not appear that the arrest was made on a legal warrant, or that respondent was arraigned upon any legal process, involve questions which should have been raised before pleading to the information, and will not be considered.—People v. Hanifan, 98 Mich. 32.

¶ 590. An accused in a criminal case waives a hearing upon a plea in abatement to the indictment where, although he contends that the order made by the judge in overruling the pleas is void because such judge was incapacitated by interest from sitting in the case, after disposal of the plea and the filing

of the petition for change of venue such application is denied, but a trial judge from another circuit is called in to preside at the trial of the case upon merits, he goes to a trial upon the merits before such substituted judge without insisting that the order overruling the pleas is void.—People v. Lay, 193 Mich. 476.

§ 118. ——Matters of abatement by pleading over.

¶ 591. Plea of not guilty is a waiver of examination.—People v. Jones, 24 Mich. 215.

¶ 592. The rule that the points raised by a plea in abatement are waived by a failure to stand upon the plea, extends to criminal cases (dictum).—Steel v. Clinton Circuit Judge, 133 Mich. 695.

¶ 593. If a person arrested upon a complaint and warrant charging an assault with intent to do great bodily harm, waives examination, is bound over for trial, and is informed against in the circuit court under two counts—one for assault with intent to do great bodily harm, the second for assault and battery, by pleading and going to trial he waives an examination on the second count.—People v. Williams, 93 Mich. 623.

§ 119. Scope of and matters admitted by plea of guilty.

Plea of guilty or confession of robbery overcome by proofs showing necessary element of crime lacking, see also post ¶¶ 1510, 1511.

¶ 594. A plea of guilty to a charge of the larceny of several articles as one act, and for a use to which all were to be put, is an admission of the larceny of all of them.—People v. Town, 53 Mich. 488.

¶ 595. Where a respondent upon being taken before the magistrate pleads guilty of drunkenness, he cannot thereafter complain that the manner of his arrest was illegal in order to contest jurisdiction.—People v. Lowerie, 163 Mich. 514.

§ 120. Withdrawal of pleas and pleading anew.

See also ante ¶ 547.

Allowance of motion to quash as withdrawal of plea, see ante ¶ 365.

¶ 596. It is within the discretion of the trial court according to the circumstances to allow a plea of not guilty to be withdrawn for the purpose of moving for quashal of the information on the ground that no preliminary hearing was had before issuing the warrant of arrest.—People v. Harris, 103 Mich. 473.

¶ 597. It was a wise exercise of discretion to refuse to permit respondent to withdraw his plea for the purpose of making a motion to quash, based upon the objection that no witnessses having knowledge of the facts were examined prior to the issuing of the warrant; it appearing that before the first trial, upon which the jury disagreed, a motion to quash was denied; that respondent's request, made during the same term of court, for leave to withdraw his plea for the purpose of renewing his motion to quash, was refused by the court; and that the second like request, the refusal of which is complained of, was made at the succeeding term of court, and after the people had prepared the case for trial.—People v. Harris, 103 Mich. 473.

VI. POSTPONEMENTS OR CONTINUANCES.

§ 121. In general; grounds and discretion.

Additional indorsements of names of witnesses as ground for time to prepare, see also ante § 21.

Tardy indorsement of names of witnesses as surprise, see also ante ¶ 73.

Application and showing for continuance, see post §§ 122-124.

Admission to avoid continuance, see post § 125.

Time of postponement, terms and conditions, see post § 126.

Power of attorney general or prosecuting attorney general to consent to continuance, see post ¶ 1528.

Binding force of agreement with attorney general for continuance on review, see post ¶ 2721.

Temporary recess or adjournment of trial after same is begun, see post § 332.

Record of adjournment and reconvenement, see post § 500.

Sufficiency of record to show error and harm from denial, see post § 595.

Objection for first time on review to denial of continuance, see post § 513.

Reviewableness of discretionary rulings on motions, see post § 628.

Continuances and postponements of misdemeanor trials before justices, see post § 651.

Continuing case on discharging jury, see post § 467.

Necessity of renewing recognizance on postponement of trial, see Arrest § 48, ¶ 140.

¶ 598. The court in a criminal case has discretion to refuse a delay asked by the defendant for the purpose of procuring witnesses.—People v. Foote, 93 Mich. 38.

¶ 599. Where the names of witnesses known to the prosecution when the information was filed are allowed to be indorsed at the trial, a refusal to grant a continuance is ground for reversal.—People v. Price, 74 Mich. 37.

¶ 600. Where, on the trial, respondent is represented by counsel who insists that the attorney originally employed in the case is better prepared to try it, and where, on the hearing of a motion for continuance on the

ground of said attorney's absence there is question whether he will postpone the case or another in which he is at the time engaged, refusal of a continuance is not an abuse of discretion.—People v. Considine, 105 Mich. 149.

¶ 601. The absence of an eyewitness of a murder is not ground for a continuance, at defendant's request, since the state is bound to produce such witness, and a failure to do so at the trial gives a ground for continuance. —In re McHugh, 152 Mich. 505.

¶ 602. The matter of a continuance rests in the discretion of the trial court, and there is no abuse of discretion in refusing a continuance asked by the accused because one of the jurors for that term of court was a res gestæ witness for the prosecution, his name being indorsed on the information, where the jurors called upon the panel were each shown to be qualified to sit.—People v. Williams, 118 Mich. 692.

¶ 603. Respondent in a criminal case is not to be forced to speedy trial without preparation to suit the convenience of the prosecuting witness.—People v. Anderson, 53 Mich. 60.

§ 122. Application and showing.

As to need for further time, see post § 123.
As to expected proofs, see post § 124.
Necessity of request for postponement to procure witnesses as foundation for motion for new trial for absence of such witnesses, see post ¶ 2294.

¶ 604. In a criminal prosecution the question of a continuance is addressed to the sound discretion of the court and the reviewing court will not interfere where the respondent was not arraigned until the day of trial agreed upon by counsel, the sole grounds for continuance being that there were names on the information not anticipated by counsel, no affidavit for continuance having been presented and no prejudice disclosed by the record.—People v. Marrs, 125 Mich. 376.

§ 123. Showing as to necessity for further time.

¶ 605. While respondent is entitled to a reasonable time to prepare for trial, a mere statement of counsel that respondent is not prepared for trial is not sufficient ground for continuance.—People v. Mason, 63 Mich. 510.

¶ 606. A mere assertion of a right to further time is not sufficient to constitute a motion for a continuance.—People v. Ranney, 153 Mich. 293.

§ 124. Showing as to expected proofs.

False affidavit as to expected testimony as admission of guilty consciousness, see post ¶ 1217.

¶ 607. Where respondent applies for a continuance on account of the absence of a witness, it is not necessarily error to require an affidavit as to what he expects to prove by such witness (Cir. Ct. Rule 55), unless he gives some good reason why he should not be compelled to disclose his defense.—People v. Anderson, 53 Mich. 60.

¶ 608. An affidavit for a continuance, containing statements by accused as to what a witness would testify, and that the witness would testify that she made certain statements to accused, and that she so testified at a coroner's inquest held by accused, which inquest was involved in the issues of the prosecution, is admissible against accused, though he did not take the stand; since the affidavit is in effect a statement of facts within the knowledge of the accused and not merely of his expectations; his guilty knowledge of the untruth of such statements being an issue, and she having given testimony on the trial contradicting the affidavit and tending to show that the affidavit was knowingly false.—People v. Hoffmann, 142 Mich. 531.

§ 125. Admission of facts to avoid continuance.

¶ 609. Where the witness whose absence is the basis of an application for a continuance on respondent's behalf in a criminal case is beyond the jurisdiction of the court, it is sufficient, to avoid a continuance, that the prosecution admit that the witness would, if present, testify as stated in the application; it not being required that the people admit the truth of the proposed testimony.—People v. Savant, 112 Mich. 297.

§ 126. Time of postponement and conditions or terms imposable.

¶ 610. Where, on the trial of a father for an alleged rape upon his daughter, the name of the daughter is indorsed upon the information as a witness after the jury is sworn, the request of the respondent for a continuance over the term should be granted, he claiming to be unprepared to meet her testimony; and it is error to continue the case for a number of weeks, and allow the jury to separate and return and try the case, the respondent not consenting to such continuance, and objecting to said trial.—People v. Evans, 72 Mich. 367.

VII. DISMISSAL OR NOLLE PROSEQUI.

§ 127. In general.

Direction by supreme court on exceptions for entry of nolle, see post § 640.
Discharge of jury for inability to agree, see post § 467.
Right to discharge on lapse of time for sentence, see post ¶ 2325.
Record of dismissal or nolle, see post § 505.
Quashal or nolle as bar to further prosecution, see Crimes § 24.
Necessity of leave to nolle or discontinue, see Comp. L. 1915, § 15724.

¶ 611. A prosecution for adultery should be discontinued where the only person com-

petent to make complaint asks leave to withdraw it (How. St., § 9279).—People v. Dalrymple, 55 Mich. 519.

¶ 612. A prosecution for adultery on complaint of the husband should be dismissed upon his filing a paper so requesting.—Hosford v. Gratiot Circuit Judge, 129 Mich. 302.

¶ 613. One who was guilty of manslaughter, but convicted of murder, should be discharged, on vacating the judgment against him, if the right to prosecute him for manslaughter was outlawed when the proceedings for murder were taken.—People v. Burt, 51 Mich. 199.

¶ 614. Where, on preliminary examination before a police magistrate, a person charged with crime is bound over to the superior court for trial, a motion may be made in such court, before the jury is sworn, to dismiss the proceedings on the ground that the examination fails to show that a crime has been committed or that there is probable cause to believe that the respondent is guilty, and upon such a motion the court will consider the evidence adduced before the magistrate and pass upon the propriety of his determination.—Barnard v. Grand Rapids Superior Court Judge, 199 Mich. 227.

VIII. EVIDENCE.

A. JUDICIAL NOTICE, PRESUMPTIONS, AND BURDEN OF PROOF.

§ 128. Judicial notice in general.

As to character and acts of officers of court, see also post ¶ 886.

Former acquittal in same court, see also ante ¶ 568.

Judicial knowledge as matter not to be pleaded, see ante § 62.

Judicial cognizance taken in civil cases, see Evidence, J.

[Note. The separation of judicial notice into civil and criminal cases is not based on any supposed distinction, but solely on the advisability of separating civil evidence from criminal evidence. Judicial notice was separated as an incident of such treatment.]

¶ 615. Courts usually take notice of matters of which every one takes notice.—People v. Plummer, 189 Mich. 415.

¶ 616. Judicial notice will not be taken of a fact, such as the operation and applicability of a law in a given place, where the law itself has prescribed the evidence to prove that it is in force.—People v. Murphy, 93 Mich. 41.

¶ 617. Courts will take judicial notice of the ordinary meaning of English words, but not of uncommon or extraordinary meanings applied in isolated cases or in particular localities.—People v. Gastro, 75 Mich. 127.

¶ 618. The courts will take judicial notice of proclamations by the governor or president setting apart certain days for fasting and prayer or thanksgiving.—People v. Ackerman, 80 Mich. 588.

¶ 619. Courts take judicial notice of municipalities within their jurisdiction.—People v. Telford, 56 Mich. 541.

¶ 620. Judicial notice is taken of political divisions of a county into townships.—People v. Maynard, 15 Mich. 463; People v. Waller, 70 Mich. 237.

¶ 621. It will be judicially noticed that a named township is within a certain county.—People v. Grimm, 182 Mich. 643.

¶ 622. The Recorder's Court of Detroit and the supreme court can take judicial notice that the city of Detroit is within the county of Wayne.—People v. Curley, 99 Mich. 238.

¶ 623. A court must have judicial knowledge of the position and character of one who acts as its officer.—Keator v. People, 32 Mich. 484.

¶ 624. Our courts are presumed to have judicial knowledge what courts in other states are of such a character that their clerks can lawfully certify under our laws.—People v. Marion, 29 Mich. 31.

¶ 625. The court may take judicial notice that fish are an important food product and that the state as a whole is interested in having the supply increase instead of decrease, and that large sums of money raised by taxation are expended by the state in the propagation and distribution of fish.—People v. Horling, 137 Mich. 406.

¶ 626. Judicial notice of the existence of Lake St. Clair will be taken as of a geographical feature.—People v. Brooks, 101 Mich. 98.

¶ 627. In a prosecution against a physician under a statute requiring a report of specified diseases "or any other dangerous diseases," for failure to report a disease not specifically mentioned, judicial notice is not taken as to the varying degrees of infectiousness of different diseases.—People v. Shurly, 124 Mich. 645.

§ 129. ——As to laws and ordinances.

Presumption as to foreign laws, see post § 135.

¶ 628. Courts will take judicial notice of public acts, both general and local, passed by the state legislature, but not of private laws or ordinances passed by the common council of a city or the board of trustees of a village.—People v. Quider, 172 Mich. 280.

¶ 629. Judicial notice cannot be taken that a county has adopted local option.—People v. Edwards, 174 Mich. 445.

¶ 630. In a prosecution in the Recorder's Court of the city of Detroit for loaning money in Detroit and charging interest thereon in excess of seven per cent per annum without having first obtained a license from the city, the court in exercising general jurisdiction is governed by the same rules as the circuit court and cannot take judicial notice of municipal ordinances, and a failure on the part of the prosecution to prove the ordinance relied upon is fatal to a conviction.—People v. Quider, 172 Mich. 280.

§ 130. Presumptions.

As to various facts and issues, see post §§ 131-137.
Rule against inference on inference, see post § 138.
Inference from failure to adduce proofs or to testify, see post §§ 139, 140.
Inference from incriminating possessions, see post § 141.
As to voluntariness of confession, see post § 265.
Presumptions pertaining to law of specific crimes, see Homicide, VII; Larceny, II; Rape; Seduction; Intoxicating Liquors.
Presumption as to previous chastity, see also Seduction, II.
Presumption as to reformation of woman after seduction, see Seduction, II.
Presumptions on review drawn from face of the record, see post § 617 et seq.
Conclusiveness and effect of presumptions as proofs in the case, see post § 311.
Falsehood, fabrication, flight, or resistance to arrest as acts impliedly admissive of guilt, see post § 250 et seq.
Presumptions in civil cases, see Evidence, II.
Burden of proof, see post § 142 et seq.
Charging on inferences and presumptions, see post § 430 et seq.

¶ 631. Presumptions are never allowable where better evidence is required by law to be preserved.—People v. Treadway, 17 Mich. 480.

¶ 632. All girls under sixteen, and not leading depraved lives, are presumptively in the legal charge of some one.—People v. Carrier, 46 Mich. 442.

¶ 633. Evidence of the larceny of money in another state, together with proof that the accused came immediately after into this state, and here undertook to negotiate for the return of the money, affords a strong presumption of the possession of the money in this state.—People v. Williams, 24 Mich. 156.

¶ 634. There is no legal presumption, for the purposes of a criminal prosecution, that bank-notes, checks, bills of exchange and other securities for money are worth the sums which they represent, or any sum.—People v. Donald, 48 Mich. 491.

§ 131. ——As to innocence or guilt.

In receiving stolen goods, see also post ¶ 661.
Instructions on presumption of innocence, see post § 405.
Presumption of innocence in civil cases involving acts of criminal nature, see Evidence § 49.

¶ 635. One accused of crime is presumed innocent until he is proved guilty.—Maher v. People, 10 Mich. 212; People v. Garbutt, 17 Mich. 9; Stephens v. People, 38 Mich. 739; People v. Bussey, 82 Mich. 49.

¶ 636. The presumption of innocence is present in every criminal case; it stands good until overcome by evidence convincing the jury beyond a reasonable doubt of respondent's guilt.—People v. De Fore, 64 Mich. 693.

¶ 637. The presumption of innocence follows the defendant in a criminal prosecution until overcome by testimony establishing his guilt beyond a reasonable doubt.—People v. Rogulski, 181 Mich. 481.

¶ 638. The presumption of innocence of an accused exists and remains until overcome by evidence which convinces the jury beyond a reasonable doubt that the accused is guilty.—People v. McClintic, 193 Mich. 589.

¶ 639. After a man has been convicted, the presumption of innocence attends him no longer.—People v. Fritch, 161 Mich. 111.

§ 132. ——As to complicity of parties in transaction.

Burden of proof of complicity, see post ¶ 664.

¶ 640. Where one has received stolen property with guilty knowledge and afterwards sold it, the presumption will arise that the whole transaction was on joint account; and the declarations of either of the parties made before the sale, concerning the terms and incidents of the common enterprise, are admissible on the same principle which allows the statements of coconspirators to be proved.—People v. Pitcher, 15 Mich. 397.

§ 133. ——As to knowledge of law or facts.

In civil cases, see Evidence § 47.

¶ 641. Though the law presumes a ministerial officer to know the law, it makes no such presumption, in ordinary cases, as to matters of fact of which the law gives no information, and which are not disclosed by the process or order which he is commanded to obey.—People v. Rix, 6 Mich. 144.

§ 134. ——As to intent or malice.

Inference of intent from nature of act or character of weapon or means used, see also Homicide §§ 44, 45.
Implied malice in mutilating animals, see Crimes ¶ 395.
In civil cases, see Evidence § 46 et seq.

¶ 642. It is a general rule governing the law of malice that when one commits an act,

unaccompanied by any circumstances justifying its commission, the law presumes that he has acted advisedly and with an intent to produce the consequences he has committed.—People v. Petheram, 64 Mich. 252.

¶ 643. Where an act is knowingly committed which naturally and usually leads to certain consequences, the inference is proper that such results are intended.—People v. Scott, 6 Mich. 287.

¶ 644. The law presumes every person to intend the usual consequences that attend the use of the means employed in the manner employed; e. g., a criminal intent is presumed from the use of a deadly weapon.—People v. Potter, 5 Mich. 1; People v. Hodges, 196 Mich. 546.

¶ 645. A respondent's intent to do great bodily harm less than the crime of murder may be inferred from the act itself.—People v. Miller, 91 Mich. 639.

§ 135. ——As to foreign laws.

Proof of foreign laws by statutes and published reports, see post § 295.

¶ 646. In the absence of proof to the contrary the common law as it exists among us will be presumed to prevail in a foreign country.—People v. Loomis, 106 Mich. 250.

¶ 647. It cannot be presumed that the statute law of New York on the subject of marriage is like our own.—People v. Lambert, 5 Mich. 349.

§ 136. ——As to regularity, verity, normality, and performance of duty.

Presumptions on review in favor of regularity of trial, see post § 617 et seq.

Sanity as normal condition to be overcome by proof, see post ¶ 665.

In civil cases, see Evidence § 34 et seq.

Presumption as to regularity of foreign criminal judgments, see Foreign Judgments ¶ 55.

¶ 648. Employees of a telegraph company are presumed to perform the duties intrusted to them in transmitting and receiving messages.—People v. Hammond, 132 Mich. 422.

¶ 649. In a prosecution for obtaining goods by false pretenses the representations made by respondent must be taken to be true unless shown to be otherwise.—People v. Wakely, 62 Mich. 297.

¶ 650. In a trial for forgery of a note, a presumption exists that the date on the note was the true date of its execution.—People v. Campbell, 160 Mich. 108.

§ 137. ——As to names and identities.

¶ 651. Identity of name is presumptive evidence of identity.—People v. Robinson, 135 Mich. 511.

§ 138. Inferences on inferences or presumptions.

¶ 652. A conviction may be based on circumstantial evidence; but circumstances cannot be presumed.—People v. Foley, 64 Mich. 148.

§ 139. Inference from failure to testify or adduce proofs.

Charging on inference, see post § 432.

Comment in argument on inferences from nonproduction of proof, see post § 385.

Existence and availability of additional evidence not produced as creating reasonable doubt, see post ¶ 1363.

¶ 653. No inference can be drawn against a respondent from the refusal of a witness to answer questions for fear of criminating himself.—People v. Hall, 48 Mich. 482.

¶ 654. A witness has no power to produce corroborating testimony, and his failure to do so cannot be used against the party for whom he testifies.—People v. Lyons, 49 Mich. 78.

¶ 655. Although the defendant in a criminal case has a right to call his wife as a witness, no presumption of his guilt will arise from his failure to do so, and it is not to be commented upon by the prosecution to the jury, notwithstanding the case is such that if he is innocent she must know it.—Knowles v. People, 15 Mich. 408; Carne v. Litchfield, 2 Mich. 340.

§ 140. ——From failure of accused to testify.

Charging against inference, see post § 432.

¶ 656. Where one avails himself of his privilege to decline to testify on the ground that his answers might tend to criminate him, no unfavorable inference can be drawn from his silence.—Knowles v. People, 15 Mich. 408.

¶ 657. Neglect by a prisoner to give evidence on his preliminary examination cannot be made ground of presumption against his innocence on the ensuing trial.—Templeton v. People, 27 Mich. 501.

§ 141. Inference from incriminating possessions or facts.

Admissibility of incriminating facts of flight, concealment, falsification, or possession, see post §§ 172-174, 251-255.

Instructions on inferences to be drawn, see post § 431.

Weight of inference and lessening weight as time wears on, see post ¶ 1392.

¶ 658. The possession of recently stolen property raises a presumption that the possessor is guilty of the theft.—People v. May, 199 Mich. 574.

¶ 659. The presumption of guilt arising from the possession of recently stolen prop-

erty is not a conclusive one and may be overcome by evidence.—People v. May, 199 Mich. 574.

¶ 660. The more remote the theft in point of time, the weaker is the presumption of guilt arising from the possession of the stolen property.—People v. May, 199 Mich. 574.

¶ 661. Where one is charged with receiving stolen goods knowing them to be stolen, the mere possession of the goods by him, without evidence tending to show guilty knowledge, can have no tendency to establish his guilt, but must be presumed to have been innocent.—Durant v. People, 13 Mich. 351.

§ 142. Burden of proof and shifting of burden.

Burden as to insanity, see post § 143.
Burden as to intent, see post § 144.
Burden as to defenses, see post § 145.
Burden as to elements in specific crimes which are separately treated, see Assault § 9; Homicide § 43 et seq.; Larceny, II; Rape; Seduction.
In prosecutions for violating liquor laws, see Intoxicating Liquors, VI, B.
Weight and sufficiency of evidence to support burden, see post VIII, C.
Sufficiency and certainty of circumstantial proofs, see post § 305.
Presumption as to innocence, see ante § 131.
Instructions on burden of proof, see post § 405.

¶ 662. In criminal cases the burden of proof is upon the prosecution throughout to show that the accused is guilty of the offense charged.—People v. Millard, 53 Mich. 63; People v. Coughlin, 65 Mich. 704; People v. McWhorter, 93 Mich. 641.

¶ 663. The prosecution in a criminal action must show as part of its own case, unless respondent admits or shows it, that no theory of innocence can reasonably accord with the facts.—People v. Millard, 53 Mich. 63.

¶ 664. The burden is on the prosecution to prove that an offense was jointly committed as averred in the information.—Stuart v. People, 42 Mich. 255.

§ 143. ——As to sanity or insanity of accused.

Presumptions and evidence as to sanity as civil issue, see Insane Persons, I.

¶ 665. Sanity being the normal condition of the mind, the prosecution in a criminal case may rest upon the presumption that the accused was sane when he committed the act until it is overcome by the defendant's evidence. But when any evidence is given which tends to overthrow that presumption, the jury are to examine, weigh and pass upon it with the understanding that, although the initiative in presenting the evidence is taken by the defense, the burden of proof upon this part of the case as well as upon the other is upon the prosecution to establish the conditions of guilt.—People v. Garbutt, 17 Mich. 9.

¶ 666. Evidence tending to show respondent's insanity does not throw upon the prosecution the burden of overbalancing it if it does not raise a reasonable doubt.—People v. Finley, 38 Mich. 482.

¶ 667. On the introduction of evidence tending to show the insanity of the accused, the burden rests on the people in a criminal trial, to satisfy the jury as to his sanity beyond a reasonable doubt.—People v. Eggleston, 186 Mich. 510.

§ 144. ——As to intent.

¶ 668. The burden of proof as to criminal intent lies upon the prosecution throughout.—Maher v. People, 10 Mich. 212; People v. Garbutt, 17 Mich. 9.

¶ 669. When a statute makes a particular offense to consist of an act committed with a particular intent, which act and intent constitute substantially an attempt to commit a higher offense than that which was accomplished, proof of the particular intent is as necessary as of the act itself; but not necessarily by direct and positive testimony. It may be inferred by any facts in evidence which satisfy the jury of its existence.—Roberts v. People, 19 Mich. 401; People v. Lilley, 43 Mich. 521.

§ 145. ——As to justification, excuse or other defense.

See also Homicide § 43.

¶ 670. Where there is evidence tending to show that defendant acted in self-defense, the burden of proof is upon the people to satisfy the jury that the homicide was not committed in self-defense, and that no reasonable belief existed in defendant's mind that he was in great bodily danger as the facts and circumstances appeared to him at the time.—People v. Coughlin, 65 Mich. 704.

B. RELEVANCY AND COMPETENCY.

1. In general.

§ 146. Relevancy and materiality in general.

Relevancy of evidence to particular issues, see post § 175 et seq.
Competency of particular kinds of evidence, see post § 151 et seq.
Relevancy of facts to other facts in evidence, see post § 147.
Details completing entire transaction, see post § 148.
Complementary parts of entire communication, see post § 149.
Things seen by jury on view as evidence, see post § 150.

Res inter alios acta, see post § 160.
Similar but unrelated facts, see post § 161.
Facts before or after crime or facts in issue, see post § 162 et seq.
Other offenses, acts and relationships, see post § 165 et seq.
Incriminating facts and possessions, see post §§ 172-174.
Remoteness of evidence in time from issues, see post § 162.
Relevancy and materiality of nonexpert opinions as test of admissibility, see post § 197.
Relevancy and materiality of nonexpert conclusions to make them receivable, see post § 197.
Relevancy and materiality of declarations to take them out of the hearsay rule, see post § 218 et seq.
Relevancy of admissions to the issues, see post § 256.
Relevancy of character evidence as determining its admissibility, see post § 268.
Relevancy of documents to make them admissible, see post § 282.
Variance of proof from allegations, see ante § 77 et seq.
Sufficiency of proofs, see post VIII, C.
Duty of state to call witnesses, see post § 349 et seq.
Materiality of testimony and oath in perjury and subornation, see ante § 43p, post § 324p; Crimes § 116.
Striking out evidence on irrelevancy or incompetency appearing after reception, see post § 366.
Admission of improper evidence as harmless error, see post § 540 et seq.
Relevancy in civil cases, see Evidence, III.
Scope and latitude allowable in examination, see Examination of Witnesses § 6.
Germaneness of cross-examination to direct or to issues in case, see Examination of Witnesses §§ 45, 46.
Questions too general in form, see Examination of Witnesses § 9.
Double and equivocal questions, see Examination of Witnesses § 8.
Question rather than improper answer as test for meaning and propriety of question, see Examination of Witnesses § 11.
Impropriety of leading or suggestive questions or questions assuming unproved facts, see Examination of Witnesses §§ 12-17.
Leading questions to woman subject of rape, seduction or similar crime, see Examination of Witnesses § 16.
Leading questions to accomplice testifying, see Examination of Witnesses § 16.
Use of interpreters, see Examination of Witnesses § 19.
Circumstances of the crime as proper matter for cross-examination, see Examination of Witnesses § 55.
Cross-examination as to collateral and immaterial matters, when and for what allowable, see Examination of Witnesses § 56 et seq.; Witnesses, VI, D.
Applicability in criminal cases evidence contained in Judi see Pub. Acts 1917, No. 208.

¶ 671. In determining the adm evidence it is indispensable to c object for which it is produce point intended to be established though evidence offered may have to prove a fact inadmissible or under the issue, it cannot be e that reason, if its tendency be al a fact which is within the issue, made relevant by the course of th tion.—People v. Doyle, 21 Mich.

¶ 672. A conviction will be se error in excluding from conside terial facts showing the circumsts which the act was committed.- Curtis, 52 Mich. 616.

¶ 673. In a trial for mansla trial court is not in error in allow defendant to prove that caused the attendance of witness did not swear.—People v. Bur Mich. 240.

§ 147. Facts relevant to facts in
See also post ¶ 1091.
Other acts and offenses and res tending to prove or disprov facts, see post § 160 et seq.
Rebutting or explaining facts, see 183.
Evidence to prove particular fact § 175 et seq.
Connecting proof to make corresp tween shoes and footprints see post ¶ 816.
Cross-examination on collateral terial matters as affecting cr witnesses, see Examination of § 56 et seq.
Admissibility of accused's lack dead bodies on issue of murder see Homicide ¶ 135.

¶ 674. Wherever a witness has a fact or transaction which, star and entirely unconnected with which led to or brought it about, pear in any degree unnatural or in itself, the previous facts whic are admissible, since without the be impossible for the jury prop preciate the testimony in referen principal transaction. This rule i applicable where the principal tra question is unlawful intercourse b sexes.—People v. Jenness, 5 Mic

¶ 675. In a prosecution for a assault, in which the assailant us a witness testified that more th before he had seen the defendant h handled knife, sharp on both ed allowable, against objection, to witness to be asked to describe

such testimony would be very remote. Exception could not be taken to excluding the question put to a witness for the defense, whether such defendant was not a shoemaker, there being no showing of its relevancy in the trial court, though it was suggested above that such an occupation would account for the knife.—People v. Niles, 44 Mich. 606.

¶ 676. Where a certificate, purporting to be under the seal of a court of record, is alleged to have been forged, evidence of the falsity of the seal is relevant to the issue, as the falsity of the seal raises a strong presumption that the signature to the certificate is also false.—People v. Marion, 29 Mich. 31.

¶ 677. It was not error to admit proof of nonpayment and protest of a check, on a prosecution of forgery of such check, since it tended to show presentment and dishonor. —People v. Tollefson, 145 Mich. 444.

¶ 678. The testimony of the people tended to show that a bank check was given to respondent in payment for the goods; that respondent was arrested directly in front of the store where the goods were sold and the check given; that, upon being arrested, he threw a piece of paper into his mouth, and chewed it beyond recognition. The prosecution was permitted to introduce in evidence a blank check, taken from the check book of the purchaser of the goods, which he testified corresponded to the one he had given in payment for the goods. Held, that the testimony was admissible to show that the paper upon which the blank check was printed corresponded in color with that which was afterwards found in the form of a wad of paper on the sidewalk near where the respondent stood at the time of his arrest.—People v. Considine, 105 Mich. 149.

¶ 679. It was competent for the people to show that, about ten minutes after respondent's arrest, a wad, which looked like paper chewed up, was picked up near the store of the purchaser of the goods, still wet, there being enough from which the jury might infer the connection between this and the check given in payment for the goods, when taken in connection with the statement of the witness that respondent at the time of his arrest was seen to throw a piece of paper into his mouth.—People v. Considine, 105 Mich. 149.

¶ 680. In a criminal prosecution for larceny evidence that a witness, to preserve footprints corresponding to the shoes of accused, "ordered men not to walk approximately across the shrubbery beds," where the prints were impressed, is admissible.—People v. Breen, 192 Mich. 39.

¶ 681. Where in a prosecution for having possession of burglar's tools, it is shown that the defendant when arrested had certain implements in his possession, which implements are in court, the people properly introduced testimony as to the purpose for which such implements could be used.—People v. Jones, 124 Mich. 177.

¶ 682. The purpose for which tools found in possession of defendant's coindictees might have been used may be shown.—People v. Freelmame, 163 Mich. 336.

§ 148. Details of entire transaction.

See also ante ¶ 674.
Complementary parts of entire communication, see post § 149.
Facts amounting to res gestæ, see post § 241 et seq.

¶ 683. In a criminal prosecution it is proper to lay before the jury such circumstances as will give them a connected and intelligible view of what was discovered by acting upon them.—Ulrich v. People, 39 Mich. 245.

¶ 684. The entire train of connected facts can be shown in a case of an offense which was the termination of a continuous transaction.—People v. Knapp, 26 Mich. 112.

¶ 685. Three persons were attacked at once. One was killed outright, another was pursued, and all were fired at. The whole transaction lasted about two minutes. Held, that in a trial for the murder it was competent to give evidence of the whole transaction as an entirety, including what happened after the killing as well as before.—People v. Marble, 38 Mich. 117.

¶ 686. On a trial for homicide, where it appeared that the riotous assembly (of which the deceased was one) gathered at the time grew out of and was connected with one that had assembled in the same place the night before and with the same object, held, that all the proceedings and objects of both gatherings, together with the provocation to defendant and his acts, constituted one entire transaction and were admissible in evidence. —Patten v. People, 18 Mich. 314.

¶ 687. In a prosecution for embezzlement of the proceeds of a check, where the receipt of the check and the money was admitted but it was claimed that the money had been accounted for, it is proper to permit proof of the history of the check in question.—People v. Peck, 139 Mich. 680.

§ 149. Complementary parts of entire communication.

See also post ¶ 1087.
Entire conversation containing admission, see post § 264.
Admissibility of all portions of document or record, see post § 284.
Circumstances of time and place attending conversation or declaration, see post § 239.

Matters rebutting or explaining declaration, see post § 240.
Showing remainder of threat to prove that it was not serious, see post ¶ 1013.

¶ 688. Where in a murder trial admissions of the accused are offered in evidence by the state, defendant has a right to have the whole conversation admitted, whether the same consists of self-serving statements or not; the test being whether they form a part of the conversation proved by the people.—People v. Bowen, 170 Mich. 129.

¶ 689. In considering a statement proved to have been made by respondent the whole statement must be received; but the credit due to it, and to each part of it, is for the jury, who may believe one portion and disbelieve another, and may give it such credit as they deem it worthy of.—People v. Griffin, 77 Mich. 585.

§ 150. Things seen on view as evidence.

Purpose of view and restrictions thereon, see also post ¶¶ 1538, 1540.

¶ 690. In a prosecution for murder, where the jury viewed the place where the crime had been committed, held that they had the right to consider all they saw in the room having reference to tracks, imprints or marks testified to and mentioned by the witnesses in a general way.—People v. Winney, 196 Mich. 347.

§ 151. Competency in general and privileged matter.

[Note. The rules of competency and the cases illustrating them are treated post under the subdivisional headings, "best and secondary," "parol, etc.," "conclusions and nonexpert opinions," "expert opinions," "hearsay, etc.," "admissions and confessions," "character and reputation," "evidence addressed to the senses; real evidence," "documents as evidence." Cases which turned on the fitness of the evidence rather than on its relation to the issues have been treated as cases on competency and placed in the foregoing headings. For convenience the matter has been arranged in subdivisions as follows:

Best and secondary evidence, see post §§ 184-194.
Parol or extrinsic evidence to vary or show terms of writings, see post § 195.
Conclusions and nonexpert opinions, see post §§ 196-202.
Expert opinions, see post §§ 203-216.
Hearsay and declarations out of court and res gestæ, see post §§ 217-246.
Admissions and confessions, see post §§ 247-266.
Character and reputation, see post §§ 267-276.
Evidence addressed to the senses; real evidence, see post §§ 277-281.
Documents as evidence, see 300.]

Testimony by accused and self testimony, see post §§ 152,
Official knowledge or state secre § 154.
Evidence obtained by illegal mea see post § 155.
Testimony of witnesses not name ments, see post § 156.
Testimony of witnesses who viol exclusion, see post § 157.
Relevancy of evidence, see ante post §§ 158-174.
Things seen by jury on view, see
Competency of secondary proof § 193.
Necessity of proof of foundation inary facts before principal post § 359 et seq.

[Note. In many respects the ru petency are the same in cri civil evidence and on quest arise the topic Evidence sho sulted, bearing in mind, ho the two kinds of evidence separated to avoid the ser which might attend an effo both kinds in one topic.]

Competency in civil cases, see E et seq.
Competency of witnesses in gener nesses, II et seq.
Incompetency of witnesses by rea tion of confidence to accuse person, see Witnesses, V.
Effect of accomplice's interest to incompetent and statutory such incompetency as witnes nesses, III.
Testimony privileged because of witness to accused as husban torney, priest, physician, or fidence, see Witnesses, V.
Applicability in criminal cases of and regulations governing th evidence" contained in Judi see Pub. Acts 1917, No. 208.

¶ 691. In corroboration of an testimony as to his presence wi on the night of an alleged trespa of such accomplice may testify t not at home on the night the tr committed.—People v. O'Brien, 6

§ 152. Testimony by accused.

Self-criminating testimony by a post § 153.
Examination and statement of acc sentence, see post § 486.
Cross-examination of accused te witness, see Examination of §§ 79, 80.
False swearing by accused in h fense as perjury, see Crimes

¶ 692. The purpose of permitting the respondent in a criminal prosecution to testify on his own behalf is to enable him to present his own defense, hence questions directed to that end by exculpating himself are not improper.—People v. Quick, 51 Mich. 547.

§ 153. ——Compulsory self-crimination.

Compulsory tests in presence of jury by accused to measure footprints, see post ¶ 1306.

Confessions and admissions as self-crimination, see also post § 247.

Impropriety of comment on failure to testify or to produce evidence, see post § 385.

Mode of objecting to self-crimination, see post ¶ 1637.

Effect of suggesting privilege to cure improper questioning of accused, see post § 556.

Privilege to decline to answer self-criminating question, see Examination of Witnesses § 109.

Personal nature of privilege against self-crimination and disability of accused thereby to shut out accomplice's testimony, see Examination of Witnesses § 109.

Waiver of privilege against self-crimination, see Examination of Witnesses § 110.

Immunity of witness from prosecution under indictment founded on his own testimony, see Witnesses, I.

Statutory immunity from prosecution on testimony given in bankruptcy proceedings, see Witnesses, I.

Scope and range of cross-examination of accused testifying on his own behalf, see Examination of Witnesses §§ 79, 80.

Secrecy and privilege of proceedings before grand jury, see Grand Jury § 6.

¶ 693. It is not compulsory self-crimination to require accused on the stand in his own behalf to take an iron bar in the case as an exhibit and insert the bar in his pocket for the purpose of showing that in such position it would be under his arm, and to call on him to answer that it was under his arm, the theory of the prosecution being that the murder was done with an iron bar carried in a concealed way by accused, and the evidence in question merely tending to show the physical possibilities.—People v. Ecarius, 124 Mich. 616.

¶ 694. The question whether under Const. art. VI, § 32, providing that no person shall be compelled in any criminal case to be a witness against himself, etc., defendant in a prosecution for violating a local option law could have been compelled to file reports of sales, or lawfully convicted if he failed to do so, was not material where the defendant did file such reports; and having been so filed, they were competent.—People v. Robinson, 135 Mich. 511.

¶ 695. A woman gave six hundred dollars to defendant to loan for her. Defendant forged a name to a note for that amount, and kept the note in his desk and retained the money, paying her the interest. The woman and defendant's partner broke open his desk and got the note. In a trial for forgery, the partner testified to this fact, and the note was offered in evidence. Held, the admission of this evidence was not in violation of Const. 1850, art. VI, § 32, as compelling defendant to be a witness against himself.—People v. Campbell, 160 Mich. 108.

¶ 696. A defendant in a prosecution for larceny is not compelled to give testimony against himself because his shoes are taken by an officer while he is in custody for the purpose of comparing them with certain footprints, and such officer is permitted to testify over objection that the shoes seemed to fit perfectly into the footprints.—People v. Breen, 192 Mich. 39.

§ 154. Official knowledge or state secrets.

¶ 697. It is not error to exclude a question to officers, they having testified that they were forewarned of a burglary and being in wait captured accused, asking them where they obtained their information that the burglary was planned. Such testimony is excluded on grounds of public policy.—People v. Laird, 102 Mich. 135.

¶ 698. A case might arise where a person claiming to have been innocently at the place where the crime was committed, at the solicitation of a person suspected of being the informant, would be entitled to inquire whether such person was the informant, although such matter is usually privileged as a state matter.—People v. Laird, 102 Mich. 135.

§ 155. Evidence obtained or discovered by illegal means or trick.

Document taken from possession of accused as self-crimination, see ante ¶ 695.

¶ 699. An officer found a letter among defendant's effects at his boarding house which tended to connect him with the crime in question. Held, it was admissible in evidence despite any illegal method the officer may have used to secure it.—People v. Trine, 164 Mich. 1.

¶ 700. Testimony of a witness who bought intoxicating liquor of respondent who was suspected and in order to secure his conviction under the liquor law is not incompetent where the prosecuting officers were not concerned in purchase.—People v. Murphy, 93 Mich. 41.

§ 156. Testimony of witnesses not named in indorsements on indictment or information.

Calling witnesses not named in indorsements, see post § 352.

¶ 701. In prosecuting for the forgery of an instrument it may be shown by the person named as taking the acknowledgment that he did not sign the paper; and the same may be shown by the person purporting to be a subscribing witness even though he be not named in the information.—People v. Sharp, 53 Mich. 523.

¶ 702. In a prosecution of manslaughter, the admission of evidence of a witness whose name was not on the information was not improper, when it appeared that such witness was an impeaching witness; and the judge should have permitted the endorsement of the name when requested. Under the circumstances, the reception of the evidence, with knowledge of the facts and against objection, was practically equivalent to an order for indorsement.—People v. McArron, 121 Mich. 1.

¶ 703. The testimony of witnesses whose names were not indorsed on an information may be received to impeach the character of the respondent in a criminal case, where the prosecuting attorney could not have known when the information was filed that such testimony would be material.—People v. Jansma, 181 Mich. 62.

¶ 704. In a criminal proceeding by indictment the testimony of witnesses is admissible though their names are not indorsed on the indictment, where they were not sworn before the grand jury, and fair notice is given of the purpose to use such witnesses.—People v. Hammond, 132 Mich. 422.

¶ 705. Failure of the foreman of the grand jury to indorse on the indictment, the name of a witness does not require the exclusion of his testimony where fair notice is given the other party.—People v. Hammond, 132 Mich. 422.

§ 157. Testimony of witnesses who violated rule for exclusion.

¶ 706. A witness who was a coconspirator in a bribery case in which all witnesses had been put under a rule of exclusion, was permitted to testify against objection, although he had in his possession for the purpose of indexing, some of the typewritten stenographer's notes of the testimony of another conspirator and had talked about such testimony with one of counsel for the people.—People v. McGarry, 136 Mich. 316.

¶ 707. A witness is not disqualified from testifying for the prosecution on rebuttal in a criminal case, by reason of his having remained in the court room after an order excluding witnesses, where it was not known or anticipated when the order was entered that his testimony would be required.—People v. Piper, 112 Mich. 644.

§ 158. Negative testimony.

Sufficiency of negative testimony to prove falsity of fact as pretended, see also post ¶ 1485.

Certificates of search of records and of absence of given record, see post § 293.

Absence of appearances at later time as evidence, see post ¶ 726.

Absence of record of payment of taxes, see also post ¶ 888.

¶ 708. It is competent to prove the nonshipment by a certain person of hogs from a certain town, by inquiring separately concerning all the channels of transportation.—People v. Clark, 10 Mich. 310.

¶ 709. Where a witness who resides in the county in which a power of attorney, that is alleged to have been forged, purports to have been executed and acknowledged, and who has dealt in lands and loans of money, and been in the habit of examining titles for fifteen years, testifies that there were not over twelve or fifteen notaries in the county, it is admissible, as far as it goes, as a basis for the additional evidence, that he had never heard of a notary in the county of the name signed to the certificate of acknowledgment.—People v. Marion, 29 Mich. 31.

¶ 710. Where one who had personally known every clerk of the county and court named in the certificate of authentication of an instrument alleged to have been forged testified that no person of the name signed to the certificate had ever held that office, and gave the names of the persons who had held it, the testimony was admissible to show that the pretended certificate was a forgery.—People v. Marion, 29 Mich. 31.

¶ 711. Where the genuineness of an instrument is contested, the sheriff's testimony that he is unable to find or hear of any such person as purports to have witnessed it is admissible as tending to show that the attestation was fictitious; the extent of the sheriff's search and opportunities affects the weight of his testimony, but not its competency.—People v. Sharp, 53 Mich. 523.

¶ 712. On a trial for larceny committed in a saloon, the saloon-keeper, a witness for the prosecution, being asked whether at the time of the theft respondent had any means of livelihood, answered that he could not swear that he did not have any. The bartender, who was also a witness, was asked what he knew about the respondent's having money the day before the larceny; and he answered: "I could not swear that he did not have any." Held, that the answers could have done no harm; and it seems that the questions were not improper.—People v. Herrick, 59 Mich. 563.

¶ 713. Upon a trial for polygamy, the certificate of the county clerk that he has diligently searched the records and is unable

to find any record of any marriage between certain persons, is inadmissible to discredit positive testimony of the marriage ceremony and that the parties were reputed to be husband and wife.—People v. Goodrode, 132 Mich. 542.

§ 159. Admissibility for limited or specific purpose.

Evidence relevant for one and not for other purposes, see also ante ¶ 671.
Purpose for which evidence of other offenses is admissible, see post §§ 165-171.
Evidence of finding of poison in viscera of other corpse, see post ¶ 787.
Declarations to show why declarant was called as a witness, see post ¶ 1061.
Complaints and statements by woman as impeaching evidence on trial where she denies the act of intercourse, see post ¶ 1120.
[Note. There are numerous holdings that given evidence is admissible for impeachment but not on the issues. In most instances these holdings appear to mean only that the evidence is proper impeaching matter and admissible for that only. Hence they have been placed in Witnesses, VI, D, which see.]
Offer and reception for restricted purposes, see post §§ 346, 347.
Restricting use or application as condition of reception, see post § 347.
Instructions as to proper or permissible use, see post § 449.
Instruction against use for improper purpose, see post § 449.
Charge on using rebuttal testimony for impeachment also, see post ¶ 2142.

¶ 714. Proof of nonpayment and protest of a check, on a prosecution for the forgery of the same, is competent as evidence tending to show that the check was presented, and not paid; but is not evidence of the alleged forgery.—People v. Tollefson, 145 Mich. 444.

¶ 715. Where an information is filed under sections 11785 and 11786, Comp. L. 1897, charging two prior convictions, records of such convictions may be introduced in evidence for the purpose of establishing the same but for no other purpose.—People v. Campbell, 173 Mich. 381.

¶ 716. Upon a prosecution for robbery accompanied by an assault, the admission of evidence that one jointly charged with respondent had blood on his sleeve when arrested, soon after the robbery, is not error, where it is followed by evidence that the parties were seen together shortly before and after the robbery, and the jury are instructed to disregard such evidence unless they are satisfied that both parties were participants in the crime.—People v. Gillespie, 111 Mich. 241.

§ 160. Res inter alios acta.

Other offenses and acts by accused, see post §§ 165-167.
Other relations and acts of parties in sexual crimes, see post §§ 168-170.
Other crimes by accomplices, see post § 171.
Similar but unrelated facts, see post § 161.
Facts and conditions either before or after facts in issue, see post §§ 162-164.
Declarations and acts of accomplices and third persons out of court as evidence against accused, see post § 226 et seq.

¶ 717. In a prosecution for adultery the defendant was asked on cross-examination whether his wife had not made a complaint against the other party for the alleged offense, and he replied that he had heard so. Held, that this answer should not have been received in evidence.—People v. Knapp, 42 Mich. 267.

¶ 718. Where, upon a trial for an assault with intent to murder, there is testimony tending to show that another person, jointly charged with the assault, accompanied respondent to the place of its commission, evidence of the condition of such person shortly thereafter, tending to establish his complicity in the crime, is admissible as against respondent.—People v. Cleveland, 107 Mich. 367.

¶ 719. On trial for nuisance by keeping up a mill-dam it is competent for defendant to show that the former owners of the mill were indicted for keeping up the same dam, tried and acquitted; and that the question litigated on the former trial was whether the dam was a nuisance or not. The acquittal would be evidence that the dam was not a nuisance at that time, though not that it has not since become such.—Crippen v. People, 8 Mich. 117.

¶ 720. In a prosecution for rape the alleged victim should not be permitted to testify that the child claimed to have been the fruit of the intercourse had been taken away from her, unless it is claimed that respondent was in some manner connected with such taking away.—People v. Duncan, 104 Mich. 460.

¶ 721. Respondent was arrested with three others for committing a certain burglary, and demanded a separate trial. The other three were convicted. Held, it was proper in respondent's trial to introduce evidence showing for what purpose the tools found on the other three persons were used.—People v. Freelmame, 163 Mich. 336.

¶ 722. Where a robbery is committed by several persons acting in concert, it is proper on the separate trial of one of them to show that the plunder was found with one of the others, or in the cell where he had been locked up.—People v. Whitson, 43 Mich. 419.

§ 161. Similar but unrelated or disconnected facts.

As part of res gestæ, see post § 241 et seq.

Experiments conducted under supposedly similar conditions, see post § 164.
Similar crimes and offenses or relationships, see also post § 165 et seq.
Evidence of other killings and attempts or assaults to show cause of death, intent, common circumstances, etc., see post § 167.
Evidence of poisons used for other purposes to rebut poisoning, see Homicide ¶ 136.
Other death by same poison as evidence of common plan, see Homicide ¶ 141.
Comparisons to show negligence in manslaughter, see also Homicide § 51.

¶ 723. Testimony of prior like acts of negligence was incompetent in a prosecution for manslaughter as the result of negligence in leaving a boiler unattended.—People v. Thompson, 122 Mich. 411.

¶ 724. On a prosecution for the forgery of a deed evidence that other deeds were made or intended at the time of its apparent execution is foreign to the question of its genuineness and properly excluded. So is evidence of possession under such deeds.—People v. Van Alstine, 57 Mich. 69.

¶ 725. In a prosecution for stealing a dropped pocketbook at a saloon, the exclusion of testimony as to what the complaining witness had done, at another saloon, in dropping his pocketbook and charging theft, was not improper; such inquiries would properly belong to cross-examination of the complaining witness himself.—People v. Long, 44 Mich. 296.

§ 162. Antecedent and subsequent facts and conditions.

See also ante ¶ 719.
As to possession or lack of money or property that might have come from crime and as to source of money possessed, see post § 163.
Testimony based on experiments and comparisons after the fact, see post § 164.
Previous and subsequent sexual relations and acts of intercourse, see post §§ 168-170.
Previous negligence as evidence of negligence of like kind, see ante ¶ 723.
Photograph taken at other time, see also post ¶ 1349.
Reputation at earlier and later times, see also post ¶ 1288.
Belief as to identity entertained at time of testifying, see post ¶ 917.
Reputation of woman for chastity at time after seduction, see post ¶ 1279.
Financial conditions and resources as proper matter on which to cross-examine to rebut or explain direct evidence, see Examination of Witnesses § 48.

¶ 726. In a prosecution for an assault with intent to commit rape in a field of growing wheat, evidence that five or six weeks afterwards, and also after harvest, an examination of the ground was made and no sign of a struggle found, was properly excluded for remoteness.—Ulrich v. People, 39 Mich. 245.

¶ 727. In a prosecution for receiving and concealing stolen goods, it is proper to exclude as immaterial testimony on respondent's part that the officers acted in conjunction with the person who bought the goods from respondent; for the offense charged against respondent was receiving them and was committed before this means of detection was resorted to.—People v. Considine, 105 Mich. 149.

¶ 728. Evidence that an inmate of accused's house was reputed a common prostitute is not so remote as to be incompetent although it relates to reputation three years before, particularly where it covers a period down to the time the offense is charged to have been committed.—People v. Russell, 110 Mich. 46.

¶ 729. In a prosecution for murder, questions as to the clothing worn by the respondent at the coroner's inquest are irrelevant in the absence of evidence that he had not changed his clothing.—People v. Simpson, 48 Mich. 474.

¶ 730. In a prosecution for child murder it is admissible to show that a doctor analyzed the contents of the stomach of the child and found it contained morphine, although he testified that he could not tell when the poison entered the stomach, where it is shown that the body was prepared by an undertaker who did not use morphine, that the grave was undisturbed, that the stomach was sealed as soon as the body was exhumed and that there were no marks upon the body except those made by the undertaker.—People v. Quimby, 134 Mich. 625.

¶ 731. In a prosecution for keeping, in violation of the local option law, a place for the sale of intoxicating liquors, evidence of sales made as far back as three months before the date alleged in the information is admissible as bearing upon the character of the place at the time charged.—People v. Caldwell, 107 Mich. 374.

¶ 732. In connection with the statement of accused that deceased was murdered by a stranger just after deceased had finished filing a saw at a nearby place, it is proper to allow a witness to state that on the following day he examined the saw and that the appearance was that several teeth were newly filed and had not been used.—People v. Wolf, 95 Mich. 625.

§ 163. ——Financial condition and resources of defendant.

Admissibility to prove motive, see also post § 181.
Rebuttal and explanation of money affairs, see post § 182.

¶ 733. On a trial for larceny it is proper to show that defendant had no apparent means of livelihood and that witness did not know of defendant's having had any money the day before.—People v. Herrick, 59 Mich. 563.

¶ 734. Evidence that a respondent charged with robbery had received about the time of the offense moneys from various sources is immaterial where it was not claimed that the stolen money was found in his possession.—People v. Becker, 48 Mich. 43.

§ 164. ——Experiments and comparisons after the fact.

Experiments made after the fact as basis for nonexpert opinion, see post § 202.
Demonstrations and experiments in presence of jury, see post § 281.

¶ 735. Where it is charged that a pocket-book was stolen by being cut from the breast pocket of one's coat, the testimony of the tailor to whom the prosecutor carried the coat to be mended, as to experiments made to see whether such a pocket-book as he described could be taken out of the pocket in that condition, is admissible, especially where it appears that the coat has since been mended and again ripped open.—People v. Morrigan, 29 Mich. 4.

¶ 736. Evidence of experiments of lifting little girls of different weights over a rail fence to show that the testimony of the complaining witness in a prosecution for an assault with intent to commit a rape, to the effect that she was dragged over the fence by the accused, was not true, is inadmissible.—Ulrich v. People, 39 Mich. 245.

¶ 737. On a prosecution for assault with intent to do great bodily harm less than murder, evidence of experiments and observations, made by witnesses two months after an affray, and offered to show that certain witnesses who had testified to seeing the affray from the stoop of a neighboring dwelling-house could not have seen it, is inadmissible unless it is shown that no change had taken place in the surroundings of the location between the time of the affray and the time when the experiments and observations were made.—People v. Deitz, 86 Mich. 419.

¶ 738. Evidence of experiments made with ordinary whisky, and a liquid which respondent's counsel claimed to be of same character as that which they claimed had produced his involuntary intoxication, was properly excluded, in absence of testimony tending to prove identity of liquor drank by respondent with that experimented with.—People v. Slack, 90 Mich. 448.

¶ 739. Evidence of the results of experiments made to ascertain within what time a given pressure of steam could be raised in a boiler by the use of oil as fuel, being competent in a prosecution for criminal negligence in leaving steam boilers fired with oil unattended, whereby the high steam pressure generated caused an explosion resulting in death, it was not subject to the objection that the conditions under which the experiments were made were dissimilar from those which existed under the boiler in question.—People v. Thompson, 122 Mich. 411.

¶ 740. In an arson case it was held improper to permit two active young men, who at the instance of the prosecution, started to walk from a certain point to the place of the fire and back to the respondent's home, to testify as to the time within which they made the trip, for the purpose of convincing the jury that respondent, a man 70 years old and ill, could have made this trip, entered and fired the barn in question and returned home in the same time or a few minutes longer.—People v. Gotshall, 123 Mich. 474.

§ 165. Other offenses or criminal acts by accused.

To show system, plan, knowledge, or intent, see post § 166.
Evidence of other killings, attempts and assaults, see post § 167.
Evidence of other sexual relations and acts, see post §§ 168-170.
Evidence of other crimes by accomplices, see post § 171.
As res gestæ acts, see also post § 241 et seq.
Declarations and res gestæ statements involving other crimes, see post § 241 et seq., and especially post ¶ 1147.
Relevancy of admission of commission of other crimes, see post § 256.
Making of other deeds as bearing on forgery of alleged deed, see also ante ¶ 724.
Evidence of abortion to establish corpus delicti of manslaughter, see Homicide § 47.
Proof of former crimes as irrelevant to killing of officer in making arrest of accused on suspicion, see Homicide ¶ 171.
Cross-examination of accused as to other crimes and offenses, see Examination of Witnesses § 80.
Admissibility of evidence of other crimes to affect credibility of accused as a witness, see Witnesses, VI.
Cross-examination respecting other crimes and prosecutions to affect credibility, see Examination of Witnesses § 65.

¶ 741. As a general rule, in criminal cases, the commission of other, though similar, offenses by the defendant cannot be proved for the purpose of showing that he was more likely to have committed the offense for which he is on trial, or as corroborating the testimony relating to such principal offense.—People v. Jenness, 5 Mich. 305.

¶ 742. Evidence cannot be excluded merely because it proves a distinct offense as well as the one on trial.—People v. Marble, 38 Mich. 117.

¶ 743. On a prosecution for arson, evidence that there was a fire in a city where accused lived more than 32 years previously, and in which the whole city burned up, and questions as to how it started and whether accused was suspected of being the incendiary, are too remote.—People v. Gotschall, 123 Mich. 474.

¶ 744. Where, in a criminal prosecution for an aggravated assault the victim has stated on cross-examination that he has been arrested for being drunk, the question how many times he has been drunk since the assault is properly excluded as having no bearing on the issues involved.—People v. Sutherland, 104 Mich. 468.

¶ 745. Evidence that a person charged with burglary has committed the like offense in the same house before is inadmissible.—Lightfoot v. People, 16 Mich. 507.

¶ 746. In order to account for the whereabouts of accused earlier in the same evening, the state may show that he broke and entered the same house earlier in the night.—People v. Gibson, 58 Mich. 368.

¶ 747. At a trial for keeping a house of ill-fame, resorted to, etc., respondent's statements concerning her husband who was not living in the house, and her arrest many years before on a charge of prostitution, cannot be shown.—People v. Pinkerton, 79 Mich. 110.

¶ 748. In a prosecution for obtaining money by false pretenses based on respondent's borrowing money on a promissory note as security, represented good and collectible, it is error to admit evidence of other transactions where the respondent had borrowed small sums on like securities where there is nothing to show criminal conduct in any of them.—People v. Robertson, 129 Mich. 627.

¶ 749. In a prosecution for uttering a forged note which the prosecution claimed had in fact been signed by the purported makers, but was afterwards altered before being uttered, it was error to admit testimony as to other dealings between the parties leading up to the giving of the note in question, and the default of respondent in respect thereto; as respondent was thereby in effect put on trial for another and distinct offense.—People v. Bennett, 122 Mich. 281.

¶ 750. It is not error, in a prosecution for murder, to receive testimony from which the suspicion might arise that respondent had also been guilty of larceny, if such testimony is relevant to the charge of murder.—People v. Wilson, 55 Mich. 506.

¶ 751. Evidence that defendant, in a prosecution for murder, committed a certain burglary and stole certain revolvers and ammunition the night t
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or intent necessary to establish a particular offense.—People v. Henssler, 48 Mich. 49; People v. Wakely, 62 Mich. 297.

¶ 760. While it is a general rule that, on a trial for a felony, the prosecution will not be permitted to give evidence tending to prove respondent guilty of another distinct and independent felony, still, where a felonious intent is an essential ingredient of the crime charged, and the act done is claimed to have been innocently or accidentally done, or by mistake, or the result is claimed to have followed an act lawfully done for a legitimate purpose, or there is room for such an inference, it is proper to characterize the act by proof of other like acts producing the same result, as tending to show guilty knowledge, and the intent or purpose with which the particular act was done, and to rebut the presumption that might otherwise obtain.—People v. Seaman, 107 Mich. 348.

¶ 761. A distinct and remote crime of the same general nature as that for which accused is on trial, but in no way related to it, is not admissible to show intent, where the crime charged was wrong in itself, and the circumstances were not such as to support an inference of accident, mistake or inadvertence.—People v. Burke, 157 Mich. 108.

¶ 762. Evidence of a distinct offense committed by the accused in going home from the commission of the offense in issue is admissible as showing the intent of the first; and, it being all one transaction, the action and whereabouts of the accused during the whole trip are relevant.—People v. O'Brien, 60 Mich. 8.

¶ 763. The admission of the testimony of a witness in a case of manslaughter by abortion, that she had applied to the respondent to have an abortion produced on her, and that some acts were done towards accomplishing that purpose, violates the rule that where intent or guilty knowledge is a necessary conclusion from the act done, the possibility of accident being absent, proof of other offenses of a similar character is inadmissible, and constitutes reversible error.—People v. Lonsdale, 122 Mich. 388.

¶ 764. In a criminal prosecution of a person, under section 11581, Comp. L. 1897, for mutilating a horse by cutting off its tongue, testimony that respondent had mutilated other horses on previous occasions in the same way is incompetent, since such acts, even if proved, are wholly unnecessary to show a malicious intent.—People v. Minney, 155 Mich. 534.

¶ 765. In a prosecution for bribery in paying a village clerk money to induce him to issue fraudulent sparrow bounty certificates, testimony tending to show a conspiracy, and also to show prior similar transactions is admissible as tending to show the purpose of the payment upon which the prosecution was based.—People v. Gorsline, 132 Mich. 549.

¶ 766. In prosecuting for a particular burglary the people can show facts apparently connected with the act of breaking into other houses at the same time, if they tend to show that the several burglaries were parts of one scheme and that the person concerned in the others was therefore guilty of the offense for which the prosecution was instituted; the tendency of the evidence is a question for the jury.—People v. Mead, 50 Mich. 228.

¶ 767. An interval between two successive entrances of the same house on the same night by the same burglar does not prevent proof of what took place at the second visit in a prosecution for the crime; the two breakings constitute one continuous burglary, even though it began to be light before the burglar left the house the second time. But even if the second entrance were a separate transaction the fact could be shown by way of accounting for the whereabouts of respondent during the night.—People v. Gibson, 58 Mich. 368.

¶ 768. In a prosecution for breaking and entering a saloon with intent to commit larceny it is error to admit evidence of former convictions for larceny two or three years before for the purpose of showing intent without showing some connection between the offenses.—People v. Henry, 129 Mich. 100.

¶ 769. On a prosecution for entering a barn in the nighttime and stealing articles therefrom, testimony of other larcenies is admissible as bearing upon the question of intent.—People v. Nagle, 137 Mich. 88.

¶ 770. In a prosecution for embezzlement, evidence of previous acts of like character is admissible to prove intent.—People v. Hawkins, 106 Mich. 479.

¶ 771. In a prosecution of a deputy township treasurer for embezzling township funds, it is proper to show his dealings with village money as village treasurer, and that by reason of his default as village treasurer he found it necessary to replenish the account which he did with township funds.—People v. Sanders, 139 Mich. 442.

¶ 772. In a prosecution for obtaining an indorsement on the false pretense that the proceeds of the paper were to be paid to a specified person it was held allowable to show that respondent had previously obtained from the indorser sums which he claimed were to be paid, and afterwards said had been paid, to the same person, when in fact they had not been. Such evidence tends to show a systematic scheme for obtaining money on false pretenses.—People v. Henssler, 48 Mich. 49.

¶ 773. It is competent, upon a prosecution for obtaining a promissory note by the false

pretense that it was a contract binding the makers to pay only upon the sale of certain machines for which they were to be given the exclusive agency in certain territory, to show, as illustrating the purpose or intent, that respondents, at about the same time, were engaged in like transactions with other parties, and had already sold to others the right which they represented they were conveying to the makers of the note.—People v. Summers, 115 Mich. 537.

¶ 774. The falsity of a pretense and the fraudulent design may be inferred from proof of numerous other like falsities done by accused and resulting in profit to him; and the fact that there is no proof that in them there was any guilty knowledge of the falsity does not make them inadmissible for this purpose on the supposition that they might have been false by mistake or deception, where that appears to be improbable.—People v. Hoffmann, 142 Mich. 531.

¶ 775. In order to show the falsity of other claims evincive of a system of defrauding the state, on an information for false pretenses it is proper to receive testimony that the services listed in those claims were not rendered and that fees and mileage of witnesses therein included were not paid by claimant and that such witnesses were not sworn.—People v. Hoffmann, 142 Mich. 531.

¶ 776. On the question whether accused had a fraudulent design to cheat the state in presenting a claim for coroner's fees for an inquest on a body stated in his claim to have been that of a "stranger" not belonging to this state, it is proper to admit other like claims with the like representation and containing other falsities, which he had equal opportunity and duty to know were false.—People v. Hoffmann, 142 Mich. 531.

¶ 777. Where, on the trial of a coroner indicted for obtaining fees for inquests from the state by false pretenses, there was evidence of other systematic false claims of like kind for fees, it was proper to receive testimony of a physician, reported as having been paid for making a post-mortem examination at one of those inquests, that he received no pay for it.—People v. Hoffmann, 142 Mich. 531.

¶ 778. On trial of one who posed as a medium, where it was claimed that accused duped his victim into procuring and wearing gold about his person, evidence of similar false pretenses with others is admissible.—People v. Ascher, 126 Mich. 637.

¶ 779. In a prosecution for uttering and publishing a forged order with intent to defraud, knowing it to be forged, evidence of the scheme and of frauds committed in pursuance of it is admissible to show the scienter, under proper instructions against permitting such evidence to prejudice the jury in other re
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¶ 786. Whether, on trial of an information for an intent to kill by poisoning, it be competent to prove a recent attempt to poison, or who prepared food a few days prior to the attempt laid in the information, by which the same person was made ill, for the purpose of showing the criminal intent charged, quære.—People v. Doyle, 21 Mich. 221.

¶ 787. In a prosecution for murder alleged to have been committed by the administration of arsenic, the admission of evidence to show that there was found in the stomach of another who lived with the accused a small amount of arsenic and that he had died a few months previous to the person alleged to have been murdered is prejudicial error, where it was expressly disclaimed by the prosecution that there was a common plan or scheme embracing the killing of both and that no common motive was shown, and the jury had been instructed that the only purpose for which the evidence could be received was to show the presence of arsenic in the house and that it must be disregarded for every other purpose.—People v. Collins, 144 Mich. 121.

¶ 788. Testimony as to the effect of an explosion of certain boilers being competent in a prosecution for criminal negligence resulting in the explosion of such boilers, it was not error in describing the effect, to show that persons other than the one named in the indictment were killed or injured by the explosion.—People v. Thompson, 122 Mich. 411.

¶ 789. Although testimony as to the effect of an explosion of certain boilers was competent in a prosecution for criminal negligence resulting in the explosion of such boilers, it was error, in describing the effect, to show that persons other than the one named in the indictment who had been killed, were taken to hospitals and were detained there.—People v. Thompson, 122 Mich. 411.

¶ 790. Upon a trial for murder by shooting, testimony to show that respondent had drawn a revolver on other persons prior to the shooting, is admissible though it tends to show a statutory offense, since it would tend to lessen the credit to be given to his testimony that he shot because he believed his life to be in danger.—People v. Farrell, 137 Mich. 127.

¶ 791. Upon a charge of assault with intent to murder his wife, evidence that defendant went previously to the house of her parents, where she was staying, and assaulted them, is admissible when the evidence shows that the accused went there with the intent to kill his wife.—People v. Owen, 154 Mich. 571.

¶ 792. In a prosecution for assault with intent to kill and murder where the defense is temporary insanity as a result of using intoxicating liquors, evidence as to the conduct of the respondent from the time he purchased the revolver, up to the time of shooting (one hour), and the fact that he shot the officer who attempted to arrest him, and tried to shoot another but missed him are admissible, and do not amount to proving the charge by evidence of other distinct and subsequent offenses, but of proving the purpose and intent of respondent by his conduct before and after the time of the alleged offense.—People v. Haxer, 144 Mich. 575.

¶ 793. One who is on trial for manslaughter in committing an abortion may, where the proof of guilt is circumstantial, and where he claims the premature birth is due to accident, be shown to have performed other abortions in the same house, as bearing on his guilty knowledge and intent.—People v. Seaman, 107 Mich. 348.

¶ 794. In a prosecution for manslaughter in attempting abortion it is proper to show by a witness that accused, a physician, performed an operation on her for the avowed purpose of producing an abortion, his defense being that the operation charged was done as a necessity to save life.—People v. Hodge, 141 Mich. 312.

§ 168. Other relations and acts of parties in sexual crimes.

See also ante ¶ 674.
Relations of accused with other than subject of crime or accomplice therein, see post § 169.
Relations of subject of crime with others than accused, see post § 170.
Other unnatural or indecent carnal offenses, see also ante ¶ 754.
Other acts of intercourse between same parties in prosecutions for common law or statutory rape, see Rape.
Other acts between the parties in prosecutions for seduction, see Seduction, II.
Admissibility of declarations and complaints by victim of alleged rape or indecent assault, see post §§ 233, 244.
Previous attempt to institute prosecution as rebuttal of claim that prosecution was extortionate in object, see post ¶ 874a.
Comments of third persons on behavior as hearsay, see post ¶ 1052.

¶ 795. Proof of acts of criminal intercourse has no tendency to prove previous acts; it tends, however, to show the probability of subsequent acts.—People v. Clark, 33 Mich. 112.

¶ 796. In a prosecution for enticing a female away for purposes of prostitution, evidence of previous illicit relations and of the subsequent conduct of the parties is admissible as bearing upon defendant's intent in enticing her away.—People v. Carrier, 46 Mich. 442.

¶ 797. When adultery is charged, the acquaintance, conduct and familiarity of the

parties are material subjects of inquiry, and pertinent to the issue, if not too remote.—People v. Girdler, 65 Mich. 68.

¶ 798. A prosecution for adultery must be instituted within a year after the offense; and evidence of acts which at most would raise only a suspicion of improper relations should not be admitted if they occurred more than a year before the commission of the alleged offense, unless they were shown to belong to a continuous series of improprieties.—People v. Davis, 52 Mich. 569.

¶ 799. In a prosecution for adultery, acts of familiarity committed two years before are too remote to be put in evidence. But acts within a short time before and very soon after the act complained of, if establishing a continuous intimacy, may be shown.—People v. Hendrickson, 53 Mich. 525.

¶ 800. In a prosecution for adultery with another's wife the people may show acts of intimacy between the parties that are prior to the time of the alleged offense, but not such as are subsequent.—People v. Fowler, 104 Mich. 449.

¶ 801. In a prosecution for adultery it is proper for the people to show acts of intimacy prior to the date charged, but testimony as to subsequent acts is incompetent.—People v. Davis, 175 Mich. 594.

¶ 802. In case of incest, a crime consisting of illicit sexual intercourse, which can only be committed by the concurrent acts of two persons of opposite sexes, evidence of previous familiarities and acts of intercourse is admissible, as tending to show concert, and a common design of both parties to commit the act charged, and habitually to indulge the criminal desire as opportunity might offer.—People v. Jenness, 5 Mich. 305.

¶ 803. Evidence of prior acts of sexual intercourse between a father and his daughter is admissible on his trial for the crime of incest committed at a later date.—People v. Cease, 80 Mich. 576.

¶ 804. In a prosecution for incest by accused with his daughter, an act of familiarity of a character evincive of a purpose of sexual intercourse, and acts of sexual intercourse at various times for period of eight years prior to commission of alleged offense may be shown.—People v. Skutt, 96 Mich. 449.

§ 169. ——Sexual relations of accused with others than subject of crime.

Weight of evidence of former relations between woman and man accused of abduction, see also post ¶ 1437.

¶¶ 805, 806. Evidence in a prosecution for statutory rape that defendant had had intercourse with a sister of complaining witness at a time when she was under the age of statutory consent is inadmissible, as such testimony, if true, would tend to prove defendant guilty of a distinct crime with which he was not charged in the information.—People v. Coston, 187 Mich. 538.

¶ 807. A witness, sister of prosecuting witness in a prosecution for statutory rape upon a child under the age of consent, who has testified to witnessing previous acts of sexual intercourse between defendant and her sister, should not be permitted to testify of her own similar delinquencies as reasons as to why she had not told her parents of the acts committed.—People v. Coston, 187 Mich. 538.

¶ 808. In a prosecution for statutory rape, a question asked of the defendant whether he had been responsible for the birth of a child by a woman employed in his office a number of years prior to the offense charged, held inadmissible to show that defendant had been guilty of similar offenses but admissible, in the discretion of the court, as affecting his credibility.—People v. La Londe, 197 Mich. 76.

§ 170. ——Sexual relations of subject with others than accused.

Other rape by accomplice on same girl, see post ¶ 813.

¶ 809. In a prosecution for rape upon a girl less than fourteen years old, testimony of intercourse by her with other men prior to the commission of the alleged offense is inadmissible, her character not being in issue, and such testimony not being competent as bearing upon her credibility as a witness.—People v. Abbott, 97 Mich. 484.

¶ 810. In a prosecution for having carnal knowledge of a girl less than fourteen years old, it is not error to refuse to permit respondent to show by the complaining witness that respondent had had sexual intercourse with her on an occasion previous to that fixed as the one upon which the offense was committed.—People v. Harris, 103 Mich. 473.

¶ 811. Where the prosecution in a trial for raping a girl under the age of consent has sought to show that she thereby contracted a venereal disease, respondent cannot show specific acts of lewdness with small boys nine months before, such evidence not tending to disprove that she contracted the disease as stated.—People v. Glover, 71 Mich. 303.

§ 171. Other crimes by accomplices.

Admissibility of declarations and admissive acts by accomplices, see post § 226 et seq.

¶ 812. It is error to admit testimony that an accomplice not called as a witness was once before arrested.—People v. O'Hare, 124 Mich. 515.

¶ 813. In a prosecution for aiding and abetting a rape on one particular occasion, evidence of a prior rape on the prosecuting witness by the same person in the respondent's house, and of the surrounding circumstances, and of what the respondent said when complaint was made to her, is admissible to show knowledge that the crime had been committed, to show her intent in doing acts relied on to prove the aiding and abetting, and to show probability that such acts of aiding and abetting were done.—People v. Neely, 171 Mich. 249.

¶ 814. In a prosecution for larceny on cross-examination of a witness for one of the respondents it is improper to show the conduct of a co-respondent relating to other goods alleged to have been stolen on other occasions.—People v. Huff, 173 Mich. 620.

§ 172. Incriminating facts and appearances.

Footprints, blood stains, and the like, see post § 173.
Possession of stolen goods, burglars' tools, or means of crime, see post § 174.
Sufficiency and weight of circumstances, see post § 305.
Associations and conduct with accomplices, see post § 224.

¶ 815. Testimony of witnesses in an arson case that they met a man of about the height and size of the respondent, of which height and size there were hundreds of others in the community, and whom neither of the witnesses placed within a mile of the fire, is incompetent as evidence that respondent was seen going towards the place in question before the fire and returning from it after.—People v. Gotshall, 123 Mich. 474.

§ 173. ——Footprints, blood stains, and the like.

Explanation of blood stains, see post ¶ 881.
Fitting shoes to footprints as self-crimination, see ante ¶ 696.
Evidence as to protection of footprints against obliteration, see ante ¶ 680.
Footprints seen by jury on view, see also ante ¶ 690.
Admissibility of testimony as to blood stains and tracks, see also Homicide § 46.

¶ 816. Testimony that a shoe offered in evidence, fitted the respondent in a robbery case, was competent where it appeared that articles stolen from the premises in question were found in the house where respondent lived with his father; that a billy made out of the butt end of a whip belonging to respondent was found near the place of the robbery and that until a few days after the robbery respondent wore pointed shoes, and that prior to the trial a pointed shoe was found concealed in the hay in a barn used by respondent and his father, and where tracks made by this shoe corresponded in measurements to pointed tracks found near the place of the robbery, and where the shoe was without objection tried on by the defendant.—People v. Keep, 123 Mich. 231.

§ 174. ——Possession of fruits of crime or of means for commission.

As to possession of weapons before crime, see also ante ¶ 675.
Evidence as to fitness of implements for felonious use, see also ante ¶¶ 681, 682.
Possession of articles not covered by indictment but stolen at same time, see also post ¶ 1148.
Evidence of theft of means to commit offense, see ante ¶ 751.
Evidence as to possession of stolen property by another, see also ante ¶ 722.
Possession by accomplices, see also post § 230.
Evidence as to purposes and uses of tools found on persons arrested for same burglary, see also ante ¶ 721.
Inference from incriminating possessions, see ante § 141.
Things themselves as evidence, see post § 278.
Acts accompanying possession as res gestæ, see post § 241 et seq.
Admissibility of evidence that one accused of killing had pistol or other means, see also Homicide § 46.

¶ 817. Possession of a satchel containing stolen property was held to have no tendency in itself to show one guilty of burglary.—People v. Gordon, 40 Mich. 716.

¶ 818. Possession of stolen goods may be shown, in connection with other evidence, upon a prosecution for burglary.—People v. Carroll, 54 Mich. 334.

¶ 819. In a prosecution for breaking and entering a store in the nighttime, evidence that the defendant some time after the crime had goods in his possession of the kind kept in the store, is not admissible in the absence of proof that the goods belonged to complaining storekeeper. (Moore and Hooker, JJ., dissenting.)—People v. Trine, 164 Mich. 1.

¶ 820. Testimony of the finding of burglar's tools, some time after an alleged burglary, on a farm is admissible where it is shown that defendant occupied the farm where the tools were found and that he was the only one living thereon and that he had worked the farm for two years up to the time of the burglary, though he spent part of this time at another place where his wife lived.—People v. Gregory, 130 Mich. 522.

¶ 821. On the trial of an indictment for rendering a counterfeit bill current as true, knowing the same to be counterfeit, evidence of the possession by defendant of counterfeit bills on other banks is inadmissible.—People v. Stewart, 5 Mich. 243.

¶ 822. The unexplained possession of goods recently stolen may be evidence of the larceny of the goods.—People v. Hogan, 123 Mich. 233.

¶ 823. Evidence, on a prosecution for larceny, of the finding in defendant's trunk, in which the specific property named in the indictment was secreted, of other property also stolen from the complaining witness, held competent as one of the circumstances of the finding of the property named and also as tending to identify the defendant with the transaction, and, in any event, not prejudicial in view of the court's charge to the jury.—People v. May, 199 Mich. 574.

¶ 824. In a prosecution for murder, testimony of a detective in another city concerning the arrest of the respondent for another crime and the finding of a 32 caliber revolver upon his person, is admissible in evidence where other evidence shows that the deceased was killed by a 32 caliber bullet.—People v. Higgins, 127 Mich. 291.

¶ 825. Testimony that a "billy" was found upon respondent's person at the time he was arrested is admissible in a prosecution for larceny.—People v. Machen, 101 Mich. 400.

§ 175. Evidence to prove particular facts and issue; corpus delicti or causes.

Evidence to prove particular crimes, see generally this division (VIII), ante §§ 146-174, post § 176 et seq. It is impossible to arrange cases on relevancy and competency of evidence according to the crimes involved, since to do so would entirely ignore the rules of evidence applied. It would likewise be impossible to make detailed and particular cross-references because they would be confusingly numerous. To ascertain what must be proved to establish a given crime, see Crimes, II, which treats of the elements of the several crimes, and see also the statutes defining the various crimes.

To prove marriage, relationship, identity, sanity, alibi or whereabouts, knowledge, intent, or motive, see post §§ 176-181.

[Note. Objections to evidence go to the competency of it or to some general principle of relevancy, as a rule, rather than to anything which identifies the ruling with a particular crime or issue. It is therefore obligatory to classify the paragraphs according to the principle on which the ruling turned. The section lines, ante and post, are designed to suggest such principle. Only those rulings which clearly turn on the relevancy of evidence to particular facts can be properly classified according to the facts or topics to be proved. The contention made must always control the classification.]

Other killings and attempts as evidence of cause, see ante § 167.

Nonexpert opinion as to ailment resulting in death, see post ¶ 929.

Medical opinions as to cause of death or bodily condition, see post § 206.

Reputation to prove status or character, see post § 274.

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try, to prove a valid marriage, is admissible to show that a ceremony was in fact performed, which, if followed by cohabitation, would establish the marital relation.—People v. Imes, 110 Mich. 250.

¶ 832. Evidence that respondent accused of adultery admitted having cohabited with complainant for some time after the ceremony is admissible on trial to prove marriage.—People v. Imes, 110 Mich. 250.

§ 177. ——Identity and qualities of things.

Other articles as evidence of identity, see post § 277.
Sufficiency of proofs of identity, see post § 319.

¶ 833. Where stolen property consisted of wool in fleeces, it was competent to prove, for purposes of comparison, the weight and quality of wool shown to a witness by defendant after the theft, and claimed by defendant to have been taken from his own sheep, such wool having been stored in defendant's house where the stolen wool was proved to have been carried and commingled with defendant's own wool.—People v. Pitcher, 15 Mich. 397.

¶ 834. In order to identify articles found in respondent's possession with those said to have been stolen from the store named in the information, testimony that the marks on tabs attached to them and on those previously in the store were alike was held admissible. —Cole v. People, 37 Mich. 544.

¶ 835. It is competent for a miller employed in a flouring mill from which sacks of flour have been stolen to testify that the flour found in respondent's possession is the same as that manufactured in the mill.—People v. Wood, 99 Mich. 620.

§ 178. ——Identity of accused or other persons.

Declarations of recognition at later time as evidence of identification, see also post ¶¶ 1086, 1090.
To identify accused as person near scene of arson, see also ante ¶ 815.
Res gestæ statements, see also post ¶ 1143.
Proof by private writings and books, see also post ¶ 1342.
Sufficiency of proof of identity, see post § 319.

¶ 836. Where it is sought to prove the presence of a person at a certain time or place by witnesses who testify that they saw him there, the vital question is whether the witnesses did see and identify such person at such time and place, and not whether they remembered seeing such person on a particular occasion.—People v. Lahnala, 193 Mich. 144.

¶ 837. In a prosecution for keeping a saloon open on Sunday, testimony that respondent kept the saloon in question and that the witness knew him tends to identify the respondent as the proprietor of the saloon.—People v. Blake, 52 Mich. 566.

¶ 838. In a prosecution for the larceny of an automobile, testimony of a witness, having a good opportunity of judging of the identity of the accused, that the man who placed the automobile in the rear of her house resembled the accused is admissible to establish the identity, although she could not say positively that the man was the respondent.—People v. Hammond, 177 Mich. 416.

¶ 839. In identifying the proprietor of a saloon it was held proper to ask a witness as to the contents of a license card which he testified he had seen in the saloon.—People v. Baumann, 52 Mich. 584.

§ 179. ——Sanity or insanity.

See also post ¶ 1279.
Acts and declarations indicative of sanity, see also post ¶ 1018.
Nonexpert conclusions and opinions, see post § 198.
Expert opinions, see post § 203.
Other attack as evidence of sanity and knowledge, see also ante ¶ 792.
Hearing of statements of others as arousing to insanity, see also post § 227.
Evidence in civil cases, see Insane Persons, I; and see also Wills, II.

¶ 840. Where insanity is made a defense it is competent to show a tendency to hereditary insanity on the part of the prisoner; also that a brother or sister has been insane. —People v. Garbutt, 17 Mich. 9.

§ 180. ——Alibi or whereabouts of person.

Identification of person at given time and place, see also ante § 178.
Evidence of commission of other crime to account for whereabouts, see also ante ¶ 746.
Rebuttal and explanation, see post § 182.

¶ 841. It is error in a criminal case to exclude testimony that will tend directly to weaken or strengthen the case made by the evidence on either side; as, e. g., testimony tending to establish an alibi and discredit state's evidence.—People v. Hare, 57 Mich. 505.

¶ 842. Where the defense to a charge of cattle-stealing was an alibi, circumstances stated by witnesses referring to occasions after the cattle were stolen and before they were sold were properly allowed to go to the jury under suitable instructions.—People v. La Munion, 64 Mich. 709.

¶ 843. Where respondent is charged with stealing cattle and seeks to show an alibi, the jury may be allowed to consider the testimony of witnesses who saw him in possession of the cattle, in connection with all other circumstances in relation to the question as

to the time of their interview, the jury being charged that the facts must be found beyond a reasonable doubt.—People v. La Munion, 64 Mich. 709.

¶ 844. While it is unnecessary to charge in the information in a prosecution for statutory rape the exact date upon which the offense was alleged to have been committed, still where the exact date of the offense is fixed by the testimony, the defendant may show that at the time he was not present and could not have committed the offense alleged.—People v. Coston, 187 Mich. 538.

¶ 845. It is not relevant to a defense of alibi how the officers, forewarned of the criminal project, gained their information or from what source.—People v. Laird, 102 Mich. 135.

¶ 846. In showing an alibi counsel for accused may ask him about conversations with persons at times and places to which attention of an accomplice has been directed when questioned as a witness for the state, where the tendency of the evidence is inconsistent with guilt.—People v. Hare, 57 Mich. 505.

§ 181. ——Knowledge, intent and motive, or fraud.

See also post ¶¶ 1150, 1153.

Other crimes and offenses evincive of intent, knowledge, plan, or system, see ante § 166.

Other acts as evincive of intent in sexual crimes, see ante §§ 168-170.

Declarations and acts evincive of mental state, knowledge, intent, etc., see post § 218 et seq.

Declarative writings evincive of motive, see also post ¶ 1028.

Declarations of others heard by accused, see also post §§ 227, 228.

Conclusion evidence as to state of another's mind, see post § 198.

Conclusion evidence as to one's own thoughts and intents, see post § 199.

Evidence to show knowledge and intent of abortionist, see Homicide ¶ 158.

Ill feeling between parties as evidence of malice in murder, see Homicide § 49.

Inadmissibility of evidence of wife's bad associations in prosecution of husband for murder, see Homicide ¶ 146.

¶ 847. When guilty knowledge is an ingredient of the offense there need not usually be direct proof of actual, positive knowledge, but the jury may infer it from suspicious circumstances, such as apparently intentional neglect to make inquiry before engaging in a doubtful transaction.—Bonker v. People, 37 Mich. 4.

¶ 848. On the question what sources of information were available as to the fact of a person's late residence, city directories commonly in use and in possession of accused may be received.—People v. Hoffmann, 142 Mich. 531.

¶ 849. One conspirator is chargeable with the acts of another upon the principle that governs the case of agency, but that does not make him responsible for the antecedent knowledge of the other and impute it to him as guilty knowledge.—People v. Lay, 193 Mich. 476.

¶ 850. Where an offense is proved by circumstantial evidence, guilty knowledge may also be proved in the same way.. Where the wife and sister of the owner are shown to have burned his property, and there is no reason to believe that it was done to injure him, and the only probable motive was to defraud insurers, it is open to the jury to infer a knowledge of the insurance by the women, if they find no other reasonable way of accounting for their action.—Meister v. People, 31 Mich. 99.

¶ 851. It is not improper on an indictment for fraudulently burning a barn, without any allegation as to burning its contents, to show what was in it. The whole transaction should be open to the jury, and the fullness or emptiness of the barn might bear upon the motive to destroy it.—Hamilton v. People, 29 Mich. 173.

¶ 852. On indictment for fraudulently burning a barn evidence of a pending chancery suit concerning the title should not have been introduced to show a motive to defraud, when the time for taking proofs had expired some time before the fire, and the answer denied the equity of the bill. A fortiori, evidence of a suit brought subsequent to the fire was improper.—Hamilton v. People, 29 Mich. 173.

¶ 853. In a prosecution for burning a building with intent to defraud an insurance company, proof of loss sworn to by the defendant describing the house and barn and their contents was properly admitted for the purpose of showing the articles which were burned, having a bearing upon the defendant's motives.—People v. Mix, 149 Mich. 260.

¶ 854. In a prosecution for burning a building with intent to defraud an insurance company, where the proof of loss sworn to by the defendant was admitted to show the articles burned and their value, the defendant is entitled to show that the fire destoyed other property not included in the proof of loss, all such evidence having a bearing upon the defendant's motives.—People v. Mix, 149 Mich. 260.

¶ 855. Bad feeling between the parties does not bear on the question of burglary, especially where there are no recent threats or demonstrations tending that way.—People v. Bielfus, 59 Mich. 576.

¶ 856. In a prosecution of an officer of a corporation for embezzlement of funds of the corporation by taking an excessive salary,

evidence that the increased salaries were never entered as such upon the books of the company, that the treasurer drew money with which they were paid from local banks on checks drawn to cash, and that the money so drawn and used by him was charged to a fictitious account and appeared upon the books as an account receivable is admissible as showing an intention of officers of the corporation to conspire to take money of the corporation illegally where there is other evidence of the defendant's bad faith.—People v. Lay, 193 Mich. 476.

¶ 857. Defendant was put on trial for false pretenses in procuring the indorsement of the prosecutor to a promissory note by the falsehood that a former note for the same amount, indorsed in like manner, was destroyed. Held, that evidence offered by the defendant that he was a partner of the prosecutor, that the latter was bound by agreement to indorse for him to an amount considerably larger than the two notes, but had refused to perform the agreement, and that the money obtained on the notes was used in their business for their joint benefit, was admissible, as tending to disprove the presumption of intent to defraud.—People v. Getchell, 6 Mich. 496.

¶ 858. In a prosecution for obtaining money by false pretenses the prosecution is not restricted to the exact transaction as it took place between the prosecutor and the accused, but can give evidence showing the steps preliminary thereto when tending to show the intent.—People v. Winslow, 39 Mich. 505.

¶ 859. In a prosecution for false pretenses the evidence for the people is not restricted to the exact transaction but may include the steps preliminary thereto when they tend to show the intent.—People v. Shelters, 99 Mich. 333.

¶ 860. On the question whether to the best of his information and belief accused certified that the bodies on which he had held inquests were not of persons belonging to the state, thereby receiving pay from the state for his fees and expenses, it was proper to introduce city directories in his library showing that they were listed as residents of his city; such directories are not proof that they were or were not strangers, but only of available information.—People v. Hoffmann, 142 Mich. 531.

¶ 861. On the question of guilty knowledge of the falsity of a statement that the person on whose body the accused as coroner held an inquest was a "stranger," and where other claims for fees for like inquests were introduced likewise false to show system and knowledge, the testimony of witnesses that the subjects of these other inquests had been residents of the city is admissible to show that available information of the facts existed.—People v. Hoffmann, 142 Mich. 531.

¶ 862. On a prosecution for obtaining money from the state by a false pretense that an inquest held was on the body of a nonresident, it was proper even if unnecessary to allow the state auditor to testify that in allowing the claim he relied on the false statement.—People v. Hoffmann, 142 Mich. 531.

¶ 863. Where defendant, charged with falsely representing that certain property was owned by him, had conveyed a half interest in such property to his father as security, and the father had subsequently joined with defendant in conveying the premises to a third person as security, the question of the interest of the father is immaterial in determining the truth or falsity of the representation.—People v. Andre, 153 Mich. 531.

¶ 864. The principal criminal element in forgery lies in the fraudulent purpose, and evidence of such of the circumstances as bear on the question of fraud is pertinent; the proofs of fraud must be substantially the same in criminal and civil cases.—People v. Marion, 29 Mich. 31.

¶ 865. A woman gave six hundred dollars to defendant to loan for her. Defendant forged a name to a note for that amount, kept the money, and paid her interest. In a trial for forgery, held, evidence that defendant never returned the money was admissible as bearing on the question of intent.—People v. Campbell, 160 Mich. 108.

¶ 866. Evidence tending to show criminal intimacy between the prisoner and the wife of the man whom he is charged with attempting to poison, and to show also that he sought to use her as an instrument in the attempt, is pertinent as bearing on the means and opportunity to commit the offense, and on the question of motive.—Templeton v. People, 27 Mich. 501.

¶ 867. On a prosecution of a physician for having prescribed intoxicating liquor while having good reason to believe that the patient intended to use it as a beverage, as indicative of the mental attitude of the accused, it is competent to prove the frequency of the applications made by one person and also the ease with which another by telephone procures a prescription of liquor.—People v. Humphrey, 194 Mich. 10.

¶ 868. Advice of counsel on the validity of a claim of a chattel as exempt is admissible in a prosecution for larceny to negative felonious intent in retaking property under claim of right from a person holding under an execution on it.—People v. Schultz, 71 Mich. 315.

¶ 869. One cannot rely upon counsel's advice to show that he has acted in good faith and had no larcenous intent unless he also

shows that he has followed the advice by taking in the manner advised.—People v. Long, 50 Mich. 249.

¶ 870. Where a justice joined in marriage a girl who professed to be of the age of consent although she was apparently not, it was held competent to show that his family and her father's were neighbors and acquaintances, and that at the marriage he did not inquire for her parents, who were not present; these facts tend to show that he knew the marriage was unlawful.—Bonker v. People, 37 Mich. 4.

¶ 871. On a trial for the alleged wrongful removal from the office of the county clerk of an enrolled decree and the accompanying papers, there was no direct proof of such removal, but the case rested upon the facts that the papers were missing, and that respondent had an opportunity and a motive for taking them. The prosecution was allowed to show that in another criminal case, pending at the time the papers were alleged to have been taken, they were used as evidence against the respondent. Held, that the testimony was competent, as tending to show a motive on respondent's part for the removal.—People v. Bussey, 82 Mich. 49.

¶ 872. Where a respondent charged with wilfully carrying away papers from a public office presents himself as a witness in his own behalf, it is proper, as bearing upon the motive for the offense, to cross-examine him as to the alleged forgeries, evidence whereof is contained in the missing papers.—People v. Bussey, 82 Mich. 49.

¶ 873. In a prosecution for maliciously threatening to accuse another of the crime or perjury, testimony that such other person was in fact guilty of perjury is not admissible as bearing upon respondent's intent, or to disprove malice upon his part, or to impeach some other person.—People v. Whittemore, 102 Mich. 519.

§ 182. Rebutting and explaining facts.

See also ante ¶ 811.

Rebuttal and explanation of declarations made out of court, see post § 240.

Rebuttal and explanation of admissions, see post § 264.

Other abortions to rebut theory of miscarriage by accident or operation as necessity to save life, see ante ¶¶ 793, 794.

Explaining failure to testify of witness' own sexual delinquencies, see also ante ¶ 807.

Proper matters to be brought out in defendant's proofs, see post § 356.

Scope and subjects of rebuttal proofs, see post § 357.

Time for rebuttal and order of proofs, see post § 358 et seq.

Propriety of comment in argument on rebutting or explanatory evidences, see post § 386, ¶¶ 1772, 1778.

in another state. Held, that this testimony was admissible.—People v. De France, 104 Mich. 563.

¶ 877. In a prosecution for the unlawful sale of fermented cider, where defendant claimed that the cider was sweet and unfermented when sold, and that if it contained alcohol it was added by others after the sale, it was reversible error to exclude testimony tending to show that the parties to whom the sale was made had whisky in their possession and had opportunity to add it to the cider.—People v. Emmons, 178 Mich. 126.

¶ 878. On a showing that a certain kind of cutter was seen near the place of the larceny charged, and an offer by the defendant of evidence tending to show that he did not own such a cutter, it is within the discretion of the court to allow the prosecution to show, on rebuttal, that defendant did have and use a cutter like the one seen near that place.—People v. Maunausau, 60 Mich. 15.

¶ 879. A theft was committed by night. The thief was arrested on the spot, and another man suspected of planning the theft was arrested immediately afterward in the near neighborhood. Held, that upon the latter's trial he could introduce rebutting evidence that he was in the habit of frequenting that neighborhood day and night.—Saunders v. People, 38 Mich. 218.

¶ 880. Where a sheriff, a witness on a trial for larceny of a cow, was sworn to show where and how he located the skull of a cow, claimed to be that of the stolen cow, and to establish the custody of the skull from the time it was exhibited to the witnesses until the time it was produced in court, the court properly refused to permit the cross-examination of the sheriff as to whether he had associated with him a mind reader in his efforts to detect or apprehend the offender.—People v. Eagle, 189 Mich. 404.

¶ 881. The girl alleged to have been raped, having stated that she found blood on her garments after the act, may be asked whether before this time she had experienced her menses.—People v. Flynn, 96 Mich. 276.

¶ 882. On a prosecution for statutory rape on a ten-year-old girl whose parents were divorced and remarried, she living with her mother then married to accused, the defense being that the charge was instigated by the father's second wife to embarrass the girl's mother in prosecuting an application for further alimony, the defendant is entitled to show the prior understanding of the child's father and mother as to alimony which understanding was about to expire.—People v. Parker, 166 Mich. 587.

¶ 883. Where in a criminal prosecution for taking indecent liberties with a female child in his bedroom the respondent testified that it was because of his sickness that the presence of the child was required in his bedroom, and he had testified fully as to his physical condition, it was not error to exclude his evidence as to the cause of his illness.—People v. Harris, 144 Mich. 12.

¶ 884. In a prosecution for forgery, evidence is admissible to show whether the person accused, whose signature is the subject of comparison with the alleged forgery, was drunk or sober at the time it was made.—People v. Parker, 67 Mich. 222.

§ 183. ——Of defendant's unsworn statement.

¶ 885. After a defendant has made his statement the prosecution may give evidence within the proper limits of rebutting testimony to contradict it.—Burden v. People, 26 Mich. 162.

2. Best and secondary evidence.

§ 184. In general; what constitutes best and secondary.

Best evidence of ordinances, foreign laws, judicial proceedings, and private writings, see post §§ 185-187.

Occasions for and admissibility of secondary evidence, see post §§ 188-190.

Notice to produce and foundation proofs for secondary, see post §§ 191, 192.

Competency and sufficiency of secondary proofs, see post §§ 193, 194.

Absence of degrees in secondary evidence, see post § 194.

Irrelevancy of opinion as to population, necessity of proof of actual count, see post ¶ 919.

Best and secondary rule applied in civil cases, see Evidence § 137 et seq.

¶ 886. As a court must have judicial knowledge of the position and action of those who act as its officers, no better evidence of their official character is needed than proof that they openly act in court in such capacity; this is so held in a trial for perjury where it appears that the oath was administered by one acting as deputy clerk.—Keator v. People, 32 Mich. 484.

¶ 887. Eyewitnesses may testify to a marriage; their testimony is in most cases more direct and reliable than documentary evidence, which has never been regarded in law as the best.—People v. Perriman, 72 Mich. 184.

¶ 888. A deputy county treasurer may testify orally that a liquor tax has not been paid; such testimony cannot be objected to as not being the best evidence of nonpayment, for the county treasurer is not required to keep a record of those who pay, and the absence of defendant's name from the monthly report made to the county clerk is only presumptive evidence of nonpayment.—People v. Paquin, 74 Mich. 34.

§ 185. Statutes and ordinances.

¶ 889. The statute laws of other states must be proved by copies authenticated in some mode recognized by law.—People v. Lambert, 5 Mich. 349.

¶ 890. Foreign statutes should, when possible, be proved as provided for in the state laws and the acts of congress rather than by the testimony of a lawyer who has practiced within the jurisdiction where they are in force.—Kopke v. People, 43 Mich. 41.

§ 186. Judicial proceedings and writings.

Competency of record as document, see post § 287.

Propriety of secondary proofs where originals are lost, see post § 190.

¶ 891. The deposition of a respondent taken on his preliminary examination, and not claimed not to contain all of his testimony, is the best evidence of what he testified to, and, if in court, is the only admissible evidence of that fact.—People v. Hinchman, 75 Mich. 587.

¶ 892. A former conviction of a defendant on a criminal trial cannot be proved by parol. —People v. Burke, 157 Mich. 108.

§ 187. Private writings and documents.

Competency of writing as document, see post § 296.

¶ 893. On the trial of a respondent for forgery of a discharge of a mortgage, the original instrument is the best evidence, and ought, if possible, to be produced.—People v. Swetland, 77 Mich. 53.

¶ 894. A witness who testifies to having delivered certain goods, together with the shipping bills, to the respondent, cannot be permitted to state where the goods were billed from. The bills are the best evidence. —People v. O'Neill, 107 Mich. 556.

§ 188. Admissibility of and occasions for secondary evidence.

Records and writings out of reach of process, see post § 189.

Lost and destroyed writings, see post § 190.

Admission of secondary cured by later admission of primary, see post § 553.

Sufficiency of parol evidence that writ existed where killing occurred in attempt to execute it, see Homicide ¶ 213a.

Rule in civil cases, see Evidence § 137 et seq.

¶ 895. Oral statements of the defendant as to the value of goods insured, made to the agent of the insurance company, are not admissible in evidence upon defendant's trial for attempt to set fire to the insured goods, where the written application for insurance contains a statement as to the value of the goods, and is offered in evidence or

is present in court 215.

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§ 190. ——Lost o ings.

Proofs of loss § 192.

Admissibility in parol proof dence ¶ 683.

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¶ 902. Parol p papers showing is admissible in v. Coffman, 59 M

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¶ 904. Parol testimony of the contents of a telegram purporting to be in reply to one sent, is admissible without direct proof showing by whom sent, where it appears that the original has been destroyed.—People v. Hammond, 132 Mich. 422.

§ 191. Necessity and sufficiency of notice to produce.

In civil cases, see Evidence § 146.

¶ 905. When an alleged forged instrument is last shown in the hands of the person accused of forging or uttering it, secondary evidence may be given of its contents without notice to the accused to produce it; but otherwise where the evidence that such instrument was last in respondent's hands is doubtful.—People v. Swetland, 77 Mich. 53.

¶ 906. Where, on the trial of a criminal case, respondent's attorney states that he will not insist upon a written notice to produce a paper claimed to have been left with respondent, and which the people desire to introduce in evidence, and, on the following morning, says that he is unable to find any such paper, parol evidence of its contents is admissible.—People v. Pope, 108 Mich. 361.

§ 192. Foundation proof of loss, destruction or inaccessibility.

Loss, destruction or inaccessibility as reason for secondary proof, see ante §§ 188-190.
Parol proof of lost commitment to afford foundation for information, see ante ¶ 22.
Order of proofs of foundation facts and of evidence founded thereon, see post § 359.

¶ 907. A witness who has sufficiently explained his failure to preserve a document may properly be allowed to state its contents.—People v. Sharp, 53 Mich. 523.

¶ 908. A witness who testifies that he has made copies of certain letters but has lost or destroyed the copies, and that he cannot remember their whole substance but does remember a part, may be permitted to give their contents as far as he can do so. But his inability to remember the whole is a proper subject on which to comment to the jury.—People v. McKinney, 49 Mich. 334.

¶ 909. Proof that a letter had been intrusted to the prosecuting attorney and that he had looked for it where he believed he had reason to expect to find it sufficiently establishes the loss of the letter to admit parol evidence of its contents.—Stewart v. People, 23 Mich. 63.

¶ 910. Where books had disappeared under suspicious circumstances and all the testimony as to the search therefor is that of a witness who says he could not find them, but had made no inquiry for them, their loss is not sufficiently proved to admit parol evidence of their contents.—People v. Lange, 90 Mich. 454.

¶ 911. In a prosecution for official neglect and corrupt conduct in fraudulently altering the figures in a tabulated sheet containing the votes cast for and against a certain constitutional amendment, the testimony traced the book in which said tabulated sheet had been placed to a room in a hotel where it had been left temporarily by the legal custodian, and clearly showed that the sheet had been taken from said book in said room by some unknown person, and had not since been seen by the officer in whose custody it had up to that time been, and who was charged by law with its custody. Held that an objection to the admission of testimony as to the contents of said tabulated sheet, on the ground that it was secondary evidence, is without force.—People v. Clarke, 105 Mich. 169.

§ 193. Competency and sufficiency of secondary proofs.

¶ 912. Where it is sought, for purposes of impeachment, to introduce a long transcript of the stenographer's notes of testimony given in another court, and it appears that they were taken by different reporters and that one has transcribed the other's work, but that the transcript has not been compared with the original, there is no error in excluding the transcript from evidence, even though the reporter testifies that his own notes are literally correct, and that he knows that his transcript of the other's is an absolutely correct copy.—People v. McKinney, 49 Mich. 334.

§ 194. Degrees in secondary evidence.

¶ 913. There are no degrees in parol or in secondary evidence.—Knowles v. People, 15 Mich. 408; and see also Eslow v. Mitchell, 26 Mich. 500.

3. Parol or extrinsic evidence to vary or show terms of writings.

§ 195. In general.

[Note. The rule, that the parties to a writing designed to afford a memorial of what they have agreed or done cannot vary or contradict its terms by oral evidence that other terms were intended, is a rule of civil evidence; since in a prosecution the state is not a party to the writing and is not bound by it. See the civil cases treated in Evidence, V. The rule excluding oral evidence because it is secondary is not the "parol evidence" rule as here understood. It is treated ante § 184 et seq.]

Parol evidence as secondary evidence, see ante §§ 184-194.

¶ 914. On a prosecution of a cashier for embezzlement from his bank under Comp. L. 1897, § 11562, it having been accomplished by means of a paper directing payment of a sum signed by his initials and similar to but

not amounting to a check, it is proper to receive extrinsic evidence that the paper was a mere memorandum and to show the circumstances attending its execution; and even had it been a check the accomplished object of it might have been shown, since the prosecution is not a suit between private parties based on the check.—People v. Messer, 148 Mich. 168.

4. Conclusions and nonexpert opinions.

§ 196. In general; what constitute conclusions and facts.

In civil cases, see Evidence, VI, A.
Dying declarations amounting to conclusions, admissibility, see Homicide ¶ 183.

¶ 915. The question whether a certain location is the place of business of another is a question of fact, and a statement of fact which may be made affirmatively by a witness. Although such a statement may be to a certain extent an inference from facts, counsel for the opposing side is not in a position to object to its admission unless he can show, on cross-examination, a want of sufficient knowledge on which to base the statement.—People v. Boos, 155 Mich. 407.

¶ 916. Where in a prosecution for assault with intent to kill, respondent's witness was asked how the complaining witness looked and acted, an answer that "It seemed that he was not very well pleased, that he was mad and angry," was incompetent, and was properly stricken out.—People v. Meert, 157 Mich. 93.

¶ 917. Where a witness is being questioned concerning identity he may be asked if there is any doubt in his mind and such question is not objectionable as evoking a conclusion of the witness at a time after that in question.—People v. Wallin, 55 Mich. 497.

§ 197. Relevancy and materiality of opinion or belief.

¶ 918. Where in a trial for murder a witness for the prosecution had testified that he saw deceased go with a gun towards the place of the killing, that he told him not to take his gun, and that when he heard the shot fired he stood up in his wagon to look, it was proper to refuse to allow him to be asked on cross-examination if he did not think at the time that deceased had shot respondent. What he thought is immaterial.—People v. Macard, 73 Mich. 15.

¶ 919. Where the defense in a prosecution for keeping a saloon open after hours seeks to establish that the hour was extended as the saloon was located in a township having a population not less than 1,000, as provided by Pub. Acts 1909, Act 291, as amended by Pub. Acts 1911, Act 170, How. 2nd Ed., § 5056, opinion evidence as to the population

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§ 201. Knowledge or observation as basis for opinion.

Experiments and demonstrations to acquire knowledge and opinion, see post § 202.

Objection to opinion or cross-examination to impair it as proper mode of attack on sufficiency of observation, see post ¶ 1638.

¶ 927. What is required to show a "sufficient opportunity" to judge of sanity depends upon circumstances which may properly move the judicial discretion, and when, taken as a whole, they move the judicial discretion of the trial judge, by apprising him that the witness may, upon reasonable grounds, believe in respondent's competency, the opinion may be given.—People v. Borgetto, 99 Mich. 336.

¶ 928. A witness who is shown to have a sufficient acquaintance with a respondent, under circumstances that give a reasonable opportunity for judging, may testify that he saw nothing unusual or abnormal, or to indicate insanity.—People v. Borgetto, 99 Mich. 336.

¶ 929. A woman attending another woman who died in an alleged attempt at abortion may not give her opinion as to what ailed the deceased without proof of minute examination of the victim's person and the facts on which the opinion is based or proof of knowledge or experience in such matters.—People v. Olmstead, 30 Mich. 431.

¶ 930. The opinions of witnesses as to what is undue and unnatural excitement in time of battle cannot generally afford safe grounds for conclusions as to the person's mental condition years afterwards, unless it appears that the excitement completely mastered the intellect and deprived the person of accountability.—People v. Garbutt, 17 Mich. 9.

¶ 931. The right to express an opinion as to the sanity or insanity of a defendant in a criminal case is not confined to experts; but mere acquaintance with the person is not sufficient; the witness must show facts and circumstances which the court can say show the insane condition and when that is done the witness may express his opinion and it is for the jury to say how much weight should attach to it.—People v. Casey, 124 Mich. 279.

§ 202. ——Experiments made after the fact.

Experience sufficient to qualify expert, see post § 207 et seq.

¶ 932. Where respondent in a prosecution for murder alleges that his rifle fell from a stump and was discharged, killing deceased, it is not error to refuse to allow a witness to give his opinion as to experiments made with a double barreled shotgun which differs in length and construction from respondent's rifle.—People v. Auerbach, 176 Mich. 23.

5. Expert opinions.

§ 203. In general; proper subjects and scope.

Relevancy and materiality of the opinion to the issues, see post § 204.

Opinion on the ultimate issues in the case, see post § 205.

Opinion on cause of death and pathological and physiological questions, see post § 206.

Persons qualified as experts and proofs of qualifications, see post §§ 207-212.

Basis for opinion and form of questions, see post §§ 213-215.

Form of opinion, see post § 216.

Opinion as to qualifications of other experts, see also post ¶ 967.

Subjects for nonexperts, see ante § 198.

Competency of nonexpert opinion on sanity, see ante § 201.

Weight and credibility of opinions, see post § 312.

Charges on weighing and crediting expert testimony, see post § 436.

Harmless errors and errors cured in admitting or excluding opinions or examining witnesses, see post XV.

¶ 933. Expert testimony is legally admissible on the ground, only, that ordinary jurymen have no such special knowledge as will enable them to understand the facts shown, without interpretation.—People v. Hall, 48 Mich. 482.

¶ 934. It seems that expert testimony should be confined to scientific questions, and not deal with matters that are within the scope of common knowledge.—People v. Sessions, 58 Mich. 594.

¶ 935. Testimony of detectives as to whether a robbery could be committed as charged is properly excluded; the subject is not proper for experts. Theories of criminal possibilities should not be admitted to contradict facts sworn to by witnesses as within their knowledge.—People v. Morrigan, 29 Mich. 4.

¶ 936. Expert evidence is allowable only to enable the jury to understand the significance of facts which have been shown by testimony that needs scientific or peculiar explanation by those who comprehend it themselves apart from their mere knowledge of the statements of books. It cannot include mere hearsay statements of the written or spoken opinions of others whom the jury have no means of examining.—People v. Millard, 53 Mich. 63.

§ 204. Relevancy and materiality of opinion.

Proper subjects for opinions, see ante § 203, post §§ 205, 206.

Relevancy and competency of chemical analysis made after exhuming corpse, see ante ¶ 730.
Admissibility of expert testimony as to character of animal tissue found near scene of killing, see Homicide ¶ 122.
Medical evidence to prove abortion as corpus delicti of manslaughter, see Homicide § 47.

¶ 937. Where respondent in a prosecution for the forgery of a deed that purports to have been made by a woman since deceased has control of the deed and refuses to produce it until he makes his defense, but then produces with it a joint deed that is not properly in the case, but also purports to be signed by decedent and respondent together, it is proper for the prosecution to ask whether all the signatures to both deeds were written by the same person and were in respondent's handwriting, and whether decedent's alleged signature was in a woman's handwriting. It would even be justifiable for the prosecution to take the ground that the joint deed was also forged.—People v. Van Alstine, 57 Mich. 69.

§ 205. Opinion on ultimate facts of case.

Nonexpert opinions on ultimate facts in case, see ante § 200.
Asking directly as to causes instead of asking what might have caused a condition, see post ¶ 969.

¶ 938. The testimony of expert witnesses is dispensed with whenever the point is reached at which the tribunal is being told that which it is itself entirely equipped to determine without the witness' aid.—People v. Fritch, 170 Mich. 258.

¶ 939. In a criminal prosecution against a physician for causing death by abortion, it is improper to permit a medical expert to give as his opinion, in answer to a hypothetical question, that a criminal operation was performed, since it is the duty and province of the court, not that of expert witnesses, to advise the jury concerning the facts necessary to establish the crime.—People v. Fritch, 170 Mich. 258.

§ 206. Cause of death and pathological and physiological questions.

Qualifications of experts, see post § 208.

¶ 940. A medical expert testifying as to the cause of the death, in an action for manslaughter in a case of fatal abortion, who was present at the coroner's inquest and who made a post-mortem examination of the body, may be asked the question, "What, in your opinion, was the cause of the shock?" where he has testified that in his opinion death was caused by shock to the nervous system.—People v. Sessions, 58 Mich. 594.

¶ 941. In a prosecution for murder by means of arsenic it was held not error to permit expert witn not deceased died —People v. MacGre

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§ 208. ——On bodily conditions, causes and effects.

Subjects proper for opinions, see ante § 206.

¶ 949. An undertaker is not necessarily an expert on physiological questions, and, unless he shows special knowledge entitling him to give an opinion, can only testify to specific facts.—People v. Millard, 53 Mich. 63.

¶ 950. Experts in chemistry are not necessarily experts in medicine, nor vice versa.—People v. Millard, 53 Mich. 63.

¶ 951. A practicing physician with a medical degree taken by study in course who has given the subject of poisons careful and discriminating study by reading and listening to lectures of instructors who have made a specialty of the subject, so that his study has resulted in the formation of a definite opinion, may express his opinion as to whether a given case is one of poisoning or not, although he has never had any actual experience in poisoning cases.—People v. Thacker, 108 Mich. 652.

§ 209. ——On agricultural, horticultural and veterinary questions.

¶ 952. A farmer of average intelligence who has resided for years in an apple-growing region, and who shows familiarity with the popular terms applied to cider in its process of aging, held competent to testify as to whether certain cider was fermented or not.—People v. Emmons, 178 Mich. 126.

¶ 953. In a prosecution under How. St. § 9391, for cruelly mutilating a horse by splitting his ear and otherwise cutting him with a knife where the question was whether a horse had the "blind staggers," a witness who saw the horse while suffering from an attack claimed to be of such disease, and who testifies that he has had considerable experience with horses and has seen several which had said disease, and is familiar with the symptoms, is competent to give an opinion upon such question.—People v. Bane, 88 Mich. 453.

¶ 954. A person accused of an assault with intent to kill a man on horseback was said to have struck a downward blow with a knife, cutting the man's clothes, wounding the horse, and cutting the hair off square across the wound. A witness who had farmed for seven years, during which he had doctored horses and performed surgical operations on them, and who claimed to have had experience in cutting live horse flesh and the hair on the horse, was asked whether the hair could be cut clean the full length of the wound. Held, that the question was properly ruled out, as the witness had not shown that he ever tried to cut hair in the way suggested; and it was not shown and was not supposable that in a surgical operation it would be important so to cut it.—People v. Niles, 44 Mich. 606.

§ 210. ——On foreign laws.

¶ 955. A minister of the gospel residing in Pennsylvania, authorized by statute to perform the marriage ceremony, and required as such to observe certain forms therein prescribed, is a competent witness to identify the book in which said statute is published, and to show the common acceptance of the publication as authority in the home courts.—People v. McQuaid, 85 Mich. 123.

¶ 956. One who had been a peace officer in another state, and who did not swear to any general knowledge of the laws of that state, but said he had, on account of a difficulty with his wife, looked into those laws, was held incompetent to testify what the written laws of that state were on the subject of marriage.—People v. Lambert, 5 Mich. 349.

§ 211. ——Preliminary proofs of competency.

Order of proof of competency and of opinion, see post § 360.

¶ 957. In a prosecution for violating a local option law by selling fermented cider, it is not error for the court to require a witness to first show his experience and observation before testifying as an expert as to whether or not cider put in the kind of bottle in evidence, would grow harder from day to day.—People v. Kinney, 124 Mich. 486.

§ 212. ——Competency as question for court.

¶ 958. The question of the competency of an expert witness is for the court and not for the jury.—People v. McQuaid, 85 Mich. 123.

¶ 959. It is the province of the court to determine the qualifications of nonprofessional witnesses to express an opinion.—People v. Kinney, 124 Mich. 486.

§ 213. Proper basis for expert opinions.

Basis of experts' opinions and form of questions calling for opinions in civil cases, see Evidence, VI, B, 2.

¶ 960. Expert testimony is not competent that is based on unsupported assumptions of fact; or upon evidence so lacking in certainty that the jury cannot see the exact basis of fact for the opinion called for; or upon facts not submitted to the expert, but taken by him from what he has himself heard on the trial.—People v. Millard, 53 Mich. 63.

¶ 961. Experts cannot be examined upon theories that are contrary to the uncontradicted facts of the case.—People v. Hall, 48 Mich. 482.

¶ 962. An expert cannot state that he has read or heard the testimony of a witness or

witnesses and then give his opinion upon such testimony, without stating the particular points of the evidence upon which he rests his conclusion.—People v. Aiken, 66 Mich. 460.

¶ 963. A physician who has testified that he examined a body found in the water for the purpose of ascertaining the cause of death, but that he could not make a very extended examination owing to the offensive condition of the corpse, may give his opinion as to how the death occurred, whether by drowning or by other means.—People v. Barker, 60 Mich. 277.

¶ 964. Physicians who held a post-mortem examination of the body, and attended the coroner's inquest, were competent to testify as experts as to the cause of the death, in an action for manslaughter in a case of fatal abortion, because of their standing as persons learned in medical science.—People v. Sessions, 58 Mich. 594.

¶ 965. It was error to permit a witness to answer the question whether death from shock would be more likely to occur to persons fearing an injury, where such witness had testified as an expert in a criminal action, that death might be produced by fright and dread of sudden peril, there being no testimony on which to base such question.—People v. Sessions, 58 Mich. 594.

¶ 966. In a murder trial where insanity is set up as a defense, it is proper to refuse the expert opinion of a physician based in part on what he understands another physician has testified.—People v. Bowen, 165 Mich. 231.

¶ 967. While one expert may testify from knowledge as to the qualifications and authority of another expert, his opinion in regard thereto, based upon general reputation, is inadmissible.—People v. Holmes, 111 Mich. 364.

¶ 968. Testimony tending to prove the laws of a foreign country is improperly admitted where the means of knowledge of the witness are not shown.—People v. Loomis, 106 Mich. 250.

§ 214. Form and propriety of questions.

Form and construction of opinion, see post § 216.

In civil cases, see Evidence, § 298 et seq.

¶ 969. What caused a wound, testified to in a prosecution for murder, is an improper question to put to an expert, though it would be proper to ask him what might have caused it. The fact is for the jury, and is not mere matter of opinion.—People v. Hare, 57 Mich. 505.

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which the experts give their opinions as to the cause of death.—People v. Vanderhoof, 71 Mich. 158, per Morse, J., and Sherwood, C. J., two others concurring in the result.

¶ 976. In a criminal prosecution against a physician for causing death by abortion, a hypothetical question assumed that the body of the deceased had been dismembered in the office of the respondent and carried therefrom in an automobile; that it was placed in sacks with bricks and thrown into the stream; that the deceased had taken cotton root, possessed a catheter, and had an appointment with respondent about an operation. Held, it was error prejudical to respondent to permit an answer to such a question.—People v. Fritch, 170 Mich. 258.

¶ 977. In a prosecution for assaulting a female under sixteen years of age, it is improper to allow the prosecutor to put a hypothetical question to a physician called as an expert, as to whether one or two acts of intercourse three or four years prior to the occasion in question would account for the complainant's condition immediately after the alleged act of defendant, where in framing such hypothetical question the testimony of the complaining witness that she had had numerous acts of intercourse with a boy and with her stepfather prior to the time in question, was overlooked.—People v. Parker, 166 Mich. 587.

¶ 978. Long hypothetical questions reciting a great number of facts so presented as to require the witness to determine questions that should be left to the jury, and so long that neither jury nor witness can remember and take account of all the elements presented, are very objectionable.—People v. Brown, 53 Mich. 531.

¶ 979. In a murder trial where insanity is set up as a defense, a hypothetical question addressed to a physician as to his opinion of defendant's sanity is properly excluded where it covers more than eight pages and where defendant's attorney apparently attempts to set up as facts to be assumed the testimony as defendant's counsel understood it, and not as it really existed at the trial.—People v. Bowen, 165 Mich. 231.

§ 216. Form, responsiveness and construction of opinion.

¶ 980. An expert cannot state that he has read or heard the testimony of a witness or witnesses and then have his opinion upon such testimony, without stating the particular points of the evidence upon which he rests his conclusion.—People v. Aikin, 66 Mich. 460.

6. Hearsay and declarations out of court and res gestæ.

§ 217. In general; what is hearsay.

Proof of statements or acts to show mental state or attitude of declarant, see post §§ 218-221.
Former testimony by accused, see post § 222.
Form of the declaration, letters and writings, see post § 223.
Acts and associations as implied declaratiops or admissions, see post § 224.
Self-serving acts and declarations, see post § 225.
Declarations and acts of third persons, see post §§ 226-229.
Declarations and acts of coconspirators, see post §§ 230, 231.
Declarations and acts of victim or antagonist, see post §§ 232-235.
Former testimony by witnesses other than accused, see post §§ 236, 237.
Foundation proofs for admission of declarations, see post § 238.
Admissibility of attendant circumstances, time or place, see post § 239.
Rebuttal and explanation of declarations, see post § 240.
Res gestæ acts and declarations, see post §§ 241-246.
Admissive declarations and confessions, see post § 247 et seq.
Testimony as to appearance, manner and actions as conclusion, see ante § 196.
Testimony as to one's own age as a conclusion, see ante § 199.
Declarants and witnesses distinguished with respect to indorsing names on information, see ante ¶ 68.
Harmless errors and errors in admission or rejection cured by other matters, see post XV.
Hearsay rule and precedents in civil cases, see Evidence, VII.
Inadmissibility of hearsay to impeach witness, see Witnesses, VI, D.

¶ 981. Hearsay testimony is that kind of evidence which does not derive its credibility solely from the credit due to the witness himself but rests also in part on the veracity and competency of some other person.—People v. Albers, 137 Mich. 678.

¶ 982. Statements of fact given by a third person to a witness are pure hearsay and inadmissible in evidence.—Hamilton v. People, 29 Mich. 173.

¶ 983. Testimony of a physician on a trial for murder, that he had learned of improper treatment of deceased after the shooting, is inadmissible because hearsay where it appeared that he had learned of it not from observation but from information.—People v. Farrell, 137 Mich. 127.

¶ 984. Testimony of a witness in a prosecution for polygamy, based upon what the judge of probate had told him relative to the marriage, is inadmissible to establish the fact of marriage, because hearsay.—People v. Goodrode, 132 Mich. 542.

¶ 985. Where it appears that a witness who testifies to the cohabitation of certain parties as man and wife has not seen the

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moment there was apparently a concurrence of opinion as to the identity of the person observed, and showing also that at the time each witness announced the identity of the person observed.—People v. Lahnala, 193 Mich. 144.

¶ 999. On the trial of a respondent for uttering a forged discharge of a mortgage, it was improper to receive in evidence the original mortgage and the accompanying notes showing interest payments thereon subsequent to the date of such discharge, and to permit the testimony of the mortgagee that he received these payments of interest from a third person in whose office such notes and mortgage were kept, without putting such third person upon the stand; since such testimony as to the payment of interest was hearsay.—People v. Swetland, 77 Mich. 53.

¶ 1000. In a prosecution for perjury, based on testimony in a bribery case that V. had not sent accused to offer the bribe, testimony of S. that he had requested V. to see accused in relation to the matter, is incompetent even though it does corroborate V.'s testimony, since its value rests in part on V.'s veracity in testifying that he did so see accused, and is therefore hearsay.—People v. Albers, 137 Mich. 678.

§ 218. Admissibility to show mental state of declarant.

To show knowledge, intent or motive, see post § 219.
Threats and ill feeling, see post § 220.
To show guilty consciousness, see post § 221.
Former testimony as admissible declaration, see post § 222.
Letters and writings as declarations, see post § 223.
Admissibility of evidence of other crimes and offenses to show system, plan, knowledge, or intent, see ante § 166.
Declaration of third persons to affect hearer with knowledge or to show mental effect on hearer, see post §§ 227, 228.
Declarations and statements of victim of rape or indecent assault, see post §§ 233, 244.
In civil cases, see Evidence § 329 et seq.

¶ 1001. On a trial for murder evidence was given by the prosecution which indicated strong mental agitation and excitement on the part of the prisoner, with an attempt to conceal it, near the supposed time of the murder. Held competent for the prisoner to prove the conversation had by him at the time, as bearing upon the question of his mental agitation and excitement, and tending to disprove the excitement, or to show its nature and extent.—Dillin v. People, 8 Mich. 357.

¶ 1002. In a murder trial for killing his wife, it is reversible error not to allow defendant to introduce in evidence a conversation in the presence of a third person, in which the wife showed him a postal card from another man, and to refuse to allow him to show the effect produced on his own countenance.—People v. Bowen, 165 Mich. 231.

§ 219. ——To show knowledge, intent or motive.

Threats and ill feeling as bearing on motive, see post § 220.
Declarative writings evidencing motive or intent, see post § 223.
Res gestæ acts and declarations, see post § 241 et seq.
Admissibility of acts to show guilty foreknowledge, see ante ¶ 847.

¶ 1003. Proof of previous conversations with respondent showing a desire to procure the burning of property by other persons is admissible to show a purpose of burning, and as bearing on the probabilities of their complicity in the fire actually set.—Meister v. People, 31 Mich. 99.

¶ 1004. Statements made and language used by a respondent charged with murdering his infant children which tend to show his motives and inducements in putting them away are competent.—People v. Foley, 64 Mich. 148.

¶ 1005. Where a conspiracy to defraud involves the personation of defendant by wearing his clothes, it is admissible to show that the defendant had proposed the scheme to a person not named in the information, but that it had actually been carried out by the confederate named.—People v. Arnold, 46 Mich. 268.

¶ 1006. In a prosecution for manslaughter in performing an abortion, where a witness testified to show criminal intent that accused had performed an abortion on her also, it was proper to allow her to testify that in the course of treating her accused proposed to her that she get what money she could from the man and divide with accused, and also that accused proposed to charge her less if she would assent to sexual intercourse with him.—People v. Hodge, 141 Mich. 312.

¶ 1007. In a prosecution for murder, evidence that about two weeks before the murder respondent said that he must hustle up to get some money, that he was going to get married, is admissible in connection with evidence that he supposed deceased to have money at the time of the killing having asserted such fact at the time.—People v. Wolf, 95 Mich. 625.

¶ 1008. In a prosecution for perjury alleged to have been committed on the trial of respondent's brother for murder, testimony that respondent offered money to witnesses to prevent them from testifying upon the

former trial, and that he proposed to secrete them to avoid service of subpœna, is admissible to show corrupt motive and intent.—People v. Macard, 109 Mich. 623.

§ 220. ——Threats and ill feeling.

Threats as evidence in homicide cases, see Homicide § 48.

¶ 1009. In a prosecution for arson defendant's animosity to the owner of the property and threats made by him two years before against such owner may be shown.—People v. Eaton, 59 Mich. 559.

¶ 1010. In an arson case, where animosity against an insurance company which had insured the barn in question, was claimed to have been the motive for the crime, testimony of a witness for the prosecution amounting to a mere impression that he had a conversation with respondent about changing his insurance from the old company to a new one, does not rise to the dignity of evidence and should be excluded.—People v. Gotshall, 123 Mich. 474.

¶ 1011. Bad feeling between the parties does not bear on guilt of burglary where there are no recent threats or demonstrations tending that way.—People v. Bielfus, 59 Mich. 576.

¶ 1012. In a prosecution for malicious injury to a fence belonging to a church society, expressions indicating enmity, used by respondent against the minister or certain members, made at times when such persons were engaged in the business of the church, were competent on the question of malice.—People v. Ferguson, 119 Mich. 373.

¶ 1013. On a trial for murder it appeared that defendant, who had been drinking, threatened to knock down three men and kill one. That part of the threat relating to the knocking down was excluded. Held error; the threat as a whole tending to show braggadocio merely.—People v. Curtis, 52 Mich. 616.

¶ 1014. In a prosecution for threatening accusation of crime testimony relative to the arrest, at respondent's instance, of such other person for perjury, and the attempt on respondent's part to secure the execution of a deed by means of threats, is admissible as bearing upon respondent's intent.—People v. Whittemore, 102 Mich. 519.

§ 221. ——To show guilty consciousness.

¶ 1015. One of several persons accused of larceny showed some excitement while the boots of those accused were being measured to see if they corresponded to tracks found at the scene of the crime. Held, that on his prosecution this fact was inadmissible as bearing upon the question of his guilt, particularly when given by persons prepossessed against him; and
People v. Wolcott,

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and contends that he has had no preliminary examination, evidence taken on such examination is admissible to show that thereupon he gave Henry as his name.—People v. Beach, 93 Mich. 25.

¶ 1024. It is not error to permit the stenographer to read in full the testimony of one accused of perjury, as given at the trial upon which the crime is alleged to have been committed, where it all has a bearing, more or less remote, upon that part of his testimony which is the basis of the charge.—People v. Macard, 109 Mich. 623.

¶ 1025. In a prosecution for perjury alleged to have been committed upon a trial for burglary, it is proper, where the materiality of the testimony upon which the alleged perjury is based would not otherwise appear, to show by the jurors and the stenographer in the burglary case the nature of the defense there relied upon.—People v. Ostrander, 110 Mich. 60.

§ 223. Letters or other writings as declarations.

Writings as admissions or confessions, see post § 248.

Letters from third persons, see also post § 226 et seq.

Details of written narrative as indication of guilty knowledge, see ante ¶ 1017.

Preliminary proofs of relevancy, see also post ¶¶ 1131-1133.

¶ 1026. In a prosecution for bribing the warden of the state prison, a letter accompanying the bribe held admissible as part of the transaction although the signature thereto was not proved.—People v. Daily, 178 Mich. 354.

¶ 1027. It is error to prove the sale of a gun to a person by a record of the sale, where neither the sale nor the record was made by the witness.—People v. Lahnala, 193 Mich. 144.

¶ 1028. On the trial of a respondent for uttering a forged discharge of a mortgage, evidence of the execution of a mortgage upon part of the mortgaged premises a year after the date of the discharge, and of the presentation to the mortgagee of an abstract of title showing the discharge of the first mortgage, is competent as presenting a motive for the commission of the crime charged, and also tending to prove that the respondent knowingly uttered the forged discharge.—People v. Swetland, 77 Mich. 53.

¶ 1029. An unsigned paper in the handwriting of the accused purporting to set out and to describe the occurrence, and to dispose of the accused's property, is admissible in a prosecution for murder of her child, alleged to have been committed in conjunction with an attempted suicide.—People v. Quimby, 134 Mich. 625.

¶ 1030. In a prosecution against the supreme secretary of a mutual benefit society for obtaining money under false pretenses, in that he induced a person to become a member and to pay for insurance by falsely representing that the society had an indemnity reserve fund of $15,000, a circular signed by him, issued in the society's behalf, and reciting that the society had a large, increasing reserve fund is competent evidence against him.—People v. Shelters, 99 Mich. 333.

¶ 1031. Where, after certain property had been shipped to defendant, and before it had arrived at its destination, the prosecuting witness was shown a statement given by defendant to a bank, in which defendant's financial condition was stated, such statement may be submitted to the jury as tending to establish a false representation, where, in reliance thereon, the prosecuting witness neglected to stop the property in transit as he might have done.—People v. Andre, 153 Mich. 531.

¶ 1032. Where, in a prosecution for false pretenses in inducing the sale of certain property to defendant, defendant was charged to have made a false statement to a bank, which was not seen by the prosecuting witness until after the goods in question had been sold to defendant, such statement may be considered by the jury in determining the defendant's intention in making the false representation relied on by the prosecuting witness, and evidence as to the falsity of his statement is admissible.—People v. Andre, 153 Mich. 531.

¶ 1033. In a prosecution for false pretenses in misrepresenting financial condition, and thereby securing a sale of property, evidence as to a statement in bankruptcy proceedings, prepared by defendant's attorney for the purpose of securing a composition with creditors, is inadmissible, where the statement was prepared some time after the making of the alleged representations.—People v. Andre, 153 Mich. 531.

§ 224. Association and conduct with accomplices.

As res gestæ, see post § 241 et seq.

Conversations with and declarations by accomplices and third persons, see post § 226 et seq.

¶ 1034. A woman was prosecuted for killing her son-in-law with strychnine, and it was the theory of the prosecution that the victim's wife was accessory to the crime. Held, that it was not error to admit evidence that on the night after his death the two women slept together, and were heard whispering a long time after retiring.—People v. Bemis, 51 Mich. 422.

¶ 1035. On a trial for burglary it appeared that respondent and another, who had been convicted of the same crime, occupied a

rented room together, both before and after the date of the crime, and were seen together on the evening thereof. Held, that evidence that they were seen together a week before was admissible.—People v. Burns, 67 Mich. 537.

§ 225. Self-serving acts and declarations.

See also post ¶ 1173.

Admissibility of self-serving direct testimony by accused, see ante ¶ 692.

Res gestæ declarations, see post § 241.

Res gestæ declarations accompanying possession, see post § 242.

Fabrication of exculpatory appearances as admission, see post § 251 et seq.

In civil cases, see Evidence, VII, D.

¶ 1036. Evidence that a person charged with larceny has previously attempted to purchase a chattel similar to that stolen has no tendency to disprove theft, and is not admissible for that purpose.—Foster v. People, 18 Mich. 266.

§ 226. Declarations, acts and conversations of third persons.

Admissibility as bearing on knowledge, information, reasoning, or mental state of hearer, see post §§ 227, 228.

Evidence of commission of other crimes by accomplices, see ante § 171.

Admissibility of accusatory statements by third persons, see post § 229.

Declarations of accomplices and coconspirators, see post § 230 et seq.

Complaints and statements by victims or antagonists, see post § 232 et seq.

Record made by third persons, see also ante ¶ 1027.

Res gestæ declarations, see post § 243 et seq.

Statements inculpating others as res gestæ, see post § 241, ¶ 1143.

Admissions by accomplices and privies of accused, see post § 262.

Mother's testimony of what her small child told her of a witnessed act, see also ante ¶ 993.

Testimony as to what child said of a killing, see also ante ¶ 995.

¶ 1037. While the admissions or declarations of an accused party are competent, the statements of another are purely hearsay, unless made under such circumstances, in the presence and hearing of the accused, that his acquiescence in such statements can be plainly inferred from his demeanor or conduct.—People v. O'Brien, 68 Mich. 468.

¶ 1038. In a prosecution for assault with intent to kill and murder, it is not error to refuse evidence offered by defendant of a conversation between the complaining witness and two of his own employees, taking place some time before the assault, where there is no offer to show that such conversation was brought to the knowledge of the respondent.—People v. Klise, 166 Mich. 1.

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leged to have been made that the note was still in process of collection, are not admissible on the ground of agency.—People v. McBride, 120 Mich. 166.

¶ 1046. In a prosecution for the larceny of certain railroad bonds, which respondent, as the people's evidence tended to show, had sent by express to a friend in another city, mailing instructions to deposit them in a safety-deposit vault, the friend testified that the package containing the bonds was received during his absence from the store where he was employed; that, upon his return, the parcel boy notified him of the receipt of the package, and witness told him to open it; that, upon the attention of the witness being called by the cashier to a letter which had been received for him, he recognized the handwriting, read the letter, and then told the boy not to open the package, but took it, and left the store. The testimony of the cashier and the parcel boy as to what occurred at that time agreed substantially with that of the witness. Held, that the testimony of the cashier and the boy related to what occurred on the receipt of the package, rather than to the conversation then had, and bore upon the character of the letter received by the first mentioned witness, and was admissible.—People v. Parsons, 105 Mich. 177.

¶ 1047. Upon a trial for causing a pregnant woman's death by procuring a miscarriage the testimony of a physician summoned to attend the woman that he understood certain money paid to him was paid on respondent's behalf is hearsay and inadmissible, and the fact that the witness is hostile to the prosecution does not justify the admission of it.—People v. Abbott, 116 Mich. 263.

¶ 1048. In the trial of a husband for shooting his wife, evidence of expressions of affection for the husband made by the wife in the interval preceding her death are admissible to show the degree of culpability she attached to his act.—People v. Alexander, 161 Mich. 645.

¶ 1049. A circus performer went to a dance and was pitched upon by some of the participating citizens. He shrieked, "Hey, Rube!" and at this signal a lot of other circus men rushed in and a fight followed in which the town marshal was killed by one of the circus men, as was supposed. Held, that on the latter's trial it was proper to exclude as hearsay and immaterial what one of the witnesses had heard of the citizens being drunk and of their having trouble with the marshal.—People v. Murray, 52 Mich. 288.

¶ 1050. In a prosecution for larceny of a watch from the person it is error to allow a saloonkeeper to testify that while accused and others were in the back room of his saloon with the door slightly open a policeman came in and said to witness that the men in the back room were crooks, whereupon witness informed the policeman that they had a watch they wanted to sell, telling the policeman to go and get them if he wanted them, and that the policeman lacked the courage to do so.—People v. Cahill, 147 Mich. 201.

¶ 1051. Where it is claimed in defense that representations of deformed human bodies or parts, the exhibition of which is prohibited by Act 103; P. A. 1903, § 2, How. 2nd Ed., § 5293, except in certain cases, were kept for sale and not for exhibition, it is proper in a prosecution for a violation of such act to exclude a letter to one of the respondents alleged to relate to the sale thereof, where there is already testimony introduced to the effect that respondents had tried to make a sale several times.—People v. Kennedy, 176 Mich. 15.

¶ 1052. Where, in a prosecution for rape, a witness for the people has testified that about a year before the alleged offense, while the victim was at her house, she noticed respondent taking hold of her arm and "pulling her around," further testimony that witness' husband spoke of it at the time, is hearsay and incompetent.—People v. Duncan, 104 Mich. 460.

¶ 1053. The admission in a prosecution for rape of testimony that since the case has been commenced a reward had been offered the prosecuting witness to stop the prosecution is prejudicial error in the absence of a showing that defendant procured the offer to be made, or that it was made with his approval or acquiescence.—People v. Long, 144 Mich. 585.

§ 227. ——To show knowledge of or mental effect on hearer.

See also post ¶ 1067.
To show information affecting hearer, see post § 228.
Reported statements as bearing on malice aroused in hearer, see also Homicide ¶ 152.

¶ 1054. In an indictment for murder, where the defendant sets up temporary insanity as a defense, any facts within his own knowledge or any conduct that he must have personally known, and any reports, true or false, that were brought to him, which would tend to produce in his mind suspicion or belief in her infidelity, are competent, and unless privileged are admissible.—People v. Bowen, 165 Mich. 231.

¶ 1055. In a trial for wife murder, where defendant sets up temporary insanity, evidence as to the truth of reports of the wife's infidelity is inadmissible as tending to raise collateral issues.—People v. Bowen, 165 Mich. 231.

¶ 1056. In a prosecution for murder by arsenic poisoning, arsenic having been found

by a post mortem examination, it is admissible to show by a witness the contents of a page in a book shown to accused.—People v. Millard, 53 Mich. 63.

¶ 1057. On a trial for murder where respondent claimed that he shot deceased because he feared his life was in danger, testimony that deceased stated as he approached respondent and was only four or five feet away, that he intended to bid respondent "good night" is admissible.—People v. Farrell, 137 Mich. 127.

¶ 1058. In a prosecution for exhibiting representations of deformed human bodies or parts in violation of Act 103, Pub. Acts 1903, sec. 2, How. 2nd Ed. § 5293, it is not error to admit a conversation between the complaining witness and one of the respondents immediately after he had seen the exhibits as such conversation is material to show knowledge by such respondent that the witness had viewed the exhibits.—People v. Kennedy, 176 Mich. 15.

¶ 1059. In a murder trial for killing his wife, a husband has the right to testify to the contents of letters from others addressed to her, but received and read by him (provided it is not through her permission, if there be such) which would tend to support the defense of insanity, provided a proper foundation for secondary evidence is laid.—People v. Bowen, 165 Mich. 231.

§ 228. ——To show information or reason for action.

To show that hearer had knowledge or was affected mentally, see ante § 227.

¶ 1060. Where respondent is charged with murdering one of an officer's posse attempting to arrest him, evidence that the officer had been told that respondent had threatened to resist arrest, and that the officer requested the posse to accompany him to respondent's house as he feared resistance because of previous threats, is admissible to show the reason of the precaution taken by the officer and as showing the circumstances of the killing.—People v. Gosch, 82 Mich. 22.

¶ 1061. In a prosecution for seduction, the defense called a witness to show that complaining witness had had illicit intercourse with him and hence was not chaste at the time alleged. The witness denied such acts and counsel, claiming surprise, offered to show that witness had stated otherwise to counsel before called as a witness. Held that this was permissible, not for the purpose of positive proof, but to show why the witness had been called.—People v. Payne, 131 Mich. 474.

¶ 1062. In a prosecution for false pretenses, inducing a sale of goods on credit, evidence that the complaining witness was informed over the telephone of respondent's financial stateme bank and to whi ness was admiss to such witness, tent to prove tha People v. Andre,

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§ 229. ——Accusi See also ante ¶

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¶ 1065. That larceny of an could not remer sation affords witness to testi defendant about in issue, and ac tomobile in que 177 Mich. 416.

§ 230. Declaratic plices

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ments. The danger that one may be unjustly prejudiced by the statements of another must be guarded against by proper instructions.—People v. Saunders, 25 Mich. 119.

¶ 1069. The acts and declarations of one conspirator before the conspiracy was formed, or after its object has been accomplished, not in the presence or hearing of the other conspirators, and not brought to their knowledge and ratified by them, are not admissible against them.—People v. Parker, 67 Mich. 222.

¶ 1070. On the trial of a conspiracy to extort money from a firm by entrapping it into a violation of the revenue laws, it was held that the statements of one of the defendants, made on the day after the making of complaint against the firm and while it was still pending, that he expected to make several hundred dollars out of it, and that another of the defendants was concerned with and instigated it, are admissible against such other defendant, where he has been connected with the conspiracy by independent evidence. —People v. Saunders, 25 Mich. 119.

¶ 1071. Upon the separate trial of one jointly charged with burglary it was competent to show what was said in his presence by the other person jointly charged as to the purchase of railroad tickets for the purpose of leaving the city shortly after the crime was committed, in which purchase and use of the tickets both seemed equally interested; and where accused was afterwards arrested in the city to which the ticket read.—People v. Dow, 64 Mich. 717.

¶ 1072. In a prosecution for burglary against one of three parties, it was competent to show what property was found upon the persons of all three of the men arrested for the same transaction.—People v. Wilson, 133 Mich. 517.

¶ 1073. The wife of an accomplice cannot be allowed to corroborate his testimony by stating where her husband told her he stayed on the night of the commission of the alleged offense.—People v. O'Brien, 60 Mich. 8.

¶ 1074. On a trial for burning a barn to defraud insurers, evidence should not have been received against one of the defendants of a false statement made by another defendant after the fire to the import that the barn was not insured, as it was no part of the res gestæ, and could not aid in defrauding the insurers.—Hamilton v. People, 29 Mich. 173.

¶ 1075. Where M. is prosecuted for adultery with A.'s wife, communications between the wife and her mother not in M.'s presence and to which he was not privy are inadmissible, as is also a letter claimed to have been written by the wife to M., but which he is not shown to have read.—People v. Montague, 71 Mich. 447.

¶ 1076. In a prosecution for adultery, conversations in respondent's absence with the woman with whom he is charged to have had intercourse is, as to him, hearsay and inadmissible.—People v. Fowler, 104 Mich. 449.

¶ 1077. Testimony that the woman with whom respondent is charged to have committed adultery stated in absence of accused that he had had sexual intercourse with her, is inadmissible, being hearsay.—People v. Imes, 110 Mich. 250.

¶ 1078. In a prosecution for bribery, in which a conspiracy to corruptly obtain municipal action of which the bribery with which defendant was charged was an incident, conversations between certain of the conspirators in furtherance of the project were admissible though had when defendant was not present.—People v. McGarry, 136 Mich. 316.

¶ 1079. In a prosecution for bribery, in which a conspiracy to corruptly obtain municipal action of which the bribery with which defendant was charged was an incident, a letter from one of the conspirators to another stating what had been done in relation to the party whom defendant was charged to have bribed, was competent: where there was testimony showing defendant's connection with the parties prior to the date of the letter.—People v. McGarry, 136 Mich. 316.

¶ 1080. In a prosecution for bribery where a conspiracy has been shown, testimony of a conversation between two of the conspirators after the conspiracy had been abandoned, is admissible where it related to devising means to avoid exposure.—People v. Mol, 137 Mich. 692.

¶ 1081. Respondent was acquitted of an attempt to bribe in connection with an alleged conspiracy. Subsequently he was prosecuted for perjury in testifying in his own behalf at the bribery trial. Held, that evidence otherwise inadmissible would not be admitted on the ground that he was a party to the conspiracy, since his acquittal in the bribery case was conclusive of that question. —People v. Albers, 137 Mich. 678.

¶ 1082. Upon a prosecution for manslaughter in causing the death of a pregnant woman by procuring a miscarriage by means of instruments, statements made in respondent's absence by the midwife who was alleged to have performed the operation, that she was in the habit of performing them for the purpose of abortion and miscarriage, and describing the methods adopted, are inadmissible, she not being under indictment, so as to make them admissions.—People v. Abbott, 116 Mich. 263.

¶ 1083. A. called at an express office for a package addressed to B. and containing a

watch alleged to have been stolen by C. Held, that on the prosecution of C. for the larceny it was proper for the defense to question A. as to directions left with A. by B. for receiving mail and express matter addressed to B.—People v. Lyons, 49 Mich. 78.

§ 231. ——Flight or resistance to arrest by accomplice.

¶ 1084. In a prosecution for burglary it was shown that the stolen property was found near the respondent and another person in a barn where they slept on the night it was taken, and that when the arrest took place the other person resisted and escaped. Held, that the resistance and flight might properly be considered by the jury.—Cummins v. People, 42 Mich. 142.

¶ 1085. Upon the trial of one of several persons jointly charged with crime, evidence that they all escaped from jail after their arrest is admissible.—People v. Cleveland, 107 Mich. 367.

§ 232. Complaints and statements by victim or antagonist.

In rape and indecent assault cases, see post § 233.

Belated complaints and reasons for delay, see post § 235.

Details and particulars of complaint, see post § 235.

Complaints as res gestæ, see post § 245.

Declarations in extremis amounting to res gestæ but not to dying declarations, see post §§ 245, 246.

Dying declarations, see Homicide, VII, B.

Written ante mortem statements as dying declarations, see Homicide, VII, B.

Rebuttal and explanation of dying declarations, see also Homicide § 60.

¶ 1086. In a prosecution for burglary a woman who slept in the house where it was committed testified that she saw the burglar plainly enough to recognize him afterwards, and that two days afterwards while with her husband she saw respondent and told her husband she believed him to be the man. The husband testified that on that occasion she recognized the respondent, and added that she recognized him as being the man that was in her bedroom at the time of the burglary: that he told her to be sure, and she said she was sure. Held, that the additional statement was hearsay and inadmissible.—People v. Mead, 50 Mich. 228.

¶ 1087. After respondent and decedent had had some words of difficulty in a saloon about an hour before the killing, decedent went out of the saloon and had a conversation with B. and P. concerning the trouble in the saloon, respondent standing 150 or 200 feet from decedent. B. testified that decedent said he would not be beaten and bruised by that bully; that he was too big for him; that he was not able to fight him, and, furthermore, did not hav
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§ 233. ——In rape cases and indecent assaults on children.

See also ante ¶ 1088.

Belated complaints and reasons for delay or silence, see post § 234.

¶ 1093. Evidence that the prosecutrix made immediate complaint after the offense is important, and facts showing her appearance—marks of violence or other indications of outrage—and also that she had reason to fear damage to life or limb if she resisted the assault upon her, are admissible, even though the facts show a former complete offense of a similar character.—Strang v. People, 24 Mich. 1.

¶ 1094. In a prosecution for rape, a question to the complaining witness as to whether she had told the priest or any one else of the outrage is not objectionable.—Maillet v. People, 42 Mich. 262.

¶ 1095. Whether it would be error to allow the prosecutrix on a charge of rape to state what she had told to others about the affair when she first disclosed it, quære.—Maillet v. People, 42 Mich. 262.

¶ 1096. In a case of assault with intent to ravish, the girl's statement to her father immediately after the alleged injury, and her appearance, would be admissible in evidence for the prosecution even upon the trial.—People v. Lynch, 29 Mich. 274.

¶ 1097. In a prosecution for an assault with intent to commit rape, statements made by the complaining witness soon after the assault, to the officer who arrested respondent, as to prior acts of familiarity between herself and respondent, are competent.—People v. Goulette, 82 Mich. 36.

¶ 1098. The complaining witness in a prosecution for an assault with intent to commit rape on a female under the age of sixteen years, may testify as to what she told a relative about the occurrence immediately after the commission of the alleged assault.—People v. Harrington, 186 Mich. 482.

¶ 1099. An uncle of the complaining witness in a prosecution for an assault with intent to commit rape on a female under the age of sixteen years, may testify as to what she told him about the occurrence immediately after the alleged assault.—People v. Harrington, 186 Mich. 482.

¶ 1100. In a prosecution for assault with intent to commit rape upon a 12-year-old girl, evidence of complaints made by her almost immediately after the offense was admissible.—People v. Rich, 133 Mich. 14.

¶ 1101. Statements made by the prosecutrix out of court and in the absence of the accused, as to the latter's guilt, are hearsay, and not admissible on a trial for rape.—People v. Ayers, 186 Mich. 366.

¶ 1102. One who, on hearing the screams of a girl who claimed to have been ravished, immediately went to the house to which she had fled, may testify as to her appearance.—People v. Jansma, 181 Mich. 62.

¶ 1103. Statements of the alleged victim as to her consent, to the intercourse through fear of threats, and as to the force used, made in respondent's presence, are admissible in connection with his failure to deny them.—People v. Flynn, 96 Mich. 276.

¶ 1104. Statements of a complaining witness as to defendant having taken improper and indecent liberties with her person are admissible as tending to corroborate the testimony of complaining witness, the fact that she complained of the conduct of the accused being admissible, but the details of the complaint being inadmissible.—People v. White, 194 Mich. 172.

¶ 1105. In a prosecution for taking indecent and improper liberties with the person of a girl, the testimony of the witness that she remembered the complaining witness having spoken to her about what she claimed that the accused did to her, is properly excluded as having the effect of a statement of the details where the complaining witness precedes such witness on the witness stand and informs the jury what her claims were.—People v. White, 194 Mich. 172.

¶ 1106. Statements made by the complaining witness in a prosecution for having taken indecent and improper liberties with the person of a girl, made to a playmate in the course of a dispute between the complaining witness and such witness as to which girl's grandfatner the accused was, do not constitute a complaint, but are mere hearsay and are improperly admitted in evidence.—People v. White, 194 Mich. 172.

§ 234. ——Belated complaints and reasons for delay.

¶ 1107. Delay in making complaint is not a fact belonging to the res gestæ, but is only material as bearing upon the credibility of the prosecutrix; and that is for the jury.—Turner v. People, 33 Mich. 363.

¶ 1108. Notwithstanding several months' delay, not only the fact of making complaint but what the victim said may be shown, and her delay in complaining does not bear on the admissibility of the evidence, but on its weight; delay in the case of a young girl is sufficiently excused by fear of chastisement for telling.—People v. Gage, 62 Mich. 271.

¶ 1109. A mother may testify as to a statement made to her by her child, eleven years old, thirteen days after an alleged rape upon her, as to who committed the offense, it appearing that the child had concealed the matter through fear that her mother would whip her.—People v. Glover, 71 Mich. 303.

¶ 1110. In a prosecution for rape it is proper to show by the victim's mother that two days after the alleged rape her daughter's appearance and behavior were such that she insisted on knowing what the matter was, and the daughter told her.—People v. Brown, 53 Mich. 531.

¶ 1111. It is not error to admit the statement of the victim's sister that she made complaint to her next morning that the prisoner on trial and another person named forced her in her chamber the evening before; the persons so implicated having themselves admitted intercourse.—Brown v. People, 36 Mich. 203.

¶ 1112. It is competent for the mother of the prosecutrix, on a trial for carnally knowing a woman under the age of consent, to testify that her daughter, upon arriving home some days after the assault, told her what had occurred.—People v. Bernor, 115 Mich. 692.

¶ 1113. In a prosecution for ravishing a girl nearly fourteen years old, her testimony to a conversation had five months after the alleged offense with a woman with whom she was then living is inadmissible where it does not appear that her previous silence was induced by threats by respondent, but, as claimed, only on his suggestion that it would be better to keep still.—People v. Duncan, 104 Mich. 460.

¶ 1114. On a trial for rape claimed to have been committed upon respondent's stepdaughter during her mother's absence, the alleged victim may testify that because of the respondent's threats to kill her if she made such complaint she did not complain to her mother on the latter's return on the evening of the day of the offense.—People v. Ezzo, 104 Mich. 341.

¶ 1115. A complaint made by a prosecutrix of the commission of rape upon her by accused within twenty-four hours after the commission of the alleged assault and as soon as she could reach her mother by train, held admissible in evidence.—People v. Ayres, 195 Mich. 274.

¶ 1116. A complaining witness in a prosecution for statutory rape, a child 14 years of age, may be permitted to give her reasons why she had not told her parents of the alleged assault upon her.—People v. Coston, 187 Mich. 538.

§ 235. ——Detailed statements by victim.

See also ante ¶¶ 1088, 1092, 1104, 1105.

¶ 1117. In a prosecution for rape, it was improper to permit a witness to narrate in detail a long conversation she had with the girl, when, three months after the commission of the offense, she complained to her of the outrage.—People v. Row, 135 Mich. 505.

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¶ 1124. The deposition of a witness taken upon the preliminary examination of a respondent is admissible on the trial as original evidence.—People v. Kennedy, 105 Mich. 434.

¶ 1125. On a second trial for rape where the prosecutrix testifies that her evidence on the first trial as to the guilt of the accused was false, her former testimony is admissible only as affecting her credibility.—People v. Ayers, 186 Mich. 366.

¶ 1126. The efforts made to secure an absent witness, or the reason why his deposition was not obtained, should be shown to warrant reproducing his testimony on a former trial.—People v. Long, 44 Mich. 296.

¶ 1127. The testimony of other witnesses at the former trial proved under the stenographer's oath may be read in evidence, where its purpose is expressly limited to showing the materiality of the alleged false testimony for which accused is charged of perjury.—People v. Macard, 109 Mich. 623.

¶ 1128. Where the prosecutrix on a second trial for rape testifies that her evidence of the first trial as to the guilt of the accused was false, her previous testimony is not admissible as substantive proof of the guilt of the accused.—People v. Ayers, 186 Mich. 366.

§ 237. ——Testimony of accomplices and co-defendants.

¶ 1129. Where respondent and another were charged with larceny and respondent was being tried first, testimony of the other given in the police court cannot be read in evidence after such other has been excused from answering on the ground that it might incriminate him, there being no charge of conspiracy, the effect of such proceeding being to get his testimony into the record without any opportunity of cross-examination.—People v. Hutchings, 137 Mich. 527.

¶ 1130. In a prosecution against respondent for conveying a weapon adapted to aid a prisoner to escape, evidence, against respondent's objection, of the files and proceedings in the prosecution against him and also the files and proceedings against the prisoner for attempted murder, while in an effort to escape, is improperly received where the proceedings were taken after the offense charged against respondent was complete, if one was committed, he being no party to the proceedings and not bound by them.—People v. Fox, 142 Mich. 528.

§ 238. Foundation proofs.

Necessity that declaration should have been heard by accused to charge him therewith, see ante § 226 et seq.

Admissibility of letter without proof of signature, see ante ¶ 1026.

Order of proofs of foundation facts and of declarations themselves, see post § 359.

Sufficiency of identification of former testimony to support reading it in argument to point out discrepancy of testimony on trial, see post ¶ 1787.

¶ 1131. Evidence as to the contents of a letter written by a person implicated in the crime, who has turned state's evidence, is inadmissible where its relevancy is not established by preliminary questions.—People v. Evans, 150 Mich. 443.

¶ 1132. In a prosecution for seduction the mother of the girl testified that after defendant's arrest he came to the mother in Louisville to induce her to go to Detroit. Held, it was not reversible error to admit in evidence two letters and telegrams on this subject, sent by defendant to the mother, without proof that defendant sent them, where on their face they showed a connection with the previous conversation with the mother.—People v. Adams, 162 Mich. 371.

¶ 1133. In a prosecution under Pub. Acts 1911, Act No. 62, How. 2nd. Ed. § 5299, prohibiting certain classes of immoral advertising, a letter, "in reply to your recent letter," sent by defendant to an advertising distributor, together with a blank form to be sworn to by the distributor, and a copy of the advertising pamphlet, which was annexed to the information, purporting to have been issued by defendant, are admissible in evidence in connection with testimony that an agent of the distributors had distributed similar pamphlets, and that the pamphlets had been received by residents.—People v. Kennedy, 176 Mich. 384.

¶ 1134. The acts and declarations of one charged as a conspirator are not admissible in evidence until a prima facie case of conspiracy is shown.—People v. Parker, 67 Mich. 222.

¶ 1135. Stenographer's minutes of former testimony cannot be received to supply the testimony of an absent witness if they are not shown to be correct.—People v. Sligh, 48 Mich. 54.

¶ 1136. Testimony of a stenographer that, by the aid of his minutes, he can give, "just as it was given in court," the testimony taken at a former trial, is sufficient proof of the correctness of such minutes.—People v. Macard, 109 Mich. 623.

§ 239. Circumstances, time or place of declarations.

See also post ¶ 1168.

Admissibility of entire statement, see also ante ¶ 689.

Complementary portion of threat to show that it was boastful, see ante ¶ 1013.

¶ 1137. On a trial for murder, testimony by the sheriff of a conversation with respondent shortly after the shooting, is admissible

though the sheriff was permitted to state that the conversation occurred in the saloon where respondent was bartender, and hence justified a subsequent argument that the law requiring the saloon to close at 10 o'clock was violated; since his testimony would have been incomplete had he not been permitted to state where the conversation occurred.—People v. Farrell, 137 Mich. 127.

§ 240. Explanation and rebuttal of declaration or statement.

Circumstances attending conversation or statement, see ante § 239.

Rebuttal and explanation of admissions, see post § 264.

¶ 1138. In a coroner's records was a statement by a doctor that deceased on whom accused held an inquest was a "stranger." It was not used before the coroner's jury but was prepared by the coroner or his clerk and signed by the doctor on request for the purpose of having a showing that deceased was a stranger to the state of Michigan, so that the fees could be collected from the state. It was untrue that deceased was a stranger, and when called by the people the doctor testified that deceased was according to her information a resident of Michigan. Held, proper to allow her to testify that by "stranger" in her signed statement she meant that deceased was a stranger to her, the issue being whether accused had guilty knowledge of the fact and presented the claim as part of a system of fraud, and her interpretation being the only reasonable one her statement would bear.—People v. Hoffmann, 142 Mich. 531.

¶ 1139. A woman physician who attended a woman at an emergency hospital and there discussed the circumstances of the woman's shooting and the place of her residence, and who testifies that she there signed a statement in which it appeared that the sick woman was a "stranger" in the presence of and at the request of accused, a coroner, indicted for falsely claiming fees from the state on the ground that the woman was not of Michigan and that he had held an inquest on her body, may testify to those facts and explain that she meant merely that the woman was a stranger to the signer; though another witness has testified that it was he, the coroner's clerk, to whom the statement was given and that another physician was present, since the jury might find that it was in fact made to accused and, if so, the testimony tended to show that he knowingly falsified.—People v. Hoffmann, 142 Mich. 531.

¶ 1140. Where, in a prosecution for assault with intent to kill, respondent testified that he had heard the complaining witness was a dangerous man, evidence was admissible on rebuttal to show the reputation of the latter for being a peaceable, law-abiding citizen.—People v. Meert, 157 Mich. 93.

drinking together at public houses, held, that every occurrence, every remark, and the whole conduct of the prisoner from the time he and the deceased came together until the consummation of the crime, were competent evidence, as part of the res gestæ, to enable the jury to determine whether any crime was committed, as well as to inform them of its degree.—People v. Potter, 5 Mich. 1.

¶ 1145. On a prosecution for manslaughter by abortion a communication from accused to the father of the woman, stating that she was sick and wanted her mother to go to see her, is res gestæ, where he being the father of the unborn child enticed the woman to leave her home and go to another town and there submit to an abortion in consequence whereof she became sick and died.—People v. McDowell, 63 Mich. 229, per Sherwood, J., and Campbell, C. J., Morse and Champlin, JJ., assenting to the principle, dissented from the application because the communication was by message to the father of the accused and was by him transmitted to the father of the woman, and being testified to by the latter was hearsay; but they concurred in the result, deeming the error harmless.

¶ 1146. A witness for the prosecution on a trial for homicide which resulted from certain riotous assemblages, having testified fully in reference to the proceedings of the assemblage on the night previous to the homicide, and that defendant had confessed to having struck deceased on the second night, denied on cross-examination that he had stated to different persons soon after that he was present as a "horner," but was merely a looker-on, and took no part in the matter whatever. Held, that such statements related to the res gestæ, and their contradiction was competent.—Patten v. People, 18 Mich. 314.

¶ 1147. In a prosecution for murder, testimony of a detective of another city concerning the circumstances of the arrest of the respondent for another crime, robbery, and his statements and conduct at that time, are admissible notwithstanding the charge and arrest was for a different crime.—People v. Higgins, 127 Mich. 291.

¶ 1148. On a prosecution for larceny, it seems that testimony of the finding of property, stolen at the time alleged, in the possession of accused, is admissible as part of the res gestæ though some of the articles were not described in the information.—People v. Nagle, 137 Mich. 88.

¶ 1149. In a prosecution for an assault and battery, alleged to have been committed by the proprietor of the house where a spiritualistic seance was being held, upon one who had been invited there to investigate, evidence that prior to the assault, which was provoked by the investigator's striking a match, the medium had been tied to a chair, and a "dark circle" formed, was admissible as part of the res gestæ.—People v. Hughes, 116 Mich. 80.

¶ 1150. Upon the charge of uttering as genuine a forged power of attorney, proof that both the power, and the deed purporting to be executed in pursuance of it, were in the handwriting of one who was concerned with the defendant in the fraud and shared in the fruits of it, is proper as part of the res gestæ and also as bearing upon guilty knowledge.—People v. Marion, 29 Mich. 31.

¶ 1151. Where the superintendent of a corporation was in the habit of forwarding invoices of lumber purchased to the home office, and of receiving checks payable to the order of the vendors for delivery to them, and was prosecuted criminally for the alleged forgery of the indorsement on one of said checks, testimony respecting the invoices, the drawing and forwarding of the checks, their payment by the bank, and their condition when presented for payment, is relevant to establish the forgery and uttering of the paper.—People v. Kemp, 76 Mich. 410.

¶ 1152. That respondent forged and uttered other checks at or before the time of forging the check set forth in the information is competent as part of the res gestæ to show the fraudulent character of respondent's act in passing the paper alleged to have been forged.—People v. Kemp, 76 Mich. 410.

¶ 1153. In a prosecution for selling liquor to a minor under Pub. Acts 1887, No. 313, § 13, respondent may show all that transpired between him and the minor at the time of the selling, as part of the res gestæ and as bearing upon the intent.—People v. Welch, 71 Mich. 548.

¶ 1154. Upon a trial for larceny it is competent to show as part of the res gestæ that respondent was seen with a newspaper in one hand, while his other hand was among the ladies' dresses, feeling of their pockets, and that the witness notified officers of respondent's movements, which caused them to watch him.—People v. Machen, 101 Mich. 400.

¶ 1155. In a prosecution for the larceny by a bookkeeper of certain bonds belonging to his employers, the people were properly permitted to show that on a certain morning, two days after the time the theft was alleged to have been committed, and after time to secrete the bonds in another city, the attention of the employers was called by respondent to the condition of the vault in which the bonds had been kept; that upon examination they found that the combination lock had been removed from the outer door of the vault, that certain books and vouchers which were in the vault the day

before had been taken, and that the bonds were gone.—People v. Parsons, 105 Mich. 177.

¶ 1156. On the trial of a conspiracy to extort money from a firm by entrapping it into a violation of the revenue law, evidence is admissible of facts so inseparably associated in time that each is intimately connected with the res gestæ of the other; as where it was attempted to show that the party complaining of the violation complained, at the same time and place, of another firm for the same offense.—People v. Saunders, 25 Mich. 119.

¶ 1157. On a trial for resisting an officer while he was arresting accused for disturbing a religious meeting, evidence that the meeting was more or less disturbed all that evening may be admissible as part of the res gestæ.—People v. Rounds, 67 Mich. 482.

¶ 1158. In a trial for larceny from the person a prosecuting witness who has identified a bank bill found on the defendant may testify that he had described the bill to one of the detectives previously; under the circumstances this is part of the res gestæ rather than a mere hearsay declaration.—People v. Morrigan, 29 Mich. 4.

¶ 1159. In a prosecution for murder, evidence that the defendant had purchased morphine, that she intended to commit suicide and take her children with her, together with evidence that she and the children were found suffering with the symptoms of morphine poisoning, and that both children subsequently died, is sufficient to entitle her admissions made at the time of the discovery to be admitted as part of the res gestæ.—People v. Quimby, 134 Mich. 625.

¶ 1160. To show circumstances of killing one of officer's posse attempting to make arrest, evidence that officer had been told that respondent threatened to resist arrest, and that officer requested posse to accompany him, as he feared resistance because of previous threats, is admissible.—People v. Gosch, 82 Mich. 22.

¶ 1161. In a prosecution under the statute punishing the careless use of firearms, based on the shooting of a boy by defendant, evidence that defendant just before the shooting pointed the gun at another boy who was present, is admissible as part of the res gestæ and as tending to show the absence of malice.—People v. Dudley, 131 Mich. 261.

¶ 1162. On a trial for murder it was proper to admit testimony of two witnesses as to matters that occurred at the house of the accused two hours after the alleged murder; that the wife of the accused had shown the witnesses through the rooms of the house and that the accused had there furnished them with cider, although he had not fol-

missible as part of the res gestæ.—People v. McBride, 120 Mich. 166.

¶¶ 1168, 1169. Statements of the wife of one charged with murdering his infant children, made in his presence, which are necessary to a full understanding of what he said, may be testified to by a third party as part of the res gestæ.—People v. Foley, 64 Mich. 148.

¶ 1170. Evidence that the mother of a person accused of manslaughter ordered him to make certain children go away, held admissible, it appearing that the children had annoyed the mother, and that the accused attacked one of the boys and killed him immediately after the mother directed him to make them go out, and consequently the statement of the mother was a part of the res gestæ.—People v. McArron, 121 Mich. 1.

¶ 1171. A statement of a mother of an accused to the effect that she said, "Now see what you have done," held admissible as a part of the res gestæ, in a prosecution for manslaughter where the accused killed a boy while driving children away from the premises, as, directed by the mother, and such statement was also admissible to explain a remark of the son who swore and said, "I will show him."—People v. McArron, 121 Mich. 1.

¶ 1172. In a manslaughter case, evidence of a remark made by the defendant's wife to a third person in defendant's presence, after a fight, asking him not to let defendant go at the "old man" any more, was properly admitted.—People v. Hossler, 135 Mich. 384.

§ 244. ——Acts and statements of accomplices.

See also ante ¶ 1150.
As to possession of goods stolen, see also ante ¶ 1166.
Acts and declarations after abandoning conspiracy but for purpose of avoiding discovery, see ante ¶ 1080.
Declarations and acts of accomplices and coconspirators, see also ante § 230 et seq.
Of third persons other than accomplices, see ante § 243, post §§ 245, 246.
Statements by other party to adultery, see also ante § 230.

¶ 1173. Where, upon N.'s trial for rape, there is evidence that two men went together to the house where the offense was committed, one of whom escaped, while the other (O.) was captured, testimony by a witness who was present at the time of the capture, that O. (who has pleaded guilty) said a few minutes thereafter, "How came I here? Oh, I know; N. brought me here," is hearsay and is not admissible as part of the res gestæ to establish N.'s identity.—People v. Newton, 96 Mich. 586.

¶ 1174. The dying declaration of the woman in childbirth, offered on a prosecution for incest, to the effect that the respondent was responsible for her condition, is not admissible.—People v. Stison, 140 Mich. 216.

¶ 1175. The acts and admissions of coconspirators are admissible as part of the res gestæ to prove guilt of one charged with bribery.—People v. Salsbury, 134 Mich. 537.

§ 245. ——Acts and statements of victims or subjects of crime.

See also ante ¶ 1048.
Declarations by woman of purpose and reason for going to where abortion was performed, see ante ¶ 1142.
Res gestæ of victim's possession of money, see ante ¶ 1164.
Belated complaints and reasons for delay in complaining, see ante § 234.
Complaints and statements by victims and antagonists as hearsay, see ante § 232 et seq.
Acts and declarations of accomplices and coparties, see ante § 244.
Admissibility of complaints made by woman or girl alleged to have been raped, see also Rape.

¶ 1176. A complaint made to bystanders within three minutes after the commission of a crime of violence (such as robbery) is immediate enough to be regarded as a part of the res gestæ.—Lambert v. People, 29 Mich. 71.

¶ 1177. A complaint of robbery made to a policeman immediately after its alleged occurrence is admissible on the prosecution as part of the res gestæ. So, also, are the statements made at the same time by the accused. —Driscoll v. People, 47 Mich. 413.

¶ 1178. In a prosecution for murder it was shown that deceased died of a wound in the head inflicted by some sharp instrument during a fight with respondent. Held, that his ante-mortem statement to the doctor who dressed his wound—neither of them at the time considering the wound to be dangerous —that respondent made the wound with a knife, was incompetent, not being part of the res gestæ.—People v. O'Brien, 92 Mich. 17.

¶ 1179. Upon a trial for murder by poisoning, a physician whom the deceased consulted about a month before her death may testify as to what she told him about her present condition but not as to what she narrated about her previous symptoms.—People v. Foglesong, 116 Mich. 556.

¶ 1180. Spontaneous statements made by a person shortly after being shot, as to the occurrence, are admissible on a trial for murder, as part of the res gestæ.—People v. Johnson, 186 Mich. 516.

¶ 1181. What a person said immediately after being shot as to whether he ever had a gun, is not admissible on a trial for mur-

der, as part of the res gestæ.—People v. Johnson, 186 Mich. 516.

¶ 1182. In a prosecution for assault with intent to do great bodily harm less than the crime of murder, evidence of what the assaulted person said shortly after the accident to a minister to whose house he was taken to be cared for, is admissible.—People v. Hennard, 162 Mich. 225.

¶ 1183. Testimony by a female companion of the alleged victim, who escaped while she and said victim were being taken in a buggy to the place where the offense was said to have been committed, that the last witness knew of the victim after witness jumped from the buggy the other girl was "hollering" for help, was admissible as part of the res gestæ, as was her testimony as to which way the buggy went after she left it, and also her testimony that after leaving the buggy she was at police headquarters a while before going home.—People v. Flynn, 96 Mich. 276.

¶ 1184. Statements of a complaining witness as to defendant having taken indecent and improper liberties with her person which are made about one week after the occurrence are not admissible as part of the res gestæ, because made too long after the event. —People v. White, 194 Mich. 172.

§ 246. ——Acts and statements of woman killed by abortion.

Declaration of woman dying in childbirth inculpating party in incest, see ante ¶ 1174.

¶ 1185. Upon a trial for manslaughter resulting from abortion, evidence of a statement by the deceased girl of what respondent had said or done some days before she related it, in regard to her taking medicine, etc., is inadmissible; it not being a dying declaration or res gestæ, it is hearsay.—People v. Aikin, 66 Mich. 460.

¶ 1186. In a criminal prosecution against a physician for causing death by abortion, the declarations of woman made to third persons the day before the alleged operation as to her pregnancy and purposes are admissible against defendant for the purpose of showing the fact of pregnancy and the corpus delicti.—People v. Fritch, 170 Mich. 258.

¶ 1187. In a criminal prosecution against a physician for causing death by abortion, it is proper to permit a witness to testify as to the inquiries which the deceased made of her in requesting to be referred to a doctor, for the purpose of proving the fact of pregnancy and the corpus delicti.—People v. Fritch, 170 Mich. 258.

¶ 1188. In a criminal prosecution against a physician for causing death by abortion, the statements of the deceased made after her visit to defendant, which were but recitals and conclusions from statements made to her by defendant, are not admissible for the purpose of proving the fact of pregnancy.—People v. Fritch, 170 Mich. 258.

¶ 1189. In a criminal prosecution against a physician for causing death by abortion, a witness testified that the deceased asked to be referred to a doctor, and referred the witness to respondent. Held, it was not proper to state why the deceased made the inquiry or to express her opinions and what she had heard concerning the respondent for the purpose of proving the fact of her pregnancy.—People v. Fritch, 170 Mich. 258.

¶ 1190. In a criminal prosecution against a physician for causing death by abortion, it is not proper to permit a witness to testify what the deceased told her the respondent had said on the occasion of the visit of the deceased to his office.—People v. Fritch, 170 Mich. 258.

7. *Admissions and confessions.*

§ 247. In general; nature and form of confession or admission.

Implied or tacit admissions, see post § 250 et seq.
Admissions in form of writing or printing, see post § 248.
Admissions contained in former testimony or pleas to indictments, see post § 249.
Relevancy of admission to the issues, see post § 256.
Admissions by accomplices, see post § 262.
Admissions by prosecuting witness, see post § 263.
Rebuttal and explanation of admissions, see post § 264.
Confessions, voluntariness or coercion, see post §§ 257-261.
Weight and effect as proof, see post § 313.
Admissions to avoid continuances, see ante § 125.
Direction of verdict on confession of accused on the stand, see post ¶ 1872.
Harmless errors in admission or rejection and cure of errors, see post XV.
Erroneous admission of evidence cured by admission of guilt, see post § 555.

¶ 1191. Where, after his arrest, and before his trial, one accused of crime makes a written confession before a notary, under oath, the introduction of the confession in evidence at the trial is admissible, and is not compelling the accused to be a witness against himself, nor is it prohibited by section 32, art. 6 of the Constitution.—People v. Owen, 154 Mich. 571. (Moore, and McAlvay, JJ., dissenting.)

¶ 1192. That the statement of the respondent to the officers at the time of his arrest was taken down stenographically does not render inadmissible previous and different

oral statements to them not included in the written report.—People v. Ponsford, 181 Mich. 659.

¶ 1193. A man was indicted for burning a barn to defraud insurers; a statement made by him several months after the burning, "that he had a good insurance on his house, and it might go to blazes with the barn," was not an admission that he burned the barn.—Hamilton v. People, 29 Mich. 173.

¶ 1194. Respondent's saying, after a homicide, "I guess I am all right yet, for they cannot prove it, when no one saw me do it," is not a confession of guilt, and should not be regarded as such in instructing the jury. —People v. Peterson, 93 Mich. 27.

¶ 1195. A statement by a physician to a prosecuting attorney after his arrest for illegally prescribing intoxicating liquor while having good reason to believe the patient intended to use it as a beverage, that he guessed he was "in wrong" as far as a certain patient was concerned, that he wanted to get rid of the matter as quickly as he could, and that he "didn't want it to get into the papers," held not to be a confession or admission of guilty knowledge or belief.—People v. Humphrey, 194 Mich. 10.

¶ 1196. In a bribery case where it was claimed that the only evidence of the bribery was to be found in extrajudicial confessions of parties who were particeps criminis, and that therefore there was no competent proof of the corpus delicti; all testimony that the party charged to have been bribed received a bribe was competent, and as there was a conspiracy, all that defendant said in plotting, planning and carrying it out was res gestæ and did not fall within the definition of confessions, although it might be statements of transactions to his confederates, if they were transactions in furtherance of the enterprise.—People v. McGarry, 136 Mich. 316.

¶ 1197. Upon the trial of a township treasurer for unlawfully appropriating to his own use money received by him in his official capacity, a conversation between him and his successor, after he himself had ceased to be treasurer, may be shown as an admission on his part of a shortage in his accounts.—People v. Seeley, 117 Mich. 263.

§ 248. Writings, prints or records as admissions.

¶ 1198. A death certificate and a sworn certificate made by one who therein described himself as "medical practitioner" and "Dr." are admissible to show that he held himself out as such practitioner.—People v. Phippin, 70 Mich. 6.

¶ 1199. In a prosecution for adultery respondent's letters to one whom he addresses therein as his wife are admissible to prove her marriage to him.—People v. Imes, 110 Mich. 250.

¶ 1200. Evidence of what one person showed to another in print is admissible if it would have been proper to show what he said to him.—People v. Millard, 53 Mich. 63.

¶ 1201. Printed reports of the state officers, printed by the state printer under their direction, are evidence against such officers. —People v. McKinney, 10 Mich. 54.

¶ 1202. On the trial of an information under Comp. L. 1857, § 5771, How. St. § 9149, the account books kept in the office of defendant during his official term, and purporting to show all his receipts and disbursements as state treasurer, are admissible to show that the sums alleged to have been embezzled have not been credited to the state; and this notwithstanding no part of the books is in his handwriting.—People v. McKinney, 10 Mich. 54.

¶ 1203. On the trial of a township treasurer for embezzlement, the record required by How. St. § 739 to be kept by the township clerk, showing the amount charged as received by the respondent from his predecessor, and the other items of his receipts and expenditures during his term of office, are competent evidence; and if it further appears that said record and said items were before the township board and respondent when settlements were made with him, and that he was satisfied with the account, except one item, which was allowed him, the testimony, taken together, is sufficient to establish the receipt of the money charged in the account as having been received by the respondent from his predecessor, and the other items charged against him in the settlement.—People v. Flock, 100 Mich. 512.

¶ 1204. The practice of taking the sworn testimony, in writing, before a notary, of one accused of crime, is useless and not to be commended.—People v. Owen, 154 Mich. 571.

§ 249. Admission by testimony or pleas in other trials.

Admissibility of former testimony in general, see ante § 222.

¶ 1205. The testimony of a witness given upon a codefendant's trial is competent, as an admission, on his own subsequent trial for participation in the same crime, although he did not testify as a witness on his own behalf.—People v. Gallagher, 75 Mich. 512.

¶ 1206. A voluntary plea of guilty by an accused person on preliminary examination, though unnecessary to be made, is such a confession of guilt as may properly be submitted to the jury in connection with like confessions made to others and with the surrounding circumstances.—People v. Gould, 70 Mich. 240.

¶ 1207. In a prosecution for being a disorderly person in that he was a drunkard, evidence of prosecution for drunkenness and plea of guilty on several occasions during the time covered by the complaint is competent as admissions of fact.—People v. Radley, 127 Mich. 627.

§ 250. Implied or tacit admissions.

Falsehood, fabrication, suppression, or concealment as admission, see post §§ 251, 253.
Pleading guilty to lesser offenses, see post § 252.
Flight or resistance to arrest, see post § 254.
Surrendering or abstaining from possible flight, see post § 255.
Offers or attempts at suppression of prosecution by third persons, see also ante § 226.
Admissibility of statements of third persons accusing defendant, see ante § 229.

¶ 1208. Where a man was prosecuted for forging a deed that purported to have been made to him by his putative wife, since dead, it was relevant to show that when her estate was inventoried the land deeded was spoken of in his presence as belonging thereto and that he did not claim it, but stated that some of his money had gone to its purchase, and asked if he could maintain a claim against the estate for the amount.—People v. Van Alstine, 57 Mich. 69.

¶ 1209. On the trial of a person for murder, it is competent for the people to show where he went and what he did after he had testified before the coroner's jury and before his arrest.—People v. Stewart, 75 Mich. 21.

¶ 1210. Stenographer's notes of evidence given in an extradition proceeding, growing out of acts for which a charge of bribery was lodged against respondent, held inadmissible in the prosecution for bribery to show that defendant then admitted the charge by silence.—People v. Daily, 178 Mich. 354.

¶ 1211. Where a respondent was charged with larceny in recapturing mortgaged property replevied from him, it was error to allow the prosecutor to read in evidence a paper which he had drawn up and introduced at the preliminary hearing, calling upon reerty immediately to sale upon such claim under the mortgage, and to bring the property immediately to sale upon such claim after due public notice, and to inform the person from whose possession he had taken the property of the time and place of such sale, since such testimony was irrelevant.—People v. Hillhouse, 80 Mich. 580.

§ 251. ——False or fabricated exculpations.

Pleading to minor offense, see post § 252.
Surrender or abstention from flight, see post § 255.

¶ 1212. In a prosecution for breaking and entering a store in the nighttime, the conduct of a defendant is always admissible, e. g., his falsifications regarding the property found in his possession, or his whereabouts at the time the offense was committed, attempts to abscond, etc.—People v. Trine, 164 Mich. 1.

¶ 1213. Where the prosecution had shown, in a trial of forgery, that, in a chancery cause relating to the mortgage alleged to have been altered, the defendant had endeavored to explain the apparent alteration by comparing the mortgage with a certain other paper, the prosecution was also allowed, by way of refuting this explanation, to show corresponding alterations in the other paper. Evidence of the falsity of such an explanation is pertinent and material, and cannot be objected to on the ground that the evidence which the prosecution had introduced of the defendant's explanation was foreign to the issue, and that the prosecution was therefore bound by and could not disprove it.—Perkins v. People, 27 Mich. 386.

¶ 1214. In a prosecution for seduction, evidence that the defendant procured false depositions and that they were all signed in the same handwriting is admissible, even though he does not use them in his defense.—People v. Adams, 162 Mich. 371.

§ 252. ——Pleas of guilty to minor offenses.

¶ 1215. Where the defendant after an alleged crime goes to two justices of the peace and offers to plead guilty of the charge of assault and battery, evidence of this fact is admissible to show the conduct of the defendant after the offense, it being a voluntary act without any inducement being offered him.—People v. Mulvaney, 171 Mich. 272.

§ 253. ——Falsification or suppression of evidence.

Exclusion of inference from failure of accused to testify, see ante § 140.
Silence at extradition proceedings, see also ante ¶ 1210.

¶ 1216. Evidence that the defendant has attempted to suppress testimony or induce perjury, is admissible and tends to show guilt in a criminal prosecution.—People v. Salsbury, 134 Mich. 537.

¶ 1217. On the issue whether accused had guilty knowledge of the falsity of a statement made by him, his affidavit for a continuance, deposing that a certain absent witness would testify to a statement made to accused on which his statement was based, may be received against him; where all the circumstances and the testimony of the said witness taken on the trial tend to show that the affidavit was knowingly false. It is a circumstance evincive of guilt like the fabrica-

tion of false exculpations by accused.—People v. Hoffmann, 142 Mich. 581.

§ 254. ——Flight, concealment or resistance to arrest.

Flight or resistance by accomplice, see ante § 231.

Comments in argument on inferences from attempted flight or falsification, see post § 384.

¶ 1218. The absconding of the party charged as principal, and his concealment after his return, may properly be regarded, in connection with evidence that defendant desired him to leave, as circumstances bearing upon defendant's guilt.—People v. Pitcher, 15 Mich. 397.

¶ 1219. Evidence of the resistance of the accused when arrested is admissible.—Hall v. People, 39 Mich. 717.

¶ 1220. It is proper to show in a criminal case what was done at the time respondent was arrested, and that he resisted the officer. —People v. Burns, 67 Mich. 537.

¶ 1221. Testimony from the prosecution about respondent's being found at the time of his arrest hiding behind some barrels, and that he at first denied his name when asked what it was, was improperly admitted where he denied that he was hiding, and where it did not appear that he knew the sheriff or his deputy, or that there was a warrant out for him, or that he was charged with crime. —People v. Burns, 67 Mich. 537.

¶ 1222. Testimony that the respondent in a robbery case escaped from jail, was properly admitted as against objection on the ground that respondent was at the time of the escape serving for another misdemeanor, and that to make such testimony competent the escape must relate to an attempt to avoid trial of an offense for which the accused was on trial; it appearing that the respondent knew at the time of the escape that he was under arrest for the robbery and would be placed on trial for the offense.—People v. Keep, 123 Mich. 231.

¶ 1223. In a prosecution for an assault with intent to commit murder, the subsequent flight and concealment of defendant cannot be considered as evidence of his guilt.—People v. Cismadija, 167 Mich. 210.

§ 255. ——Surrender or abstention from flight.

¶ 1224. Evidence that one charged with crime voluntarily surrendered after having escaped from jail is inadmissible to remove the inference of guilt arising from the fact of his escape.—People v. Cleveland, 107 Mich. 367.

§ 256. Relevancy of admission to issues.

See also ante ¶¶ 1208, 1211.

Admission of cohabitation as evidence of marriage, see also ante ¶ 832.

Sufficiency of foundation proof of corpus delicti, see post § 266.

¶ 1225. Evidence of an admission by the accused as to the commission of similar larcenies at other times as a business is incompetent on a trial for larceny.—People v. Lapidus, 167 Mich. 53.

¶ 1226. In prosecution for assault, admissions of defendant as to assaults on other persons on occasions distinct from that for which he was on trial, are inadmissible.—People v. Klise, 156 Mich. 373.

¶ 1227. The defendant's admission that he is the brother of the girl's mother, and his treatment as such by the family, are competent evidence in prosecution for incest.—People v. Jenness, 5 Mich. 305.

¶ 1228. Conversations with respondent, after his arrest upon a charge of bastardy, tending to show the act of sexual intercourse, are admissible in a prosecution for seduction.—People v. Hubbard, 92 Mich. 322.

§ 257. Voluntariness; inducement or coercion.

Effect of making statement to or in presence of officers, see post § 258.

Statements made by mistake or not meant to be heard, see post § 259.

Statements obtained by trick or deception, see post § 260.

Voluntariness as court or jury question, see post § 261.

Foundation proofs of voluntariness, see post § 265.

Voluntariness of pleas of guilty, see ante § 113.

¶ 1229. Proof of a confession is never admissible unless it is voluntarily made.—People v. Brockett, 195 Mich. 169.

¶ 1230. A confession to be voluntary must be the free will and accord of defendant without coercion whether from fear of any threat of harm, or inducement by hope of reward, or methods known as "sweating."—People v. Brockett, 195 Mich. 169.

¶ 1231. It is only where statements are drawn from a prisoner by some artifice, promise or threat which induces the hope of benefit, or acts upon his fears, or are made under compulsion, that the law precludes their being used as admissions. If they are free and voluntary, then the motive or intent of the accused in making such statements is not material, as regards their admission in evidence.—People v. Swetland, 77 Mich. 53.

¶ 1232. The written statement of a respondent charged with murder is admissible for the prosecution where the record discloses no undue influence in obtaining it.—People v. Foley, 64 Mich. 148.

¶ 1233. A confession obtained by a private person by saying to the accused: "I know

your father, and you had better tell me so I can tell him so that he can help you," is not obtained by duress where there is no reason to believe that the person obtaining it, or the father of the accused, could influence the prosecution.—Ulrich v. People, 39 Mich. 245.

¶ 1234. Confessions of guilt are inadmissible when persons, apparently acting by authority, obtain them by making respondent believe that he will get off easier by making them. So held where the confessions were made to persons who were allowed access to the prisoner's cell after midnight.—People v. Wolcott, 51 Mich. 612.

¶ 1235. A confession was obtained from a weak-minded person under arrest for crime by telling him that the best thing he could do was to own up, giving him drink, and tak ing him in irons to a lawyer's office where he was interrogated with bolted doors and in the presence of those who were hostile to him, and where his answers were taken down in writing and sworn to. Held, that the confession was not voluntary and could not be used against him.—Flagg v. People, 40 Mich 706.

¶ 1236. Admissions made by a respondent charged with rape were not made under duress because so made in the presence of the father of the injured girl in question, who was very excited and made threats against respondent; and in any event there was no error as respondent was sufficiently guarded by a charge stating the effect of admissions made under duress.—People v. Rich, 133 Mich. 14.

§ 258. ——Statements made to officers.

Offering to plead guilty to minor crime, see ante § 252.

Impropriety of taking sworn testimony on being accused of crime, see also ante ¶ 1204.

¶ 1237. An admission of guilt obtained from an accused person by pressure exerted by public officers, is not admissible against him.—People v. Prestige, 182 Mich. 80.

¶ 1238. Voluntary statements of an accused person to public officers made at the time of his arrest are admissible against him. —People v. Ponsford, 181 Mich. 659.

¶ 1239. A confession of crime is not rendered inadmissible by the fact that it was made to and in the presence of police officers, unless induced by threats, promises, or other circumstances amounting to duress.—People v. Owen, 154 Mich. 571.

¶ 1240. To subject an accused person to a severe "grilling" for several hours, and to use pressure for the deliberate purpose of obtaining an admission of guilt to be used against him, is a practice not included among the duties of prosecuting attorney,

pears that he volunteered the talk; that it was suggested to him by the officer that he should do his talking with the attorney for his employers, whose property he was charged with having stolen, that he was under no obligation to talk with the witness; and that the only suggestion that savored of possible advantage to the respondent was that he might, by talking with the attorney, avoid trouble and notoriety.—People v. Parsons, 105 Mich. 177.

¶ 1249. Respondent objected to the admission in evidence of a statement made by him to the prosecuting attorney while in custody, and taken down by a stenographer, on the ground that it was made in the course of the preliminary examination, and, under the statute creating the court, inadmissible. An extended colloquy followed between the court and the counsel for the respective parties as to the circumstances under which the statement was made, during which respondent's counsel made the further claim that the statement was involuntary. The statements made during the colloquy were unchallenged by respondent, and tended to negative either that they were involuntary or that they were made on a preliminary hearing, and he offered no testimony upon the subject. Held, that the objections were properly overruled.—People v. Clarke, 105 Mich. 169.

¶ 1250. A confession is not voluntary which is obtained after compelling an accused to sleep for two nights upon the cement floor of a cell and persistently importuning him during such period of confinement to make a confession.—People v. Brockett, 195 Mich. 169.

¶ 1251. The mere fact that a defendant accused of murder makes statements while in jail to the prosecuting attorney in reply to questions, does not create the presumption that said statements were made involuntarily.—People v. Sartori, 168 Mich. 308.

¶ 1252. A deputy sheriff told a defendant that he had better tell him the truth about the alleged crime, so that if defendant was innocent, the officers might know it. Defendant then made statements which by their falsity tended to connect him with the crime. Held, said statements were admissible, no promise of leniency having been made.—People v. Trine, 164 Mich. 1.

§ 259. ——Statements by mistake or not meant to be heard.

See also ante ¶ 1246.

¶ 1253. Statements by one under arrest for murder, and under the control of officers who were unduly exciting his fears, made to a newspaper reporter whom he took to be a lawyer, are inadmissible, even if no inducement was held out to him.—People v. Stewart, 75 Mich. 21.

¶ 1254. An officer may testify to a conversation overheard by him between the respondent in a criminal case and his counsel in the jail.—People v. Durfee, 62 Mich. 487.

§ 260. ——Statements obtained by trick or artifice.

See also ante ¶ 1253.

¶ 1255. While respondent was in jail, the deputy sheriff arranged for one Wilcox, a friend of respondent, to visit him for the ostensible purpose of cutting his hair, but for the real purpose of getting information against him. At Wilcox's suggestion, respondent wrote a letter to be delivered to his wife, in which he made admissions of guilt. Wilcox turned this letter over to the officer. Held, it was admissible in evidence against the respondent as a confession.—People v. Dunnigan, 163 Mich. 349.

§ 261. ——As court or jury question.

Charges on voluntariness, see post § 444.

¶ 1256. It is the province of the court to determine in a case free from doubt whether a confession is voluntary or not before admitting or rejecting the same as evidence; but in case of conflict of testimony, or where there is room for doubt, the court should submit the question to the jury, with instructions that if they are satisfied that inducements were used they should disregard the confession.—People v. Barker, 60 Mich. 277.

¶ 1257. Where the preliminary testimony clearly shows that a statement of an accused person at the time of arrest was voluntarily made, it is the duty of the court to admit it, but if in doubt to admit it and leave it to the jury under proper instructions to determine whether voluntarily made.—People v. Prestige, 182 Mich. 80.

¶ 1258. Where the preliminary testimony makes it clear either that the statement claimed to have been made as an admission or confession is voluntary or involuntary, it is the duty of the trial court to admit or reject it, but if the testimony leaves the question in doubt it is the duty of the court to admit it and leave the question to the jury under proper instructions to determine whether it was voluntarily made.—People v. McClintic, 193 Mich. 589.

¶ 1259. Evidence of respondent's statements or confessions to an officer is competent where the question whether they were freely and voluntarily made is fairly submitted to the jury.—People v. Howes, 81 Mich. 396; People v. Robinson, 86 Mich. 415.

¶ 1260. Where a statement made in jail by one charged with rape, to the effect that he had intercourse with the alleged victim, was testified to by the sheriff as voluntary, while respondent did not testify at all as to the interview, it was for the jury to decide

whether it was voluntary.—People v. Flynn, 96 Mich. 276.

§ 262. Admissions by accomplices or privies.

Admissibility of third persons' and accomplices' declarations in general, see ante § 226 et seq.

¶ 1261. While the admissions or declarations of an accused party are competent, the statements of another are purely hearsay, unless made under such circumstances, in the presence and hearing of the accused, that his acquiescence in such statements can be plainly inferred from his demeanor or conduct.—People v. O'Brien, 68 Mich. 468.

¶ 1262. Where two are jointly indicted, and one on the trial of the two admits his own guilt, the admission has no force as evidence against his codefendant.—People v. Stevens, 47 Mich. 411.

¶ 1263. On the joint trial of persons accused of crime the admissions of one made in the other's absence may be admitted as evidence against him, but the jury must be cautioned not to allow them to prejudice the corespondent.—People v. Maunausau, 60 Mich. 15.

¶ 1264. A conspiracy may be shown by the detached acts and statements of the individual conspirators, and in a prosecution therefor the admissions of a confederate after the offense was committed are admissible to prove his own participation, the jury being cautioned not to permit his confessions to prejudice others.—People v. Arnold, 46 Mich. 268.

¶ 1265. Statements made in respondent's absence by a person not charged as an accomplice are inadmissible in aid of the prosecution.—People v. Lyons, 49 Mich. 78.

§ 263. Admissions by prosecuting witness.

¶ 1266. In a prosecution for larceny an offer to show that the deceased prosecuting witness had made a settlement of the money taken by the accused is inadmissible inasmuch as the prosecuting witness is not a party to a criminal case, and therefore his admissions or contradictory statements cannot be introduced as affirmative or original evidence. It was essential to the admissibility of this testimony for impeachment, that the prosecuting witness' attention should have been first called to it.—People v. Peck, 147 Mich. 84.

¶ 1267. Evidence that the prosecutrix had admitted sexual intercourse with another person than the defendant is not admissible in a trial for seduction as proof of a substantive fact, nor to show by itself a want of virtue, though it might be used as impeaching testimony after the proper foundation had been laid for its introduction.—People v. Brewer, 27 Mich. 134.

§ 267. In general; character of accused.

Relevancy of character or trait, see post § 268.
Reputation and personal knowledge or opinion distinguished, see post § 269.
Common rumor or loose talk, see post § 270.
Single instances, see post § 271.
Customs and habits of persons, see post § 272.
Character or reputation of other persons, things and places, see post §§ 273-276.
Weight and effect of character evidence as proof, see post § 816.
Instructions on character evidence, see post § 445.
Character and reputation affecting credibility of witness, see Witnesses, VI, D.

¶ 1273. In every criminal trial the defendant is entitled to prove good reputation, and the jury are at liberty to give it such weight as they think it entitled to.—People v. Garbutt, 17 Mich. 9; Hamilton v. People, 29 Mich. 195; Watson v. Watson, 53 Mich. 168, 177.

¶ 1274. Evidence of good character is admissible not only in a case where doubt otherwise exists, but may be offered for the purpose of creating a doubt.—People v. Jassino, 100 Mich. 536; People v. Humphrey, 194 Mich. 10.

¶ 1275. The character for chastity of a female defendant in a criminal case can be put in issue only by her, and when not so done it cannot be injected into the case by cross-examination, or by rebuttal of such cross-examination improperly allowed.—People v. Connelly, 157 Mich. 260. (Hooker, Grant and Montgomery, JJ., dissenting.)

¶ 1276. It is not competent for the prosecution, on the trial of a criminal case, to introduce evidence that tends only to prove a general disposition to commit crime.—People v. Potter, 5 Mich. 1.

§ 268. Relevancy to issues.

To rebut statements or declarations as to character of person, see ante § 240, ¶ 1140.
Opinion of one expert as to another's qualifications based on reputation, see ante ¶ 967.
Admissibility of evil repute in prosecution for keeping or letting house for disorderly purposes, see also post ¶¶ 1465, 1467.

¶ 1277. Defendant's reputation as a good soldier in the army is irrelevant in a case of homicide.—People v. Garbutt, 17 Mich. 9.

¶ 1278. In a prosecution for perjury it is error to exclude testimony tending to prove that respondent's reputation for truth and veracity is good, and the fact that counsel does not state the purpose of such testimony does not justify its exclusion, the purpose being obviously one bearing on one of the issues in the case.—People v. Albers, 137 Mich. 678.

¶ 1279. In a trial for seducing and debauching an unmarried woman, she being prosecuting witness, evidence of her reputation for morality and virtue at the time of the trial is inadmissible, as her reputation at that time would be injuriously affected by the offense itself when made known.—People v. Brewer, 27 Mich. 134.

¶ 1280. Testimony in a trial for murder that deceased was reputed to be a woman of loose character is inadmissible to sustain respondent's theory that he was rendered insane by reason of a venereal disease communicated to him by her.—People v. Beverly, 108 Mich. 509.

¶ 1281. In a prosecution for larceny, it is competent to inquire into defendant's reputation for honesty in the community where he resides. The inquiry in each case should relate to the trait of character involved in the crime charged.—People v. Ryder, 151 Mich. 187.

§ 269. General reputation or personal knowledge of witness.

¶ 1282. It is not error in a prosecution for perjury to refuse to permit witnesses to give their opinion, based on personal knowledge and not on reputation, of respondent's character for honesty and integrity, it being a settled rule of the common law that such testimony is inadmissible.—People v. Albers, 137 Mich. 678.

§ 270. Rumor and common talk.

¶ 1283. Reputation cannot be shown by rumors at a distance.—People v. Pinkerton, 79 Mich. 110.

§ 271. Single and specific instances.

See also post ¶ 1292.
Single act to rebut good character, see post ¶ 1296.
Admissibility of specific instances of violent temper observed by accused as bearing on killing in self-defense, see also Homicide § 52.

¶ 1284. Specific instances of good conduct held not admissible to show the reputation of a defendant in a prosecution for seduction.—People v. Bollman, 178 Mich. 159.

§ 272. Customs and habits of persons.

Of associates, victims and third persons, see post §§ 273, 274.

¶ 1285. On a trial for robbery the prosecuting witness testified that he was taken by the prisoner to a house of ill-fame, and thence into the street where he was robbed. The defense then sought to show that the prisoner was not accustomed to visit such places. Held immaterial.—People v. Becker, 48 Mich. 43.

¶ 1286. Testimony by the wife of a respondent on trial for burglary that he had left her, that he had admitted he had another wife living, and that he got drunk and abused her—she being called as a witness by the people, and it not appearing that she had any knowledge of the offense or of respondent's connection therewith—is prejudicial and requires reversal.—People v. Betts, 94 Mich. 642.

§ 273. Character of associates, victims and third persons.

Evidence of known dangerous character of deceased to show killing in self-defense, see Homicide § 52.

Quarrelsome character as evidence on alleged killing in self-defense, see Homicide § 52.

¶ 1287. In a prosecution for keeping a house of ill-fame, evidence that one of the inmates of the house had borne the reputation of being a common prostitute is admissible.—People v. Russell, 110 Mich. 46.

¶ 1288. Evidence in a prosecution for keeping a house of ill-fame that one of the inmates of the house has borne the reputation of being a common prostitute, is not so remote as to be incompetent although it relates to reputation three years before, particularly where it covers a period down to the time the offense is charged to have been committed.—People v. Russell, 110 Mich. 46.

¶ 1289. The bad character of a woman on whose premises a person was arrested charged with an assault committed elsewhere cannot be shown upon the prosecution of such person for such offense, in the absence of any showing implicating the woman.—People v. Sweeney, 55 Mich. 586.

¶ 1290. Where there is no pretense that the killing was in self-defense, but rather that defendant had followed the deceased for the apparent purpose of shooting him, evidence showing that deceased was reputed to be a quarrelesome man, that he carried weapons and threatened to use them on defendant, is inadmissible.—People v. Garbutt, 17 Mich. 9.

¶ 1291. Upon a trial for murder, evidence that deceased was reputed to be a woman of loose character is inadmissible in support of the theory that respondent was rendered insane by reason of a venereal disease communicated to him by the deceased.—People v. Beverly, 108 Mich. 509.

¶ 1292. Upon a trial for murder, respondent cannot show that deceased on one occasion held up the officials of a railroad train, even though respondent had been informed of such fact before he shot deceased, since such evidence related to a specific act of violence and was inadmissible.—People v. Farrell, 137 Mich. 127.

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¶ 1294. Und St. § 9222, wh existence of ar be presumed u actually engag evidence of ge munity of the other state, an the business t missible as ten facto a bank bank."—Jennin

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§ 276. Rebuttal

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of this circus, how many different fights with outsiders have you been engaged in?" was proper in rebuttal.—People v. Murray, 52 Mich. 288.

9. Evidence addressed to the senses; real evidence.

§ 277. In general; articles subject of or connected with crime.

Burglars' tools and other incriminating articles, see post § 278.
Comparisons of handwriting, see post § 279.
Exhibition of person or corporal injuries, see post § 280.
Demonstrations and tests in presence of jury, see post § 281.
Things seen by jury on view, see ante § 150.
Real objects and experiments as evidence in civil cases, see Evidence, IX.
Seizure and keeping of property or evidence found on prisoner at time of arrest, see Arrest § 26; Crimes § 36.

¶ 1299. Articles remaining in a store after a burglary committed therein are admissible to identify similar articles found in the possession of the party charged with the crime, by showing that all bear like evidences of shop wear or exposure.—People v. Van Dam, 107 Mich. 425.

¶ 1300. In a murder case it is not error to permit the counsel for the people to exhibit the clothing of the murdered man to the jury, it being proper to show the circumstances under which the crime was committed, and how near to each other the parties were at the time of the killing, and it being claimed that the clothing exhibited some evidence of such fact.—People v. Wright, 89 Mich. 70.

§ 278. Incriminating articles; burglars' tools.

Proof of fact of possession as relevant evidence, see ante § 174.
Admissibility of guns, pistols and weapons in homicide, see also Homicide § 46.

¶ 1301. Admission in evidence of burglar's tools found in defendant's possession on his arrest nearly four years after the commission of the offense for which he was being tried, is reversible error.—People v. Courtney, 178 Mich. 137.

¶ 1302. The sheriff's testimony that he was told by the chief of police in the city where defendant was arrested that certain burglar's tools were taken from his room, held insufficient to admit such testimony and the tools as admissions, where it merely appeared that defendant was present when the tools were taken, and no acquiescence of any kind was shown.—People v. Courtney, 178 Mich. 137.

§ 279. Comparisons of handwriting or documents by jury.

Admissibility and competency of document for comparison, see post § 285.
Questioning experts on handwriting by comparison, see Evidence § 297.
Writing name in presence of jury for purpose of showing ability to write, see post ¶ 1307.
Overcoming expert testimony by comparison of writings by jury, see post ¶ 1395.

¶ 1303. In a prosecution for larceny, where a draft was properly in evidence, and respondent introduced certain receipts, it is not error to permit a comparison of the handwriting on the two documents.—People v. Hutchings, 137 Mich. 527.

¶ 1304. The genuineness of the seal of a court of record may be proved or disproved by comparison.—People v. Marion, 29 Mich. 31.

§ 280. Exhibition of person or of corporal injuries.

Inspection of person in civil cases by jury on question of identity or resemblance, see Evidence § 573.

¶ 1305. In a criminal prosecution for assault the person upon whom the assault was made may be allowed to exhibit his injuries to the jury.—People v. Sutherland, 104 Mich. 468.

§ 281. Demonstrations and tests by accused or witness.

Requiring demonstrations and tests as compelling self-crimination, see ante § 153.
Nonexpert opinions based on subsequent experiments, see ante § 202.
Testimony based on experiments and comparisons made after the fact in issue, see also ante § 164.

¶ 1306. A prisoner on trial for a crime cannot be required, against objection, to try on a shoe to determine whether tracks found at the scene of the offense were his own; nor, if he objects, can he properly be required to measure the shoe after trying it on. But if he tries it on without objection, the ruling that he must measure it is not prejudicial error, as any witness could do it is well as he.—People v. Mead, 50 Mich. 228.

¶ 1307. Where, on a trial of a person for forgery, the defense is that the note was drawn by the defendant and delivered to a third party, who returned it, signed apparently by the payor by her mark, and that the defendant purchased it in good faith, and the payor denies signing the note, and testifies that she can write, it is error to permit the payor to write her name upon a piece of paper and allow the prosecution to introduce the paper in evidence for the purpose of showing that she can write; since the effect may go beyond such purpose.—People v. Schick, 75 Mich. 592.

10. Documents as evidence.

§ 282. In general; relevancy and materiality.

Documents connected with the crime, see post § 283.

Admissibility in whole or in part, see post § 284.

Documents for comparison of writing, see post § 285.

Particular public and official records and writings, see post §§ 286-295.

Private writings, see post § 296.

Medical and scientific books, see post § 297.

Maps and diagrams, see post § 298.

Pictures and portraits, see post § 299.

Authentication of documents and foundation proofs to admit them, see post § 300.

Purposes for which public records or writings may be received, see also post §§ 287, 288.

Matters provable by private books and writings, see also post § 296.

Admissibility of other writings as res gestæ of forgery, see ante § 241.

Falsity of seal as relevant to impeach document, see also ante ¶ 676.

Admissibility of document as court question, see also post ¶ 1321.

Mode of offering documents and extent of matter put in evidence by offer, see post § 341.

Best and secondary evidence, see ante §§ 184-194.

Writings as hearsay, see ante § 223.

Writings or prints as admissions or confessions, see ante § 248.

Admission of document as infraction of right to confront witness, see post § 340.

Production and inspection of documents before trial or offer in evidence, see ante § 103.

Harmless errors in admission or rejection and cure of errors, see post XV.

Reading from documents in argument to jury, see post § 389.

Taking documents and papers to jury room, see post § 460.

Competency of documents as evidence in civil cases, see Evidence, VIII.

¶ 1308. On an issue of whether criminal abortion was the cause of death in an action for manslaughter, diagrams of the female organs found in a medical book were inadmissible where they did not apply to the case and state of facts under the issue being presented.—People v. Sessions, 58 Mich. 594.

¶ 1309. In a prosecution for assault and battery growing out of the presentment of a drain petition for signature, it is not error to refuse to compel production of the petition, it being irrelevant to the crime.—People v. Kenyon, 93 Mich. 19.

§ 283. Documents subject of or connected with the crime.

Document related to subject of quarrel in which assault occurred, see also ante ¶ 1309.

forged can only be made with such writings as are part of the files of the cause or as are legally in evidence for some other purpose than that of such comparison. Hence probate files including the will cannot be put in evidence in a prosecution for forging a deed to obtain a proved signature of the grantor who was also the testator.—People v. Parker, 67 Mich. 222.

¶ 1317. A diary taken from a prisoner upon proof merely of admissions that it belonged to him cannot be admitted in evidence as a basis for comparison in handwriting to prove forgery by him of other instruments. Possession and ownership of a document do not authorize the inference that the owner can write, or that he wrote the matter contained in it.—Van Sickle v. People, 29 Mich. 61.

§ 286. Public records.

Judicial records and transcripts, see post § 287.
Deed and title records, see post § 288.
Record of preliminary examination or depositions taken thereat, see post §§ 289, 290.
Coroner's verdict and minutes, see post § 292.
Official certificates of search or of contents of records, see post § 293.
Certificates of marriage, birth, death, etc., see post § 294.
Statute books and law reports, see post § 295.
Portions of records, see ante § 284.
Foundation proofs of character and authenticity of the record, see post § 300.
Best and secondary evidence of records, see ante § 186.
Public reports and documents as admissions by official preparing them, see ante § 248.
Certificates, records and official documents as evidence in civil cases, see Evidence, VIII, C.

¶ 1318. The record kept by the clerk of the state house of correction pursuant to How. St. §§ 9771, 9772, is a public record, and may be introduced in evidence whenever its contents are material to the issue, or certified copies thereof may be introduced.—People v. Kemp, 76 Mich. 410.

¶ 1319. "Official registers," e. g., a record of licenses, when produced as evidence and shown to come from the proper official depository, are as a rule admissible in evidence without further attestation.—People v. Davis, 171 Mich. 241.

¶ 1320. The weather record kept at a signal station of the United States is saved from being hearsay evidence by the presumption arising from its being an official document.—People v. Dow, 64 Mich. 717.

§ 287. ——Judicial records and transcripts.

Best evidence of judicial proceedings and writings, see ante § 186.
Records of preliminary examination and depositions taken down thereat, see post §§ 289-291.
Modes of proving judgments and judicial doings, see also Evidence § 545 et seq.
Civil judgments as evidence or estoppel in criminal cases, see Former Adjudication § 12.
Criminal judgments as res adjudicata, see Former Adjudication §§ 10, 11.
Transcript of former testimony as memoranda to refresh memory of witness, see Examination of Witnesses § 24.
Minutes of testimony on preliminary examination as memoranda to refresh memory, see Examination of Witnesses § 24.
Warrant and papers as evidence on claim of lawful resistance of arrest, see Homicide § 52.
Writ and papers pertaining thereto as evidence on claim of lawful defense of property in prosecution for homicidal assault, see Homicide § 52.

¶ 1321. In proving a divorce, in a prosecution for adultery, the entire chancery record may be introduced if its legal result is all that is made known to the jury. The fact of the decree and its validity are for the court alone and to be determined from the record.—People v. Broughton, 49 Mich. 339.

¶ 1322. In a prosecution for desertion and abandonment of a wife and minor child evidence consisting of a complaint and warrant in a prior similar case in which there was no conviction against the same defendant is admissible for the purpose of fixing the date of the first arrest where there is testimony in the case as to acts happening just before and after the first arrest.—People v. Schelske, 187 Mich. 497.

¶ 1323. In a prosecution for perjury alleged to have been committed upon a trial for murder, the papers returned by the examining magistrate in the murder case may be introduced in evidence for the purpose of showing the regularity of such proceedings.—People v. Macard, 109 Mich. 623.

¶ 1324. It seems that the judgment in a suit in which perjury is alleged to have been committed, is inadmissible as evidence of guilt or innocence in a prosecution for the perjury.—People v. Albers, 137 Mich. 678.

§ 288. ——Deed and title records.

See also ante ¶¶ 1310, 1311.
Portions of road record, see ante ¶ 1315.

¶ 1325. How. St. § 5685, making the record of conveyances, and other instruments authorized to be recorded, prima facie evidence, does not apply when the question of the forgery of the original instrument is in issue either in a criminal or civil suit.—People v. Swetland, 77 Mich. 53.

§ 289. Records of preliminary examination.

¶ 1326. It is proper though not necessary for the prosecution in a criminal case to introduce the warrant and return of the examining magistrate, said instruments being part of the case, and every juror being presumed to know that a certificate of probable cause is usually necessary to such proceedings.—People v. Case, 105 Mich. 92.

§ 290. Transcripts of depositions given on preliminary hearing.

To prove testimony given on which perjury is predicated, see post ¶ 1503.

Incompetency of reporter's transcript when not authenticated by reporter who took the notes, see also ante ¶ 912.

Reading from depositions in argument to jury, see post § 389.

Taking down and signing testimony on preliminary hearing, see Arrest, VII.

¶ 1327. The deposition of a witness upon preliminary examination is not competent evidence of the commission of the offense.—People v. Lindgren, 128 Mich. 694.

¶ 1328. The deposition of the complaining witness taken at the preliminary examination cannot be used as substantive evidence on the trial of a criminal cause, where the deponent may be produced as a witness.—People v. Harrington, 186 Mich. 482.

¶ 1329. The testimony of a girl alleged to have been raped by accused, which she gave on the preliminary examination and which was then reduced to writing, is admissible as impeaching evidence only, when she testifies on trial, and is not in that event substantive evidence on the issues; as against her contrary testimony at the trial it will not sustain a conviction.—People v. Miner, 138 Mich. 290.

¶ 1330. Where on a second trial for rape the prosecutrix testifies that her evidence on the previous trial as to the guilt of the accused was false, her affidavit made before a justice of the peace before the issuance of a warrant for the arrest of the accused, is not admissible as substantive proof of the latter's guilt.—People v. Ayers, 186 Mich. 366.

¶ 1331. Where on a second trial for rape the prosecutrix testifies that her evidence on the previous trial as to the guilt of the accused was false, her affidavit made before a justice of the peace previous to the issuance of a warrant, is admissible only as affecting her credibility.—People v. Ayers, 186 Mich. 366.

¶ 1332. A defendant's deposition on his preliminary examination may be introduced in evidence by the prosecution upon the trial. —People v. Prague, 72 Mich. 178.

¶ 1333. In a trial for murder, a witness at the time of the trial was about to be confined, and coul
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Modes of proving marriage, see ante § 176; and see generally Marriage, III.

¶ 1338. A foreign certificate of marriage is inadmissible in a criminal prosecution for adultery.—People v. Imes, 110 Mich. 250.

¶ 1339. A certificate of marriage is admissible in a prosecution for adultery, when accompanied by proof of the identity of the parties.—People v. Isham, 109 Mich. 72.

§ 295. Statute books and law reports to prove laws.

Best evidence of foreign statutes and ordinances, see ante § 185.

¶ 1340. Under Comp. L. 1871, § 5935, How. St. § 7508, admitting as prima facie evidence authoritative printed copies of the statutes of any of the United States, the Revised Statutes of New York for 1852 were admitted as prima facie evidence of the law of marriage as it stood in that state in 1869, it not being shown that any change had intervened.—People v. Calder, 30 Mich. 85.

¶ 1341. The construction placed upon a state's marriage laws by the court of last resort of such state may be shown by the published reports of the court.—People v. McQuaid, 85 Mich. 123.

§ 296. Private books and writings.

Bills, notes, mortgages, etc., connected with or the subject of the crime, see ante § 283.

City directory as evidence of source of information, see ante ¶¶ 848, 860.

Best and secondary evidence, see ante § 187.

Private books as documentary evidence in civil cases, see Evidence, VIII, A, B.

¶ 1342. Where the existence of a certain person was in issue in a suit, and testimony was introduced tending to show that he worked for a certain party, then deceased, at a given date, and the books kept by such employer showed his accounts with his other employees during the period stated, but the name of such person did not appear thereon, such books are admissible in evidence, the absence of such name being a circumstance which it was competent to show.—People v. Kemp, 76 Mich. 410.

¶ 1343. The pass books and signature book of a savings bank are admissible, with the testimony of bank officers, as original documents and res gestæ in showing the existence of deposits.—People v. Hurst, 41 Mich. 328.

¶ 1344. The cash blotter is no part of the bank books, but simply a memorandum for the cashier or teller, and changes in its entries are not evidence of embezzlement by the banker.—People v. Wadsworth, 63 Mich. 500.

¶ 1345. On the question whether accused falsely pretended with design to cheat the state in rendering a claim for coroner's fees that deceased was a "stranger not belonging to this state," whereas she was and had been a resident, it was not error to introduce and read from city directories in possession of accused and proved to be correct showing her residence and the place thereof; since it would thus appear that if the directories were consulted they afforded information contrary to that certified, and if not consulted, being commonly used sources of information, but instead of it devious and unpromising sources were resorted to, an inference against belief in the truth of the facts stated would arise.—People v. Hoffmann, 142 Mich. 431.

§ 297. Medical and other scientific books.

Relevancy to issues, see also ante ¶ 1308.

In civil cases, see Evidence § 511.

Use of books in examining witness, see Examination of Witnesses § 75.

¶ 1346. The statements of a medical book cannot properly be put in evidence as authority on medical questions, though testimony as to what it says, if actually admitted, can be contradicted by producing the book.—People v. Millard, 53 Mich. 63.

§ 298. Maps and diagrams.

Relevancy to issues, see also ante ¶ 1308.

Use in examining witnesses, see Examination of Witnesses § 18.

¶ 1347. In a prosecution for larceny from a safe, a plan of the room in which the safe stood, which was shown to be approximately correct although it did not contain some of the details, was admissible to show that a witness standing at a certain point could see respondent at the safe.—People v. Mindeman, 157 Mich. 120.

§ 299. Pictures and portraits.

As documents in civil cases, see Evidence § 505.

¶ 1348. In a prosecution for burglary, where respondent after his arrest had denied being at the place in question and had claimed to be a resident of a certain city, a picture which the chief of police testified was shown to respondent after his arrest, and which respondent at first had denied but later admitted being a picture of himself, was properly admitted in evidence for the purpose of showing the falsity of statements made by respondent as to his identity.—People v. McDonald, 133 Mich. 366.

¶ 1349. In a prosecution for larceny a photograph of the defendant taken shortly after the theft is admissible in evidence to identify the defendant, where the evidence shows that he has put on glasses since that time and that he declined to remove them before the jury.—People v. Carey, 125 Mich. 535.

§ 300. Authentication and foundation proofs.

See also ante ¶ 1317.

Connecting proofs, see also ante ¶ 1322.

Self-proving nature of clerk's certificate to acknowledgment, see also post ¶ 1489.

Order of proofs of foundation facts and of the document, see post § 359.

¶ 1350. Writings are not admissible in evidence as public records without proof of their official character. The recitals contained in them of the character of the officers whose acts they are offered to prove are not evidence for such purpose.—Hall v. People, 21 Mich. 456.

¶ 1351. A weather record kept at United States signal station is not admissible in a criminal case unless the observer who took it is called to confront accused, though in civil cases it might be admitted as a public record.—People v. Dow, 64 Mich. 717.

¶ 1352. The record made in another state of a certificate of marriage, which certificate bears no date, and neither declares when the marriage took place nor shows where the minister who performed the ceremony resided, and which appears to have been recorded nearly three years after the alleged marriage, and after a prosecution for bigamy on a subsequent marriage has been commenced, is entitled to no consideration, and is not admissible as evidence for any purpose.—People v. Lambert, 5 Mich. 349.

¶ 1353. Upon a trial for rape upon a girl whose age was disputed, an unproved, unauthenticated paper purporting to be a certificate of marriage (How. St. § 859) of the girl's parents, and to have been made by a justice of the peace, but which was not filed in the county clerk's office until fifteen years after its date, while the trial was in progress, such delay being unaccounted for, was inadmissible.—People v. Etter, 81 Mich. 570.

¶ 1353a. In a prosecution for keeping open a saloon on Sunday in violation of the statute, the testimony of the prosecuting attorney as to the liquor dealer's bond and his license is properly admissible where he identifies the records and testifies that he found them in the county treasurer's office, although he states on cross-examination that all he knows of the records is what some one else told him.—People v. Davis, 171 Mich. 241.

C. QUANTITY, DEGREE AND SUFFICIENCY OF PROOF.

§ 301. In general; overcoming reasonable doubt.

Number of witnesses required, see post § 302.

Weight and credibility of evidence, see post § 303.

Conclusiveness of proofs, see post § 304.

Circumstantial proofs, see post § 305.

Sufficiency of proofs of particular elements of the crime, see post §§ 306-309.

Sufficiency of proofs of particular facts, see post §§ 319-322.

Sufficiency of proof of included lesser offenses, see post § 323.

Sufficiency of proofs of particular crimes, see post §§ 324-324w.

Instructions on reasonable doubt, see post § 406.

Insufficiency of evidence or contrariety of evidence to verdict as ground for new trial, see post § 477.

Necessity of exception or objection to failure of evidence, see post § 516.

Defect or lack of proof as harmless error, see post § 545.

Errors in evidence rendered immaterial by sufficiency of other competent evidence, see post § 551 et seq.

Sufficiency of bill of exceptions to show all the evidence for purpose of reviewing sufficiency, see post § 595.

Preponderance rule in civil cases, see Evidence, X.

Proof of criminal acts in issue civilly, see Evidence §§ 578, 585.

Sufficiency of evidence to support issuance of warrant, see Arrest § 13.

Sufficiency of evidence to justify binding over, see Arrest § 34.

¶ 1354. A verdict in a criminal case cannot properly rest on a mere preponderance of conflicting evidence, but should be based on proof that leaves no reasonable doubt of guilt.—People v. Sligh, 48 Mich. 54.

¶ 1355. The jury in a criminal action should acquit if they cannot all agree, beyond a reasonable doubt, that respondent was guilty as claimed by the prosecution.—People v. Hare, 57 Mich. 505.

¶ 1356. The rule of reasonable doubt is not confined to felonies.—Elliott v. Van Buren, 33 Mich. 49.

¶ 1357. A reasonable doubt is not a mere imaginary, captious or possible doubt, but a fair doubt based on reason and common sense, and growing out of the testimony in the case; it is such a doubt as will leave one's mind, after a careful examination of all the evidence, in such a condition that he cannot say he has an abiding conviction to a moral certainty of the defendant's guilt.—People v. Finley, 38 Mich. 482.

¶ 1358. A reasonable doubt is not farfetched, speculative or arbitrary, but is such that, after looking over the testimony and considering all the facts proved to their satisfaction, and the natural circumstances surrounding the facts, the jury are still unable to say that the accused is guilty.—McGuire v. People, 44 Mich. 286.

¶ 1359. Reasonable doubt is such a doubt as leaves one's mind, after a careful exam-

ination of all the evidence, in such a condition that he cannot say he has an abiding conviction to a moral certainty of respondent's guilt.—People v. Flynn, 96 Mich. 276.

¶ 1360. A "reasonable doubt" is a fair doubt growing out of the testimony as distinguished from an imaginary, captious or possible doubt; an instruction to the effect that it must be an "obstruction of an insurmountable character" is erroneous.—People v. Burke, 157 Mich. 108.

¶ 1361. It is only necessary that the jury should be satisfied beyond a reasonable doubt of the guilt of a person charged with crime, and it is not necessary for the court to charge that the elements of the offense must be proved to a moral certainty.—People v. Coulon, 151 Mich. 200.

¶ 1362. The authority of an agent to attempt to suppress testimony or induce perjury in the interest of a defendant in a criminal prosecution may be shown by circumstances and need not be proved beyond a reasonable doubt.—People v. Salsbury, 134 Mich. 537.

¶ 1363. Conviction should not be claimed upon evidence showing only part of the res gestæ or whole transaction, if it appears that the evidence of the rest is attainable.—Hurd v. People, 25 Mich. 405.

§ 302. Number of witnesses required.

In perjury cases, see post ¶ 1500 et seq.
Duty to call witnesses for state, see post § 349 et seq.

¶ 1364. Except in case of some peculiar offenses a fact need not be proved by more than one witness.—Knowles v. People, 15 Mich. 408.

§ 303. Weight and credibility.

Of presumptions, see post § 311.
Functions and provinces of court and jury in weighing and considering evidence, see post § 397.
Charges on weighing and crediting evidence, see post § 433 et seq.
Charges on weight and credibility of testimony of accused, see post § 440.
Taking case from jury on insufficiency or lack of evidence, see post § 399.
Credibility of witnesses in general, see Witnesses, VI.
Impeachment and contradiction or corroboration of impeached witnesses, see Witnesses, VI, D.

¶ 1365. The weight of evidence is a question for the jury.—People v. Pitcher, 15 Mich. 397.

¶ 1366. In seeking to prove a sequence of facts, the establishment of any one of them often aids in establishing the others, the average mind requiring less proof of a fact naturally following another established or admitted fact, so that an apparent agreement of several persons that a fact exists gives additional weight to the testimony of each when they later testify to personal knowledge of such fact.—People v. Lahnala, 193 Mich. 144.

§ 304. Conclusiveness of proofs.

Conclusiveness and effect of presumptions, see post § 311.
Conclusiveness of criminal judgments as res adjudicata, see Former Adjudication § 10.
Conclusiveness of civil judgments offered as evidence in prosecutions, see also Former Adjudication § 11.

¶ 1367. In a prosecution in this state for bigamy defendant offered in evidence the record from a court of another state of a divorce from his first wife, which recited that the parties resided in that state. Held (by two of the three justices sitting), that the prosecution could show that the parties did not so reside, and that the suit was fraudulent and collusive.—People v. Dawell, 25 Mich. 247.

¶ 1368. The prosecution is bound in a criminal action by the testimony upon which the theory of its case rests.—People v. Hare, 57 Mich. 505.

§ 305. Circumstantial proofs.

To prove conspiracy, see post ¶ 1464.
Circumstances regarded as admissible, see ante § 146 et seq.
Admissibility of conclusions of witness based on narrated circumstances, see ante §§ 198 et seq., 203-206.
Conclusiveness and effect of presumptions, see post § 311.
Instructions on reasonable doubt in circumstantial proofs, see post § 406.

¶ 1369. Where conviction is sought upon evidence purely circumstantial, every material circumstance or link in the chain of testimony must be proved beyond a reasonable doubt. People v. Foley, 64 Mich. 148; People v. Aikin, 66 Mich. 460.

¶ 1370. A conviction may be based on circumstantial evidence; but circumstances cannot be presumed.—People v. Foley, 64 Mich. 148.

¶ 1371. If any of the facts or circumstances established is inconsistent with the hypothesis of guilt, such hypothesis cannot be true.—People v. Aiken, 66 Mich. 460.

¶ 1372. In criminal cases not only must each of the facts from which an inference is drawn be proved beyond any reasonable doubt, but the inference itself must be such as admits of no other rational conclusion.—People v. Sessions, 58 Mich. 594.

§ 306. Corpus delicti.

Insufficiency of confession alone, see post § 314.

Reasonable doubt as to corpus delicti in murder cases, see Homicide § 61.

¶ 1373. Direct proof of the corpus delicti cannot always be obtained. It and the defendant's guilt can rest together on one foundation of circumstantial evidence.—People v. Hawksley, 82 Mich. 71.

¶ 1374. In the absence of direct evidence of the cause of death, the jury in a prosecution for murder should acquit if the fact of death can be accounted for upon any reasonable theory other than that of respondent's guilt.—People v. Stewart, 75 Mich. 21.

¶ 1375. Where in a prosecution for breaking and entering a store in the nighttime, there is testimony showing the breaking and entering and the stealing of the property of the complaining witness in the nighttime, prima facie proof of the corpus delicti is established, and evidence to connect defendant with the transaction is then admissible. —People v. Trine, 164 Mich. 1.

§ 307. Venue or place.

¶ 1376. The omission by the state treasurer to charge himself with the receipt of moneys in the county where his office is required to be kept, or a denial of its receipt there, would be evidence to go to the jury of embezzlement in that county.—People v. McKinney, 10 Mich. 54.

¶ 1377. Evidence that a theft was committed in the township of Dorr is sufficient evidence of venue in a prosecution before a justice of the peace of Allegan county.—People v. Grimm, 182 Mich. 643.

§ 308. Responsibility or complicity of accused.

See also ante ¶ 1375.

In proving conspiracy, see post § 324c.

In proving keeping of disorderly house, see post § 324d.

In aiding in concealment of stolen goods, see post ¶ 1507 et seq.

In homicide, see Homicide § 68.

¶ 1378. No one can be convicted, even under a joint information, without proof of his individual guilt.—People v. Lange, 56 Mich. 549.

¶ 1379. Two men were jointly indicted and tried for a burglary. The theory of the prosecution was that one of them broke and entered the building while the other was present aiding and abetting. The one supposed to have broken and entered admitted his guilt on the trial. Held, that it was still necessary to give evidence as to the other which should cover the whole case.—People v. Stevens, 47 Mich. 411.

¶ 1380. A person charged with arson is also charged with being personally present where he could commit the offense; and on a plea of not guilty the prosecution have the burden of proving the fact beyond reasonable doubt, whether the doubt arise from a defect in the evidence for the prosecution or from the impression produced by the evidence for the defense.—People v. Fairchild, 48 Mich. 31.

¶ 1381. In a prosecution for obtaining property by the assignment of a fabricated mortgage and accompanying note, proof by comparison of handwritings, that the signature to the assignment and the indorsements on the note were in the same handwriting as the body of the mortgage, and that the signatures were forged, is not sufficient to connect the respondent with the offense if it is not also shown, as a basis for the comparison, that the handwriting in any paper is actually his.—People v. Cline, 44 Mich. 290.

¶ 1382. Where a plea of not guilty is interposed to an information for arson the jury must acquit, if on the whole evidence they have a reasonable doubt as to any material fact covered by the essential averments, including the actual participation of the accused.—People v. Fairchild, 48 Mich. 31.

¶ 1383. On the trial of a conspiracy to extort money from a firm by entrapping it into violating the revenue laws by selling to them a larger quantity of liquor than the law allows, evidence that one of the defendants advised the others, before the purchase of the liquor, as to what the law applicable to the case was, and continued consulting with them after they had succeeded in the plot, and then endeavored to persuade the accused to settle the prosecution by the payment of a large sum of money, is sufficient to warrant the submission of the case to the jury as to such defendant.—People v. Saunders, 25 Mich. 119.

¶ 1384. The connection of accused, indicted as one aiding and abetting a burglary, is sufficiently shown by evidence that he was loitering about the office building in which the crime was committed, that his presence there as a stranger in the city and at the times in question, and especially at the time of the commission of the crime, was such that it could not be accounted for otherwise than on the hypothesis that he knew what was going on and was there to keep a watch. —People v. McDonald, 133 Mich. 366.

¶ 1385. On an information for feloniously burning a building with intent to defraud an insurance company, the circumstantial evidence that the defendant unsuccessfully endeavored to procure others to burn the building, and when he failed he said he would burn it himself, that he placed a jug containing either kerosene or gasoline in the house, and so arranged that it could readily

be ignited, that after the building burned he endeavored to divert suspicion to others by procuring false testimony, and that the building was insured for more than its value was sufficient to justify the finding of the jury that the defendant was actually and personally present at the burning or set fire to or burned the building, and this is so despite the fact that there were witnesses who swore that he was four miles away at the time the building was burned.—People v. Mix, 149 Mich. 260.

¶ 1386. In a criminal prosecution against two colored women jointly for stealing money from the person of the prosecuting witness, a white man, who was in company with another white man at the time of the theft, the latter being engaged in conversation by one of the defendants, while the other, during a conversation with the prosecuting witness, picked the latter's pocket, evidence held sufficient to sustain a conviction of both defendants.—People v. Smith, 196 Mich. 459.

§ 309. Specific intent or knowledge and other qualifying elements.

Inference of absence of malice on information for careless use of weapons, see post ¶ 1512.

Weight of presumption as to intent, see post § 311.

¶ 1387. Where an intent is made the gist of an offense that intent should be shown by such evidence as, uncontradicted, will fairly authorize it to be presumed beyond a reasonable doubt.—People v. Getchell, 6 Mich. 496.

¶ 1388. Conviction in a criminal prosecution involving the question of intent (such as larceny) cannot be based upon counsel's admissions.—People v. Hall, 86 Mich. 132.

§ 310. Defensive proofs; particular defenses.

Sufficiency of alibi proofs, see post § 320.

Sufficiency of proofs of insanity, see post § 321.

¶ 1389. The defense of an alibi is as legitimate as any other, and the witnesses who testify to it are entitled to like credit with others.—People v. Hare, 57 Mich. 505.

¶ 1390. Proving an alibi does not impose the burden of showing that the accused was absent at the very time at which the evidence for the prosecution tends to show the offense was committed, nor need it absolutely preclude the possibility of his being at both places.—Stuart v. People, 42 Mich. 255.

§ 311. Conclusiveness and effect of presumptions.

Presumptions as to complicity of parties in transaction, see ante § 132.

Presumption arising from possession of incriminating goods, see also ante ¶¶ 659, 660.

¶ 1391. The presumption that one intends the consequences of his acts, though a weighty circumstance, is not conclusive in the case of a crime the gist of which is the intent itself.—People v. Sweeney, 55 Mich. 586.

¶ 1392. Possession of stolen goods immediately after the theft may sometimes be almost conclusive of guilt, but the presumption weakens as the period of time between the theft and the possession increases, and may scarcely arise at all if others besides the accused have had equal access with himself to the place where the goods were found.—Gablick v. People, 40 Mich. 292.

§ 312. Expert and opinion evidence.

Misleading effect of allowing experts to sit within railing during taking of testimony, see post ¶ 1531.

Weight and sufficiency of expert testimony in homicide cases, see also Homicide, VII, C.

Weight and credibility in civil cases, see Evidence § 600.

¶ 1393. Facts shown by credible testimony cannot be overcome by evidence of opinions; and a jury must not form its own opinion in disregard of such testimony.—People v. Millard, 53 Mich. 63.

¶ 1394. While the testimony of experts is not always the most reliable, and, comparatively, it has been held to have little value, such witnesses are to be judged from the same standpoint as other witnesses, and the fact that they are employed, or that they differ in their conclusions, does not justify the assumption, as a matter of law, that their testimony is open to suspicion.—People v. Seaman, 107 Mich. 348.

¶ 1395. Where the jury in a prosecution for forgery has the alleged forgery before it for inspection, together with genuine writings, it is not to rely solely on the testimony of experts, but must use its own judgment in deciding upon the effect of a comparison of the papers as evidence in the case.—People v. Gale, 50 Mich. 237.

¶ 1396. Testimony of experts is to be judged for credibility as that of other witnesses is to be judged, having regard to the possibilities of bias, prejudice and pride of opinion.—People v. Vanderhoof, 71 Mich. 158, per Morse, J., and Sherwood, C. J.

§ 313. Confessions and admissions.

Foundation proofs to admit confession, see ante §§ 265, 266.

Sufficiency of proof of corpus delicti to support admission of confession, see ante § 266.

Necessity and sufficiency of corroboration, see post § 314.

Charges on confessions and admissions, see post § 444.

¶ 1397. Evidence consisting of admissions by accused on the stand, held to justify a conviction under Comp. L. 1897, § 11591, making it a crime for an officer of a corporation to embezzle its funds, he having been its secretary and having used its funds for personal accounts.—People v. Butts, 128 Mich. 208.

¶ 1398. A conviction in a case involving the question of intent cannot be based upon the admissions of counsel that such intent existed.—People v. Hall, 86 Mich. 132.

§ 314. ——Necessity for and sufficiency of corroboration.

Order for reception of corroborating proofs, see post § 363.

¶ 1399. In a prosecution for an attempt to murder the respondent's unsupported confession is not sufficient evidence of the corpus delicti.—People v. Lane, 49 Mich. 340.

¶ 1400. The corpus delicti cannot be proved by the naked extrajudicial confession of the accused.—People v. Lapidus, 167 Mich. 53.

¶ 1401. It is the general rule that the corpus delicti may not be proved by the naked extrajudicial confession of the accused. —People v. Ranney, 153 Mich. 293.

¶ 1402. An extrajudicial confession by a respondent charged with adultery, of a marriage with the complaining witness, is not alone sufficient to establish the marriage.—People v. Isham, 109 Mich. 72.

¶ 1403. In a prosecution for keeping a policy-shop the corpus delicti is sufficiently proved outside of respondent's confession, by his being found with materials for the game in a room where the game was going on.—People v. Hess, 85 Mich. 128.

¶ 1404. In a prosecution for larceny of diamonds from a safe, evidence that someone without authority removed the diamonds under such circumstances as to warrant the inference of larceny, was a sufficient proof of the corpus delicti to authorize the admission of evidence tending to implicate the accused.—People v. Mindeman, 157 Mich. 120.

¶ 1405. On an indictment for obtaining money by false pretenses, in issuing a worthless check, the confession of the accused that he knew that the check was worthless is sufficiently corroborated where it is shown that defendant applied to a hotel keeper to cash the check, that the check was cashed, and respondent received the money, that the check was forwarded in the usual course of business to the bank upon which it was drawn, was returned unpaid, and that the hotel keeper had never received his money; and this is true without regard to whether the corpus delicti, which must be proved by facts in addition fession of the accu consisting of mere specific injury or o with somebody's l of loss.—People v.

§ 315. Unsworn sta

¶ 1406. A defen the consideration o it such credit, in v all the circumstar titled to.—Maher Durant v. People, People, 13 Mich. 5 Mich. 710.

¶ 1407. The sta trial for a crimina to make one, may in view of all the affect its credit, n that he is not req claim any protecti nificant omissions. Mich. 224.

§ 316. Character ev

Sufficiency of evid repute, see als Instructions on ch § 445.

¶ 1408. A pers entitled in all cas mony to his good dence of his guilt sonable doubt he r standing his goo Mead, 50 Mich. 22

§ 317. Accomplice

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¶ 1409. The cre like that of any o a question for the such testimony al —People v. Jenne v. People, 15 Mich. 23 Mich. 301; Peo

¶ 1410. A pers can be convicted evidence of an a lagher, 75 Mich. 5

¶ 1411. A perso be convicted upon complice without firmation from Nunn, 120 Mich. 5

¶ 1412. An acc as to his presence of an alleged tres by testimony of

at home on the night the trespass was committed.—People v. O'Brien, 68 Mich. 468.

¶ 1413. Respondent was prosecuted for perjury in testifying in his own behalf in a prosecution for bribery, the testimony in question being that V. did not send him to offer the bribe. Upon objection that the conviction should not stand because secured by the uncorroborated testimony of V., held that the testimony of respondent and another witness at the trial for bribery might be looked to for corroboration.—People v. Albers, 137 Mich. 678.

§ 318. Conflicting and contradictory testimony.

In perjury cases, see post ¶ 1500 et seq.
Direct testimony opposed by opinions, see ante ¶ 1393.
Insufficiency of cumulative or contradictory evidence to warrant new trial for newly discovered evidence, see post § 478.
Conclusiveness on review of verdict based on conflicting testimony, see post §§ 633-635.
Impeachment by proof of contradictory statements, see Witnesses, VI, D.

¶ 1414. Where one not the legal custodian of a public record who testified that the record which he produced and offered in evidence was the official record, further answered on cross-examination that all he knew of the records was what someone else told him, the effect of such apparently inconsistent statements goes to the sufficiency and probative force of the evidence, and is a question of fact for the jury.—People v. Davis, 171 Mich. 241.

§ 319. Sufficiency of proofs of particular facts; identity, title, incorporation, etc.

Identity and existence of person, see also post ¶ 1484.
Proofs of title to and demand for money or property in embezzlement, see post ¶ 1473 et seq.
Sufficiency of identification of stolen goods received by accused, see post § 324r, ¶ 1505 et seq.
Modes of proving identity, see ante §§ 177, 178.
Presumptions as to particular facts, see ante § 130 et seq.
Sufficiency of secondary proofs, see ante §§ 193, 194.
Failure of proof by variance, see ante § 77 et seq.
De facto incorporation of principal of agent prosecuted for embezzlement, see also Crimes § 72.

¶ 1415. Identity of common names and of residence in cities or long settled localities is not enough to establish identity of persons where the personal liberty of others depends on the fact.—People v. Cline, 44 Mich. 290.

¶ 1416. Identity is not necessarily proved by direct evidence, but may be proved by circumstances all pointing towards one person.—People v. Stewart, 163 Mich. 1.

¶ 1417. In a prosecution for arson a conductor of an electric line testified that a woman asked him if his car stopped at a place near the premises in question; that after receiving his reply, she boarded the car and got off at that place; and that the woman was the respondent. At the trial the conductor was not able at first to pick out the woman and his testimony as to how he identified her was somewhat incoherent. Held, his evidence was sufficient to go to the jury.—People v. Stewart, 163 Mich. 1.

¶ 1418. Identification of stolen fleeces with those found in the accused person's possession is completely shown by their agreement in number, by this person's acknowledgment that he had taken the fleeces stolen, and by his not making effort after his arrest to recover the wool or its value.—People v. Taylor, 93 Mich. 638.

¶ 1419. In a prosecution for receiving a quantity of scrap brass knowing it to have been stolen, evidence that the brass and a horse and wagon were taken at the same time; that the wagon, when afterwards found, had a broken axle; that respondent was seen on the road near by with a broken-down wagon laden with heavy material; that an expressman was employed, who conveyed the contents of the wagon, which proved to be scrap brass, to a certain place, where it was sold by respondent and melted down by the purchaser,—is sufficient to go to the jury upon the question of the identity of the property sold with that stolen.—People v. Kiley, 107 Mich. 345.

¶ 1420. The testimony of the complaining witness that one of the razors found in respondent's possession had a rivet similar to that in one stolen from him, and that he had never seen any other razor with such a rivet, was sufficient to go to the jury upon the question of the identity of the property.—People v. Moloney, 113 Mich. 536.

¶ 1421. Respondents were tried for burglarizing an office located four miles outside the city, in which office a company had left some caps, dynamite, and fuse. Shortly after the crime, articles of a similar kind were found near the place where respondents were arrested, under some weeds. These articles were not positively identified as those in the office. Held, there was sufficient evidence on this point to warrant submitting the question of the identity to the jury.—People v. McDonald, 163 Mich. 552.

¶ 1422. The fact that flour found in respondent's possession was in sacks labeled with the name of the owner of a mill from which flour had been stolen, and was of the grade there manufactured, was some evidence tending to show that it was of the

same quality as that stolen.—People v. Wood, 99 Mich. 620.

¶ 1423. In a prosecution for forging a deed of land, the title of the person named as grantor may be proved by the record of a deed to him, and by the testimony of the register of deeds that a careful examination of the records fails to show any transfer of the land since such deed to him, save the alleged forged deed.—People v. Parker, 67 Mich. 222.

¶ 1424. Existence of a de facto corporation was shown, where an attempt to organize a labor association under Pub. Acts 1897, No. 13, was made, articles were prepared accordingly, and the incorporators assumed to be a corporation and to act as such.—People v. Carter, 122 Mich. 668.

¶ 1425. The nonexistence of a marriage record is not shown by the testimony of a witness to the effect that she went to one whom she supposed to be a magistrate, and that he instituted a search, and told her there was no such record.—People v. Loomis, 106 Mich. 250.

§ 320. ——Alibi or whereabouts.

Degree of proof required and credit allowable to defense of alibi, see also ante ¶¶ 1389-1390.

¶ 1426. In a prosecution for arson, respondent's witnesses testified with great positiveness that the fire occurred at 7 p. m. In such case it would have been impossible for respondent to have reached the place in question at that time after getting off a car near by. The people's witnesses fixed the time of the starting of the fire at from 7:15 to 7:30. Held, the positive value of respondent's evidence on this point did not prevent the case from being a proper one to go to the jury.—People v. Stewart, 163 Mich. 1.

¶ 1427. Respondent was convicted of arson in setting fire to buildings belonging to her and insured in her favor. The conductor on an electric line testified that respondent took the car and alighted at a place near the buildings in question at 6:56 p. m. There was evidence that she boarded a car at another stop near said buildings to return at about 8:10 p. m., and that the fire started about 7:15 or 7:30 p. m. The tracks of a woman were found three days later in and about the premises in question. Respondent failed to account satisfactorily as to her whereabouts at the time of the fire. Held, there was sufficient evidence coupled with other circumstances to warrant the submission of the case to the jury.—People v. Stewart, 163 Mich. 1.

§ 321. ——Sanity, insanity or mental incapacity.

Indicia and evidences of insanity in general, see Insane Persons, I.

¶ 1428. Evidence that soon after the shooting the defendant said, "Stand back, don't come near me"; that about two hours afterwards, responding to a physician's question as to what had happened, said, "There was a little crowd and they tried to press me, and I had to defend myself," this physician testifying that the defendant at the time had the mental condition of a rational man, but badly excited; and that defendant, after being arrested, felt his hip, spoke of his revolver, and expressed a wish for a butcher knife to defend himself with, is not sufficient to support a request for an instruction that the defendant should be acquitted if at the time of shooting he was in a state of delirium and unable to reason, and entertained the delusion or fancy that the persons about him were in some way seeking to injure him and believed it necessary to use revolver to defend him from supposed attack.—People v. Slack, 90 Mich. 448.

§ 322. ——Possession of incriminating articles.

Probative effect of fact of incriminating possession in burglary cases, see also post ¶ 1448.

¶ 1429. Respondents were tried for burglarizing an office. The alleged stolen goods were found two days after the crime within two feet of where the respondents were when they were arrested. Held, it was proper to leave to the jury the question whether respondents were in possession of said property.—People v. McDonald, 163 Mich. 552.

§ 323. Proof of lesser and included offenses.

Conviction for lesser offense as conforming to or varying from indictment for greater, see ante § 80.

Proof of felony as proof of misdemeanor, see also Crimes § 9.

Sufficiency of proofs of lesser assaults and assaults included in homicidal attempts, see Assault § 10; Homicide §§ 65, 66.

Provision against acquittal for misdemeanor charged when proof shows felony, see Comp. L. 1915, § 15742.

¶ 1430. Every forcible resistance to an officer involves an assault, and if the higher charge is not made out there may still be a conviction for the assault covered by it.—People v. Haley, 48 Mich. 495; People v. Warner, 53 Mich. 78.

¶ 1431. Even though the evidence on the part of the people under an information charging robbery, if believed, showed that respondent was guilty of robbery, he still could be convicted of the lesser offense of assault with intent to rob.—People v. Blanchard, 136 Mich. 146.

§ 324. Particular offenses; necessary and sufficient proofs.

[Note. The specific crimes in so far as touched by precedents on the sufficiency

of proof are arranged in alphabetical order following. A similar arrangement of precedents on sufficiency of the charging parts of indictments and informations occurs, ante §§ 43a-43u, and one on the propriety of instructions and requests occurs, post §§ 455a-455w. The matters so arranged are such as were deemed to be peculiar to the crime in question and not of application to other crimes as well. It is often difficult to say whether an opinion passes on the sufficiency of proof or on the substantive elements of the crime. Sometimes both are passed on. Where the decision seemed to pass on sufficiency of proofs the case was placed in the appropriate section following. A search of both places will always be advisable whichever class of precedents be desired.]

General rules for determining sufficiency of proofs, see ante §§ 301-305, 311-318.

Proofs of general elements of crimes, e. g., corpus delicti, venue, complicity of accused, intent, and knowledge, see ante §§ 306-309.

Proofs of defenses, see ante § 310.

Proofs of particular facts, see ante §§ 319-322.

Proofs of included offenses, see ante § 323.

Sufficiency of case founded on evidence introduced by defendant after people rested, see also post ¶ 2833.

In prosecutions under liquor laws, see Intoxicating Liquors, VI, B.

Evidence tending to prove particular issues, see post §§ 175-181.

Material and necessary issues to be proved, see ante § 73.

Variances of proofs from allegations, see ante § 77 et seq.

Degree of proof required in bastardy proceedings, see Bastards § 10.

§ 324a. Abandonment and desertion.

Elements of the crime, see Crimes § 38.

¶ 1432. To sustain an allegation that the child was confided to the defendant it is not necessary to show that it was delivered into his immediate and manual custody; if it were delivered to some other person employed by him to receive it, and upon the faith of representations made by him to the mother, inducing the belief on her part that it would be under his control and direction, it would be sufficient.—Shannon v. People, 5 Mich. 71.

¶ 1433. To make out a case of wife abandonment under the criminal statute, Act No. 144, Pub. Acts 1907, it is not necessary to establish that the wife has become a public burden.—People v. Stickle, 156 Mich. 557.

¶ 1434. In order to convict for deserting and abandoning a wife and minor child under Pub. Acts 1907, No. 144, How. St., 2nd Ed., § 11539, it is necessary that the jury be satisfied beyond a reasonable doubt as to an act of desertion and an abandonment of the wife and a refusal or neglect to provide for them.—People v. Schelske, 187 Mich. 497.

¶ 1435. In a prosecution for deserting and abandoning a wife and minor child under Pub. Acts 1907, No. 144, How. St., 2nd Ed. § 11539, evidence held sufficient to find defendant guilty where he did not support his family for two years after an absence of six months, although he had not formed the intention prior thereto of separating himself from his family, and had contributed to their support during such six-month period. —People v. Schelske, 187 Mich. 497.

¶ 1436. Evidence in a prosecution for wife and child desertion and abandonment that the husband contributed a small sum of money extending over a period of six months held as tending to prove that defendant did not intend to abandon his family.—People v. Schelske, 187 Mich. 497.

§ 324a. Abduction and enticement.

Elements of the crime, see Crimes § 39.

¶ 1437. Evidence of former illicit relations is significant though not conclusive evidence of its bearing upon the intent of one who is charged with enticing away a female for prostitution; but it may properly be dispensed with where proof of their subsequent conduct is conclusive as to the unlawful intent.—People v. Carrier, 46 Mich. 442.

§ 324a. Adultery.

Sufficiency of confession as proof, see ante ¶ 1402.

Proofs of marriage in bigamy, see post ¶ 1443 et seq.

Elements of the crime, see Crimes § 41.

Sufficiency of proof of adultery in divorce, see Divorce § 69.

¶ 1438. In a prosecution for adultery it is not enough to show the prior marriage of the accused to a woman under the legal age, without showing that she acquiesced in the marriage on arriving at the age of consent and before the offense.—People v. Bennett, 39 Mich. 208.

¶ 1439. In a prosecution for adultery a sufficient showing is made that the complaint was made by one authorized by Comp. L. 1897, sec. 11690, How. 2nd Ed., § 14775, providing that, "No prosecution for adultery shall be commenced but on the complaint of the husband or wife," where the complaint is signed by a person offered as a witness by the people, and counsel for respondents states that such person is an incompetent witness because the evidence shows that he is the husband of one of the respondents, and by consent the case has been made prima facie that he is married to such respondent, and where also the record of his marriage to said respondent is received in evidence.—People v. Davis, 175 Mich. 594.

§ 324a. Arson and burnings.

Proof of presence and responsibility of accused, see ante ¶¶ 1380, 1382, 1385.

Elements of the crime, see Crimes § 42 et seq.

¶ 1440. In an information charging an attempt to burn insured property with intent to injure the insurance company, an allegation that the insurance company which it was intended to defraud is a corporation having a right to do business in this state is unnecessary, and the incorporation therefore need not be proved; and, it having appeared that the company was engaged in doing business in this state, it seems that it was unnecessary to show affirmatively that the company had complied with our statutes in reference to foreign insurance companies.—People v. Jones, 24 Mich. 215.

¶ 1441. An actual insurance must be proved where respondents are charged with burning insured property with intent to defraud the insurer: and where it is claimed that the insurance was made through an agent, the agency must be proved; where created by written authority, the writing should be produced or accounted for unless there is evidence of ratification; and where an alleged agent had only acted by correspondence and interviews with others who purported to be agents, and he had no personal knowledge as to their position or authority, and had only corresponded with the insurer by reporting to a person who assumed to be secretary, but of whose authority as such there was no other proof, the agency was not proved.—Meister v. People, 31 Mich. 99.

¶ 1442. It was sufficient evidence to go to the jury in an arson case that defendant, who had a tenant whom he could not get rid of had threatened to burn him off, that defendant was seen going towards the house with a can partly full of kerosene and coming back with the can empty, and that shortly after that the house was seen in flames.—People v. Burridge, 99 Mich. 343.

§ 324a. Assault and battery.

Elements of the crime and sufficiency of the proofs, see Assault, I.

§ 324b. Bigamy and polygamy.

Proofs of marriage in adultery, see ante ¶ 1438.

Elements of the offenses, see Crimes § 48.

¶ 1443. Where the first marriage is alleged to have taken place in another state, proof of a valid marriage according to the laws of that state must be given. And there being evidence that the law of that state on the subject is in statute form, it cannot be presumed, against the innocence of defendant, that the statute is like our own.—People v. Lambert, 5 Mich. 349.

¶ 1444. A defendant cannot be convicted of bigamy where the only evidence of the first marriage is proof of the cohabitation of the parties as man and wife, and their statements that such marriage had taken place.—People v. Lambert, 5 Mich. 349.

¶ 1445. Upon a trial for polygamy, a former valid marriage is shown by testimony of the accused and his alleged first wife showing the performance of a marriage ceremony between them followed by their living together as husband and wife.—People v. Goodrode, 132 Mich. 542.

§ 324b. Bribery, embracery and corruption of agents.

Elements of the crime, see Crimes § 50.

¶ 1446. Payment of money to a prosecuting attorney to influence him to put a case over the term is not evidence that it was done corruptly within the meaning of Comp. L. 1897, sec. 11311, if such money was paid by one somewhat ignorant of court practice under the belief that such attorney had a right to demand and receive it for his trouble and costs.—People v. Bilitzke, 174 Mich. 329.

§ 324b. Burglary, breaking and entering, and attempts.

Proof of complicity in burglary, see also ante ¶ 1379.

Proof of connection with burglary, see also ante ¶ 1384.

Sufficiency of identification of stolen articles with those traced to accused, see ante § 319.

Unlawful possession of burglar's tools, see post § 324b, ¶¶ 1459-1461.

Elements of the crimes, see Crimes § 51 et seq.

¶ 1447. The statutory offense of burglary cannot be made out without a clear proof of the breaking.—People v. McCord, 76 Mich. 200.

¶ 1448. In a prosecution for burglary it seems that the mere possession of articles stolen is not prima facie evidence of guilt of the burglary.—Stuart v. People, 42 Mich. 255.

¶ 1449. Where the only evidence against respondents convicted of burglary is the possession by them of the stolen property, the conviction must be set aside.—People v. McDonald, 163 Mich. 552.

¶ 1450. A conviction for statutory burglary from a store is unwarranted by testimony which identifies neither place, person, nor property, and which purports to describe talk, to which the witness paid little attention, "about somebody's getting in, and he taking the stuff out after they handed it out to him." Nor is it justified by testimony that defendant had complained that he had not been given a "square whack at the Fremont deal"

when there was no proof that the deal was a burglary or that any burglary had been committed at Fremont.—People v. Butler, 55 Mich. 408.

¶ 1451. Evidence that fleeces were stolen from a barn which was locked about nine o'clock the night before, the theft being discovered about sunrise, that 12 of the fleeces were taken and others were scattered about, that marks of the hitching and standing of a horse and buggy were found near by, that accused after daylight drove to a house and asked to leave some bags there, is sufficient to sustain a verdict that an entry into a barn with intent to commit larceny was made after daylight; since it was necessary to have light to select the best fleeces.—People v. Taylor, 93 Mich. 638.

¶ 1452. The testimony of the people tended to show that respondent, while in the building on the day preceding the burglary, raised the window through which the entry was made just enough to remove the bolt by which it was fastened from the slot prepared for that purpose, and on the following night completed the raising of the window sufficiently to enable him to enter the building, it could not be contended that such testimony changed the offense from burglary.—People v. Dupree, 98 Mich. 26.

¶ 1453. Evidence that the owner of the dwelling-house claimed to have been entered, on his return thereto, found a door, which his son testified he had bolted after his father left the house, unbolted and open, and a window, which the son testified was closed, open, and respondent in the house, is sufficient to show a breaking.—People v. Curley, 99 Mich. 238.

¶ 1454. A conviction for burglary is sustained by evidence that a mill was broken and flour stolen, that there were tracks of men leading from the window of the mill to the road, whence there were tracks of a wagon with one wheel out of alignment and of a horse with three unshod feet and one foot with a broken shoe, that similar flour was afterwards found in possession of one of accused though such flour was not locally obtainable, that another accused had a horse and wagon capable of making the tracks, and that on the evening of the burglary they and the other accused were seen in a one-horse wagon going towards the place of the crime.—People v. Wood, 99 Mich. 620.

¶ 1455. Conviction for burglary is sustained, where it appeared that one of two persons who committed the burglary in question was shot dead and immediately thereafter a window crashed and another person was heard running away; that respondent upon being arrested the next morning was shown the dead person and at first denied acquaintance with him and then admitted that he was his best friend; that the deceased and respondent had been seen together in the afternoon of the burglary going towards another place from which a pair of shoes and two shirts were afterwards found to have been stolen, and that the shoes were found on the feet of the deceased when he was shot, and the shirts were on respondent when he was arrested, and there was testimony tending to show that the deceased and respondent were seen together late on the night of the burglary, and he falsely accounted for a cut on his hand when arrested.—People v. Hogan, 123 Mich. 233.

¶ 1456. A conviction under an information charging respondent with having in the nighttime broken and entered a dwelling-house with intent to commit larceny, was sustained where it appeared that the breaking was into a barn which was within an inclosure surrounding the dwelling of the owner in question as well as the barn; the contention that since the taking effect of Pub. Acts 1899, Act No. 34, the common law offense of burglary was restricted to the breaking and entering of the actual dwelling-house of another not being sustained, as such law did not do away with the common law offense of burglary.—People v. Griffith, 133 Mich. 607.

¶ 1457. Evidence of the stealing of two large horse blankets, a set of single harness, a bridle, and a pair of hopples, from buildings on a farm, there being other farmers living within forty rods of the buildings, and there being evidence that the property was in the buildings when night set in, but had disappeared and could not be found the next morning after daylight, supports a finding of burglary in the nighttime.—People v. Tracy, 121 Mich. 318.

¶ 1458. The offense of an attempt to break and enter a dwelling was not shown to have been committed by one who proposed to another to break into a house and get money, and accordingly met such other person at a saloon and loaded a revolver there which he threatened would kill a man unless he got his money that night, and who thereafter went into a drug store and purchased chloroform to be used in the commission of the crime, and was arrested on emerging from the drug store with the chloroform and with slippers to be used in entering the house, in his possession.—People v. Youngs, 122 Mich. 292.

§ 324b. ——Unlawful possession of burglars' tools.

¶ 1459. Proof of possession and of a general intent to use, in the felonious manner mentioned in the statute, in the county where the prosecution is instituted is sufficient to support an information under How. St. § 9175 relating to having burglars' tools in possession.—People v. Edwards, 93 Mich. 636.

¶ 1459a. Defendant was tried under 3 Comp. L. 1897, § 11589, for having burglars'

tools in his possession. There was testimony that tended to show that the instruments found in defendant's possession were used by burglars, and that they were used for picking locks and opening doors; that the defendant was a burglar and sneak thief by occupation, and had been for years; that he called on an inmate of the jail; and that he claimed to be in haste to leave town, and gave different places as his destination. Held, there was sufficient evidence to go to the jury to show on the part of the defendant a knowledge of the adaptation and design of the tools in his possession for criminal purposes.—People v. Jefferson, 161 Mich. 621.

¶ 1460. Section 11589, 3 Comp. L. 1897, makes it a crime for a person to have certain implements and tools in his possession for purposes of theft. Held, to sustain a conviction there must be proof of knowledge of possession of the implements, of knowledge of their adaptation to and design for the criminal purpose, and of an intent to use them for such purpose.—People v. Jefferson, 161 Mich. 621.

¶ 1461. Where a person accused of having burglars' tools in his possession contrary to 3 Comp. L. 1897, § 11589, admits that he is taking such tools to a named place, there is sufficient proof of his knowledge of possession to establish that element of the crime.—People v. Jefferson, 161 Mich. 621.

§ 324c. Conspiracy.

Proof of responsibility or part in conspiracy, see also ante ¶ 1383.

Conspiracy to obstruct business maliciously, see post ¶ 1498.

Elements of the crime, see Crimes § 58.

¶ 1462. There can be no conviction for conspiracy aside from the confessions of individuals, unless there is independent evidence of the participation of the different persons charged.—People v. Arnold, 46 Mich. 268.

¶ 1463. On an information for conspiracy to falsely accuse a person of arson, if the proof is directly to the effect that the defendants resorted to peculiar methods shown in contriving for the arrest of another for a crime they knew he did not commit, there is evidence sufficient to justify the submission to the jury of the question of the defendants' intent.—People v. Dyer, 79 Mich. 480.

¶ 1464. In a prosecution for perjury alleged to have been committed upon a trial for burglary, evidence of a conspiracy between respondent and others to give such false testimony, for the purpose of aiding the respondent in the burglary case, need not be express to justify its submission to the jury, since proof of a conspiracy, from its very nature, must often be made by circum-

the house was resorted to by men, and that respondent spent a considerable portion of her time there, where she was arrested, and interposed on behalf of a girl who was also arrested, saying that she was the cook; and that on another occasion, when a visitor called for beer, she replied that she did not have any in the house, tends to support a conviction.—People v. Wright, 90 Mich. 362.

¶ 1469. It is not necessary to prove, on a prosecution for keeping a house of ill fame, the bad reputation of men who resorted to the house, where their acts were of such a character as to warrant the inference that they went there for immoral purposes, and the inmates are shown to have been women of evil reputation.—People v. Russell, 110 Mich. 46.

¶ 1470. Respondent was tried under Comp. L. 1897, § 11697, for keeping a house of ill fame. Respondent rented the rooms in the building in question to various occupants, resided elsewhere with his family; carried a key to the building; hired the help to do the hall and room work and paid the same; went there every day and saw the building; and "had entire charge of the building just as though my wife and family lived there." There was evidence that he directed custom to the place. Held, he was properly convicted under said section instead of being tried under section 11699, relating to the leasing of property to be used as a house of ill fame.—People v. Hoek, 169 Mich. 87.

¶ 1471. Evidence held sufficient to show that defendant kept a house of ill fame, the evidence not being set out or reviewed.—People v. Peroni, 169 Mich. 110.

¶ 1472. Held, in a prosecution for keeping a house of ill fame, that the evidence as to the character of the house was for the jury and supports a verdict of guilty.—People v. Martin, 176 Mich. 381.

§ 324e. Embezzlement.

Sufficiency of proof of incorporation of principal of accused, see ante ¶ 1424.
Elements of the crime, see Crimes § 68 et seq.
Necessity of proof of intent to embezzle, see also Crimes § 74.

¶ 1473. In a prosecution against an agent and officer of a labor association for embezzling money of the association, the omission to prove a demand for the money was not fatal in view of respondent's admission that the money of the association was gone and that he lost it on horse races.—People v. Carter, 122 Mich. 668.

¶ 1474. In a prosecution against an agent and officer of a labor association for embezzling money of the association, testimony that the respondent receipted for the money as treasurer, and that it was intended by the depositor to be applied to the purchase of stock in the association, was evidence that the money in question was that of the association and that it was received by respondent in the course of his duties.—People v. Carter, 122 Mich. 668.

¶ 1475. A conviction of embezzlement cannot be sustained upon evidence that complainant deposited money until arrangement could be made for him to purchase the interest of defendant's partner in the bank, though the money was handed to defendant at the bank and by him turned into the bank and was lost through the bank's failure, it appearing that it was intended that the money should be deposited.—People v. Nielsen, 130 Mich. 670.

¶ 1476. Where money has been sent to a broker with specific instructions to buy certain stock, it is in the nature of a special deposit or trust and an intention to create the relation of debtor and creditor is not shown by a letter from the broker stating that the amount had been placed to the sender's credit.—People v. Karste, 132 Mich. 455.

¶ 1477. On Oct. 13th plaintiff sent a check to a broker with instructions to purchase certain stock therewith. The broker deposited the check, and on Nov. 14th received instructions cancelling the first order and to use the money in buying certain other stock. The broker wrote that he placed the order. Between the two dates the broker's balance had at times been less than the amount of the check, but on Nov. 14th was greater. Held, that the jury was justified in finding that the broker had the funds on hand on the latter date.—People v. Karste, 132 Mich. 455.

¶ 1478. In a prosecution for embezzlement a clear case is presented where it appears that the defendant had obtained a number of shares of stock from the complaining witness under the representations that he had a purchaser therefor and had given his receipt for the stock, the defendant being a stock broker, and in payment therefor had tendered him a check but there were no funds in the bank to meet it, it further appearing that he had sold all the stock and received the money therefor.—People v. West, 146 Mich. 537.

¶ 1479. In a prosecution for embezzlement from a fraternal insurance society, evidence showing that records of the society, kept under the direction of respondent, showed a balance of several thousand dollars, while the bank records showed a balance to the credit of the society of only a few hundred dollars, and that respondent stated from time to time to warrant holders that there was no money on hand to meet their demands, was sufficient to authorize a conviction, notwithstanding evidence of transfers

of record, and such proof is not essential in a prosecution for the forgery of such certificate.—People v. Marion, 29 Mich. 31.

¶ 1490. On a prosecution for the forgery of a mortgage with the purpose of defrauding, everything tending to explain the fraud and its extent and character can be shown, such as matters relating to the ownership and value of the premises which the mortgage purported to cover. And respondent's representation to the persons defrauded that he was the owner of the mortgaged property, together with the preparation of the papers, their retention for signature, and their return signed, constitute a sufficient chain of facts to prove forgery as well as uttering.—People v. Sharp, 53 Mich. 523.

¶ 1491. Evidence of the general reputation of the existence of a bank in another state, and that its bills pass current, being admissible, its weight is for the jury, who may be satisfied with it.—Jennings v. People, 8 Mich. 81.

¶ 1492. Proof that a deed was forged and that the defendant procured its acknowledgment by false personation, and that he undertook to raise money on it, and proof that would authorize an inference that he procured it to be recorded, together with proof that he undertook to raise money on it, warrant a conviction for uttering a forged deed.—People v. Dane, 79 Mich. 361.

¶ 1493. In a prosecution for forging a deed of land, the title of the person named as grantor may be proved by the record of a deed to him, and by the testimony of the register of deeds that a careful examination of the records fails to show any transfer of the land since such deed to him, save the alleged forged deed.—People v. Parker, 67 Mich. 222.

§ 324f. Criminal frauds.

Embezzlement, see ante § 324e.
Forgery and false pretenses, see ante § 324f, ¶¶ 1483-1493.
Elements of the statutory offenses, see Crimes § 86 et seq.

¶ 1494. Actual knowledge and intent to defraud must be shown in order to warrant the conviction of a respondent under Laws of 1887, Act No. 9 (How. St. § 9209d), which makes it a criminal offense to give knowingly a false pedigree of any animal with intent to defraud.—People v. Umlauf, 88 Mich. 274.

§ 324h. Homicide and homicidal assaults.

Nature and elements and degrees of the crimes, see Homicide.
Weight and sufficiency of evidence in homicide cases, see Homicide, VII, C.

§ 324i. Indecency and obscenity.

Elements of statutory offenses against decency and of offenses characterized by obscenity, see Crimes §§ 95, 96.
Adultery, see ante § 324a.

¶ 1495. The purpose for which an obscene picture was obtained is an essential element of the offense, and must be proved, for it cannot be presumed; and where the evidence fails to show that respondent did more than to sit for the negative, and where such sitting only appears from the fact that the negative was found in the possession of photographers, together with negatives made by them of her residence, a verdict of not guilty should be directed.—People v. Ketchum, 103 Mich. 443.

¶ 1496. In a prosecution for a violation of Act 103, Pub. Acts 1903, sec. 2, How. 2nd Ed., § 5293, prohibiting certain exhibitions of deformed human bodies or representations thereof, except for scientific purposes before members of the medical classes, where the exception is negatived in the complaint and warrant and there is evidence tending to show that the exhibition was not made to one included in the exception, it is not error to deny a motion by defendant for a directed verdict on the ground that the evidence did not show that the complaining witness was not included in the exception.—People v. Kennedy, 176 Mich. 15.

§ 324i. Insurance, unlawful agency or business.

Burning to defraud insurer, see ante ¶¶ 1440, 1441.
Elements of statutory insurance crimes, see Crimes § 97.

¶ 1497. Laws 1881, Act No. 148 (How. St. § 4354), makes it unlawful for any person as "agent" to solicit business for an insurance company without obtaining the certificate of authority from the commissioner of insurance provided for by Comp. L. 1871, § 2987 (How. St. § 4290), which makes the term "agent" include any acknowledged agent or any other person who shall in any manner aid in transacting the insurance business of any company not incorporated by state law. Held, that evidence that one man filled out for another a blank application on which insurance was effected by a policy issued by a company which he assumed to represent fairly tended to show that he was acting as agent for the company.—People v. Howard, 50 Mich. 239.

§ 3241. Larceny.

Embezzlement, see ante § 324e.
Obtaining property by false pretenses, see ante § 324f.
Obtaining property by robbery, see post § 324r.
Breaking and entering with intent to steal, see ante § 324b.
Elements of the crime and sufficiency of evidence, see Larceny.

§ 324m. Malicious obstruction of business.
Elements of the offense, see Crimes § 106.

¶ 1498. A., the chief engineer of a railroad company, was charged with conspiring with B. and C. and others to obstruct the business of a corporation by operations incident to building a bridge for the railroad across a canal owned by such corporation. Held, that the fact that B. and C. were A.'s subordinates in the employ of the company, and were subject to his orders, did not make him the sole mover in the matter so as to destroy any preconcerted action, the evidence showing that they acted in concert, and failing to show that B. and C. acted under A.'s orders or that A. acted under the orders of the railroad company.—People v. Petheram, 64 Mich. 252.

§ 324m. Medicine, unlawful practice of.
Elements of the offense, see Crimes § 108.

¶ 1499. There was sufficient evidence that accused advertised or held himself out as practicing medicine, when he exhibited a sign as "Dr. ——, Magnetic Healer," and was called to visit two sick persons, and treated them as a magnetic healer and made a certificate of death for one and a medical practitioner's sworn statement, and also made a report of infectious diseases.—People v. Phippin, 70 Mich. 6.

§ 324p. Perjury, subornation and false swearing.
Elements of the offenses, see Crimes § 115 et seq.
Materiality of the testimony as basis for prosecution for perjury, see Crimes § 116.

¶ 1500. A conviction for perjury cannot be sustained merely upon the contradictory sworn statements of the defendant, but the prosecution must prove which of the two statements is false, and must show that statement to be false by other evidence than the contradictory statement.—People v. McClintic, 193 Mich. 589.

¶ 1501. On a prosecution for perjury committed on a preliminary hearing in giving testimony directly contradictory of the oath on which the warrant issued, the proof suffices where the magistrate testifies to the statements made to obtain the warrant and there is nothing to contradict it, and where the other testimony is proven; since it is not necessary that the existence of grounds for the issuance of warrants be reduced to writing.—People v. McClintic, 193 Mich. 589.

¶ 1502. In a prosecution for endeavor to procure perjury under Comp. L. 1897, § 11308, a conviction will be sustained by testimony that the respondent arrested upon the charge of bastardy had met the complaining witness by appointment, that he had handed her a letter containing the false testimony for her to sign, had said that he would settle the matter and that he g
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Mich. 166.

§ 324p. Poor law off
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§ 324r. Rape and ass
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§ 324r. Receiving or
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make out the crime
—People v. Montag

¶ 1505. In a p
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before, because he
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stealing the revolver if he thought best. Held, that the circumstances were sufficient to sustain a conviction.—People v. Oblaser, 104 Mich. 579.

¶ 1506. In a prosecution for receiving stolen property, evidence that the barber shop of the complaining witness was broken open in the nighttime, that, when he came there in the morning, nothing was in the place, and that the articles were lost, which belonged to him, consisted of those described in the information, was sufficient to justify a finding that the property was feloniously taken.—People v. Moloney, 113 Mich. 536.

¶ 1507. An indictment, under R. S. 1846, chap. 154, § 20, How. St. § 9142, for aiding in the concealment, etc., is supported by proof of acts of the aider, which will assist the principal felon in converting it to the use of the thief, or which will aid him in preventing its recovery by the owner; and it is not necessary to prove that the property was actually hidden or secreted anywhere.—People v. Reynolds, 2 Mich. 422.

¶ 1508. Evidence that a sealskin sacque was found in defendant's possession, and was one of a lot manufactured and placed on sale by a certain firm; that on Dec. 23, 1887, a woman whom defendant afterwards registered at a hotel as his wife called at the store of said firm in the evening, tried on several cloaks, and finally ordered one sent to a hotel, which was done, and the sacque brought back; and that the loss of the sacque was not discovered until Jan. 18, 1888, though an inventory of the stock was taken Jan. 1, does not establish the fact of a larceny sufficiently to warrant conviction upon a charge of receiving and concealing stolen goods knowing them to have been stolen, it not being shown that the woman took anything from the store or had opportunity to do so without discovery.—People v. Montague, 71 Mich. 318.

¶ 1509. Where, under an information in two counts, the first for stealing a horse, the second for aiding in its concealment knowing it to have been stolen, the evidence tends to show that the accused, though not present at the taking, knew the horse was stolen; that he was actively engaged in assisting the sale of it; that he represented to some persons that it was his, and to others that it was his associate's; and that when arrested he claimed to the sheriff that "we bought the horse," there is evidence to sustain a conviction under the second count.—People v. Harris, 93 Mich. 617.

§ 324r. Robbery and assaults with intent to rob.

Elements of the offenses, see Crimes § 126.

¶ 1510. Where a person on trial for robbery admits the forcible taking, but explains it as an attempt to get back property taken from himself, the question of his good faith depends entirely on whether he simply meant to get back what he believed to be his own. His being intoxicated is a fact which it is proper for the jury to consider.—Driscoll v. People, 47 Mich. 413.

¶ 1511. Where one is charged with assault and robbery under Comp. L. 1897, § 11484, and pleads guilty but explains in his examination by the court that he did not intend to kill if resisted, a conviction and sentence thereunder cannot be sustained under Comp. L. 1897, § 11485, defining assault with intent to rob.—People v. Scofield, 142 Mich. 221.

§ 324s. Seduction.

Elements of the offense and sufficiency of proofs, see Seduction.

§ 324w. Weapons, carrying or carelessly using.

Elements of the statutory offenses, see Crimes § 133 et seq.

¶ 1512. In a prosecution under the statute punishing the careless use of firearms, the jury may legitimately infer the absence of malice from testimony that defendant and two other boys met in a cornfield where the other boys were at work; that defendant had a gun and the boys were looking at it; that after about 30 minutes one of the boys claimed he must go to work when defendant put a shell in the gun and said, "Look out, or I will shoot you," and simultaneously did shoot and seriously injure the boy.—People v. Dudley, 131 Mich. 261.

¶ 1513. Respondent was convicted under section 11510, Comp. L. 1897, of discharging intentionally without malice a firearm aimed at certain persons. The evidence showed that he came out of his place of business upon the street; that said persons were standing on the opposite side of the street; that respondent said to them: "You fellows will get your eye full; I will get you sons of bitches"; that he then re-entered his shop and in a few minutes came out armed with a revolver; that said persons immediately started to run; that respondent followed them and called out: "Halt, or I will get you"; and that respondent fell and upon arising fired his revolver towards them. Held, the statute being designed to punish a class of acts done carelessly and the evidence tending to show malice and ill will on the part of respondent, his conviction could not stand.—People v. Peterson, 166 Mich. 10.

IX. TRIAL AND TRIAL PRACTICE.

A. NATURE, TIME, MODE, AND CONDUCT OF TRIAL.

§ 325. General nature and modes of trial.

Separate or joint trials, see post § 326.
Publicity of trial, see post § 327.
Presence of accused, counsel and judge, see post § 328.

Improper persons within railing, see post § 331.
Terms and time for trial, see post § 329.
Suspension, adjournment or interruptions of trial, see post §§ 332, 333.
Attendance and functions of attorneys, see post § 330.
Taking view of place by jury, see post § 335.
Making stipulations and admissions, see post § 334.
Receiving statement by accused, see post § 336.
Reception and exclusion of evidence and order of proofs, see post, IX, B.
Indorsing names of witnesses and adding further names, see ante §§ 20, 21.
Time allowable for and manner of argument to jury, see post, IX, C.
Irregular or improper remarks and conduct by judge in course of trial as error, see post § 395.
Conduct and custody of jury during view, see post § 457.
Communications from jury to court after retirement, see post § 462.
Return of jury into court after retirement to deliberate, see post § 463.
Arguments and conduct of counsel and remarks affecting trial, see post, IX, C.
Provinces of the court and the jury and questions belonging to each, see post, IX, D.
Instructions and requests, see post, IX, E.
Custody of jury, conduct and deliberations, see post, IX, F.
Verdict and rendition of same into court, see post, IX, G.
Sentence or judgment, rendition of same and recording and entering, see post, XI, XII.
New trials and motions in arrest, see post, X.
Practice to preserve rulings and questions arising on trial for review on error or otherwise, see post, XIV.
Trials for misdemeanors before justices and minor courts, see post, XVIII.
Review of trial practice and rulings by error, exceptions or certiorari, see post, XV, XVI.
What are regarded as criminal prosecutions, see also ante § 1.
Nature of proceedings for commitment of juvenile delinquents, see Incompetents § 6; Constitutional Law ¶ 881.
Nature and mode of proceedings for violation of municipal ordinances, see Municipal Corporations, XVI, B.
Civil or criminal nature of bastardy proceedings, see Bastards §§ 4, 6.
Nature of contempt proceedings, civil or criminal, see Contempt § 18.
Quasi-criminal nature of disbarment proceedings, see Attorneys § 5.
Civil nature of capias of fraudulent debtor proceedings, see Civil Arrest §§ 1, 23.
Right to jury trial and essentials of same, see Constitutional Law §§ 209, 210; Jury, I.
Competency and qualifications and selection of jurors, see Jury.

within this state shall be public, and every citizen may freely attend the same."—People v. Murray, 89 Mich. 276.

§ 328. Presence of accused, counsel and judge.

Right to be present at taking of view, and waiver of right, see post § 335, ¶¶ 1540, 1541.

At giving of additional instructions after retirement and return into court, see post § 454.

Colloquy on return of jury into court after retirement in absence of accused but in presence of his counsel, see post ¶ 2255.

Right to have communications received from jury after retirement made known to counsel, see post ¶ 2252.

Presence on return of jury into court for information or rereading of testimony, see post § 465.

On examination of prisoner before sentence on plea of guilty, see post § 486.

Presence at sentence by justice to imprisonment, see post ¶ 2994.

Duty of attorneys to attend, see post § 330.

Showing in record as to presence of accused, see post § 500.

Presumption as to judge's attendance from recitals in record as to adjournment, see post ¶ 1524.

Polling the jury on return of verdict, see post § 469.

Right to confront witnesses, see post §§ 339, 340.

Absence of attorney as ground for continuance, see ante § 121.

¶ 1519. After the regular conviction of a person charged with crime he can no longer insist on being personally present in court for further proceedings, such as the disposition of a motion for a new trial.—People v. Ormsby, 48 Mich. 494.

¶ 1520. Where one on trial for a felony, who is out on bail, fails to appear at the hour to which court has adjourned pending the deliberations of the jury, a verdict rendered in his absence is valid, notwithstanding the provision of How. St. § 9568, that no person indicted for a felony shall be tried unless personally present during the trial.—Frey v. Calhoun Circuit Judge, 107 Mich. 130.

¶ 1521. Where, during argument of counsel to the jury in a criminal case, the trial judge was in a room adjoining the court room where he could hear the argument, held that his absence from the court room did not justify the reversal of the case in the absence of any showing that prejudice resulted to the defendant therefrom.—People v. Kimbrough, 193 Mich. 330.

§ 329. Terms and time for trial.

Time to institute prosecution and limitations on prosecution, see ante, II.

Time and term for filing information or indictment, see ante § 13.

Time and term for motion for new trial or motion, see post § 480.

Time for procedure for review, see post § 5[illegible] et seq.

Postponements and continuances, see ante VI.

Postponement for purpose of preparation, see ante § 121.

Objections for first time on review to improper time for trial, see post § 513.

Constitutional provision as to speedy trial, see Constitutional Law § 199.

Offering bribe to postpone or frustrate prosecution, see Crimes § 50.

General law as to terms and places for court, see Courts, II.

Right to speedy trial, see Const. art. II, § 19.

Time for trial, statutory provision, see Comp. L. 1915, § 15731.

¶ 1522. The statute requiring that when a defendant arraigned in the county court requested to be tried before the circuit judge such judge should, on the first day of the next term, assign a day for the trial, was, as to time, directory only.—People v. Doe, 1 Mich. 451.

¶ 1523. Judgment will not be set aside on the ground merely that respondent was examined and arraigned for trial at the same term, though bound over to answer "at the next term."—People v. Mason, 63 Mich. 510.

¶ 1524. Even if Comp. L. 1897, § 303, requires an ending of the term at the end of five days, when the judge does not appear at the beginning of the term, the court will not assume that the judge was not present each day, although no business was done; and there was no presumption in the case in question that the judge did not attend on a record showing adjournment on a certain day to a day stated and the signature of the trial judge to it.—People v. McGarry, 136 Mich. 316.

¶ 1525. On a court journal showing as of a day in term that the court "thereupon adjourned," it cannot be said that the adjournment was sine die, but only that it was without a definite day to reconvene; and the court was not thereby at an end for the term precluding resumption of business.—People v. McGarry, 136 Mich. 316.

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§ 330. Attendance and functions and duties of attorneys and officers.

General duty and functions of prosecuting attorney and assistants, see Attorneys §§ 62-66.

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Admissibility of evidence to rebut unsworn statement, see ante § 183.

Statement by accused in trial before justice, see post § 654.

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B. RECEPTION AND EXCLUSION OF EVIDENCE.

§ 337. In general; regulating and limiting examination.

Separation and exclusion of witnesses from court during examination of other witnesses, see post § 338.

Confrontation of witnesses by accused, see post §§ 339, 340.

Offering and introducing evidence and witnesses, see post §§ 341-348.

Duty of state to call witnesses, see post §§ 349-351.

Calling witnesses whose names are not indorsed, see post § 352.

Objections and rulings thereon, see post §§ 353-355.

Scope and subjects of defensive and rebuttal evidence, see post §§ 356, 357.

Order and sequence of proofs and reception out of order, see post §§ 358-364.

Exclusion or striking out of evidence, see post §§ 365, 366.

Recalling witnesses and opening case for further proofs, see post §§ 367, 368.

Reading testimony at preliminary examination to witness as basis of present examination, see ante ¶ 1555.

¶ 1556. Const. art. VI, § 28, securing to the defendant in a criminal prosecution the right "to be confronted with the witnesses against him," does not apply to the proof of the facts in their nature essentially documentary, and which can only be proved by the original or by a copy officially authenticated in some way; and especially not when the fact to be thus proved only comes up collaterally.—People v. Jones, 24 Mich. 215.

¶ 1557. A certificate of marriage, signed only by the minister or officiating officer, or the record thereof, cannot avail as evidence of the marriage in a criminal prosecution for bigamy, where the defendant is entitled to be confronted with the witnesses against him.—People v. Lambert, 5 Mich. 349.

¶ 1558. It is improper to admit in evidence against the respondent in a criminal case, for the purpose of showing the state of the weather at a particular time, the official record kept at the United States signal station, without the presence on the witness stand of the man who made the observations and the record. Accused has the right to confront the witness.—People v. Dow, 64 Mich. 717.

¶ 1559. Witnesses in civil cases are not required by any constitutional rule to be produced in open court, and in equity the prevailing practice is against it, depositions being taken when witnesses cannot be present. But the constitution does not permit this to be done in criminal cases.—People v. Sligh, 48 Mich. 54.

¶ 1560. Respondent's constitutional right to be confronted with the witnesses against him is not infringed by the admission, in a trial for rape, where the prosecuting witness is dead, of her deposition taken on the preliminary examination before the justice where respondent was present.—People v. Dowdigan, 67 Mich. 95.

¶ 1561. A conviction cannot be set aside for the admission of a deposition in pursuance of a voluntary stipulation by the parties or their counsel, even if the respondent is represented only by counsel assigned to him; in making such a stipulation the respondent waives his constitutional right to be confronted by the witness.—People v. Murray, 52 Mich. 288.

¶ 1561a. The right to confront witnesses is not denied by reading the testimony of a witness, properly proved by the stenographer, which the witness gave at a former trial of accused on the same information, where the witness at the time of the second trial is by reason of sickness not able to attend.—People v. Farrell, 146 Mich. 264.

§ 341. Offers and introduction of proof.

Duty to admit offered confession and submit voluntariness to jury, see also ante § 2[illegible]
Improper offers prejudicial to accused as error, see post § 342 et seq.
Repeating offers as error, see post § 348.
Election between counts, see ante § 46 et seq.
Election of counts to meet objections, see ante §§ 65, 66.
Offer of evidence as election to rely on count to which it relates, see ante § 48.
Preliminary proofs of competency as expert, see also ante § 211.
Reception of evidence on promise to supply connecting evidence, see post § 364.
Objections and rulings thereon, see post § 353.
Objection proper to reach too narrow offer, see post ¶ 1636.
Exclusion of evidence offered out of time, see post § 365.
Reading from documents and writings in evidence as a part of argument to jury, see post § 389.
Necessity and sufficiency of offer to make question for review, see post §§ 514, 523.
Admission of improper evidence as harmless error, see post § 540 et seq.
Production and inspection of documents before trial, see ante § 103.
Admissions by counsel, see ante § 334.

¶ 1562. Where respondent in a criminal case seeks to show good faith by putting in evidence a conversation between himself and his counsel, his offer must be distinct as to the nature of the conversation in order to render it admissible; and there should also be an offer to show that respondent followed the advice given.—People v. Long, 50 Mich. 249.

¶ 1563. In a prosecution for aiding and assisting a girl to leave the state knowing her to be a subject of the industrial home for girls, without the consent of the board of control of such home, the introduction of the commitment is sufficient to bring into evidence an indorsement of the approval of the circuit judge thereon since this is a part of the commitment and hence did not require to be offered separately.—People v. Kuney, 137 Mich. 436.

¶ 1564. A conviction will not be reversed because the prosecuting attorney, in making proof of the service upon respondent of notice to produce a certain paper in his possession which the people desired to introduce in evidence, was permitted to read such notice in the presence of the jury.—People v. Brown, 110 Mich. 168.

§ 342. Offer of incompetent witness.

¶ 1565. Where the wife of a defendant in a criminal case is called to the witness stand without the consent of the defendant, and the defendant is forced to prejudice himself with the jury by objecting to her testimony,

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¶ 1576. In a prosecution for larceny, certain testimony in regard to the possession of the stolen property after the time of the alleged theft was held proper to go to the jury on proper instructions to meet the uncertainty of time and the claim of an alibi.—People v. Le Munion, 64 Mich. 709.

¶ 1577. Evidence in a wife murder trial tending to show incompetently that accused had sustained improper relations with another woman ought to be given to the jury, when proper as impeaching a witness, under an instruction to consider it only for that purpose.—People v. Foglesong, 116 Mich. 556.

¶ 1578. Where a witness for the defense admitted his friendly relations with the accused a letter showing witnesses' connection with him wherein he posted accused and gave information concerning the efforts of the police to arrest him is properly admitted to discredit him, even though statements of facts made therein might be incompetent as evidence, where the court discriminated clearly between the proper and improper use of the letter.—People v. Thorne, 148 Mich. 203.

¶ 1579. In a prosecution for manslaughter, where a witness wanted to correct his testimony, it was proper for the court to exclude statements made by the attorney for the accused, as such statements were unimportant, the material thing being whether the witness wanted to correct his evidence.—People v. McArron, 121 Mich. 1.

§ 348. Repeating offers and questions after ruling.

Necessity of renewing objections to save question for review, see post § 525.
Repetition of questions and requestioning witnesses, see Examination of Witnesses § 29.

¶ 1580. Where the court in a murder trial has excluded certain evidence, it is improper for defendant's counsel persistently to attempt to get the evidence before the jury by leading questions, and his offers of such proof should be submitted in writing to the court.—People v. Bowen, 165 Mich. 231.

§ 349. Duty of state to call witness or adduce proofs.

Where witness is accomplice or under indictment for same crime, see post § 350.
Production of witness without swearing or examining as a sufficient calling, see post § 351.
Calling witnesses not named on information, see post § 352.
Necessity of indorsement of names of witnesses on informations, see ante § 20.
Necessity of request to call state's witnesses to save objection for review, see post § 519.
Nonproduction of state's witness as harmless error, see post § 538.

¶ 1581. Prosecuting attorneys are sworn ministers of justice, bound to protect the innocent as well as to see that guilty are punished; they must stand indifferent as between the accused and private interests; and they cannot suppress testimony.—People v. Evans, 72 Mich. 367; People v. Swetland, 77 Mich. 53; People v. Bussey, 82 Mich. 4[illegible]. People v. Deitz, 86 Mich. 419.

¶ 1582. The public prosecutor has no right to suppress testimony that favors respondent.—Wellar v. People, 30 Mich. 16; People v. Gordon, 40 Mich. 716.

¶ 1583. A prosecuting attorney is not at liberty to call only such witnesses as are most favorable to the prosecution, when there are others who are in a situation to know, and do in fact know, as much about the transaction.—People v. Etter, 81 Mich. 57[illegible].

¶ 1584. In a homicide, and in cases where analogous reasons exist, those witnesses who were present at the transaction, or who can give direct evidence on any material branch of it, should always be called by the prosecution, except, perhaps, where they are too numerous; the fact that the witnesses may not be favorable to the prosecution is no excuse for not calling them, although it may authorize the prosecuting attorney to press them, when necessary, with searching questions.—Wellar v. People, 30 Mich. 16.

¶ 1585. The prosecution is bound to call all the eyewitnesses to the transaction, unless the number was so great as to make the testimony merely cumulative.—People v. McCullough, 81 Mich. 25.

¶ 1586. The prosecution must call as a witness a person who was present in the room where the shooting which resulted in the homicide for which respondent is on trial took place.—People v. Harper, 83 Mich. 273.

¶ 1587. The refusal of the prosecution to call as witnesses all persons who witnessed the affray in which an assault complained of was committed is ground for reversal.—People v. Deitz, 86 Mich. 419.

¶ 1588. In a prosecution for assault and battery the court has power to compel the prosecution to call as a witness one who has seen the affray where there are few such witnesses.—People v. Kenyon, 93 Mich. 19[illegible].

¶ 1589. It is the duty of a prosecuting attorney to call all eyewitnesses unless in cases of misdemeanor the testimony will be merely cumulative.—People v. Upton, 169 Mich. 31.

¶ 1590. Generally, all attainable witnesses should be called for the prosecution before the prisoner is put to his defense, unless their evidence is merely cumulative.—Hurd v. People, 25 Mich. 405.

carrying the body home, where the prosecutor claimed that they knew nothing about the res gestæ, but offered to produce them.—People v. McArron, 121 Mich. 1.

§ 352. Calling witnesses not named on information.

Indorsements of names, addition or striking names, and time and showing for leave to indorse, see ante §§ 20, 21.

Competency of testimony of witnesses not named, see ante § 156.

Mode of objection to testimony, see post § 355.

Right to object that rebuttal testimony might have been given in chief, see also post ¶ 1645.

¶ 1618. Where the prosecuting attorney shows that he had not known before trial began that a certain person was a material witness, such person may be sworn on behalf of the people, even though his name had not been indorsed upon the information as that of a witness.—Hill v. People, 26 Mich. 496.

¶ 1619. Where an immaterial matter testified to by a witness for the people is denied by respondent, the prosecution cannot introduce witnesses in rebuttal whose names are not indorsed on the information.—People v. Deitz, 86 Mich. 419.

¶ 1620. Under Comp. L. 1897, § 11934, it is error in a criminal case to permit the people to swear a witness in rebuttal without the name of such witness being indorsed upon the information and without requiring any showing as to why it was not indorsed.—People v. Casey, 124 Mich. 279.

¶ 1621. Where on a trial for uttering an alleged forged instrument the persons whose names purported to be affixed as witnesses were not produced nor their names indorsed on the information, and where no showing was made that the names were fictitious, their testimony was a necessary part of the people's case, which could not be omitted without good excuse.—People v. Swetland, 77 Mich. 53.

¶ 1622. Where, in a prosecution for keeping a saloon open after hours, three witnesses testify in behalf of the people that, after the hour for closing, they, in company with three women, whose names are not indorsed on the information, went into a room back of the bar-room kept by respondent, and there purchased lager beer of respondent's barkeeper, it is not error for the court to deny respondent's motion to place the names of the women upon the information, and produce them as witnesses for the people; it appearing that the prosecution has not failed to put all parts of the transaction before the jury by the testimony of the three men, and that the introduction of the testimony of the women would be merely cumulative.—People v. Kindra, 102 Mich. 147.

¶ 1623. After witnesses for the pe testified that they were in responde room after hours with three women gone fully into the facts and after ent had rested, one of the women w and examined as a witness for th Her name was not on the indictme testimony corroborated that of the t but was taken under respondent's that it was more prejudicial to hin would have been had it been take in the trial. Held, that the time o the witness was within the discretio court.—People v. Kindra, 102 Mich.

¶ 1624. It was not error to refuse pel the prosecution to produce an certain witness who was present a preceding the one in which the dece killed, whose name was not indorse information, where, although defenda that the witness was present on the in question, the application was n until the people had rested and a witness was fifty miles away.—P Hossler, 135 Mich. 384.

¶ 1625. Whether the people should pelled to produce a witness who is to in the testimony, but who is not sary witness for the people's case, i ter within the sound discretion of court.—People v. Plummer, 189 Mic

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§ 353. Objections and rulings on offers tions.

Specification of grounds of object post § 354.

Argument of objections and offers in of jury as error, see post § 373.

Improper remarks in passing on ob see post § 395.

Objections to witnesses, see post § 3

Grounds and reasons for striking dence, see post § 366.

Motion to strike or cross-examin proper mode of reaching ambig swers, see post ¶ 1676.

Objection or demurrer to reception evidence, see post § 401.

Mode of taking and preserving objec exception to ruling or otherwise pose of review by writ of erro tions or certiorari, see post, XI

Making objections in civil cases, s V. C.; Saving Questions.

Objection on review for first time t of witness was not indorsed, § 511.

Objection on review for first time ness signed deposition on hearin

within this state shall be public, and every citizen may freely attend the same."—People v. Murray, 89 Mich. 276.

§ 328. Presence of accused, counsel and judge.

Right to be present at taking of view, and waiver of right, see post § 335, ¶¶ 1540, 1541.

At giving of additional instructions after retirement and return into court, see post § 454.

Colloquy on return of jury into court after retirement in absence of accused but in presence of his counsel, see post ¶ 2255.

Right to have communications received from jury after retirement made known to counsel, see post ¶ 2252.

Presence on return of jury into court for information or rereading of testimony, see post § 465.

On examination of prisoner before sentence on plea of guilty, see post § 486.

Presence at sentence by justice to imprisonment, see post ¶ 2994.

Duty of attorneys to attend, see post § 330.

Showing in record as to presence of accused, see post § 500.

Presumption as to judge's attendance from recitals in record as to adjournment, see post ¶ 1524.

Polling the jury on return of verdict, see post § 469.

Right to confront witnesses, see post §§ 339, 340.

Absence of attorney as ground for continuance, see ante § 121.

¶ 1519. After the regular conviction of a person charged with crime he can no longer insist on being personally present in court for further proceedings, such as the disposition of a motion for a new trial.—People v. Ormsby, 48 Mich. 494.

¶ 1520. Where one on trial for a felony, who is out on bail, fails to appear at the hour to which court has adjourned pending the deliberations of the jury, a verdict rendered in his absence is valid, notwithstanding the provision of How. St. § 9568, that no person indicted for a felony shall be tried unless personally present during the trial.—Frey v. Calhoun Circuit Judge, 107 Mich. 130.

¶ 1521. Where, during argument of counsel to the jury in a criminal case, the trial judge was in a room adjoining the court room where he could hear the argument, held that his absence from the court room did not justify the reversal of the case in the absence of any showing that prejudice resulted to the defendant therefrom.—People v. Kimbrough, 193 Mich. 330.

§ 329. Terms and time for trial.

Time to institute prosecution and limitations on prosecution, see ante, II.

Time and term for filing information or indictment, see ante § 13.

Time and term for motion for new trial motion, see post § 480.

Time for procedure for review, see post § 580 et seq.

Postponements and continuances, see ante, VI.

Postponement for purpose of preparation, see ante § 121.

Objections for first time on review to improper time for trial, see post § 513.

Constitutional provision as to speedy trial, see Constitutional Law § 199.

Offering bribe to postpone or frustrate prosecution, see Crimes § 50.

General law as to terms and places for court, see Courts, II.

Right to speedy trial, see Const. art. II, § 19.

Time for trial, statutory provision, see Comp. L. 1915, § 15731.

¶ 1522. The statute requiring that when a defendant arraigned in the county court requested to be tried before the circuit judge, such judge should, on the first day of the next term, assign a day for the trial, was, as to time, directory only.—People v. Doe, 1 Mich. 451.

¶ 1523. Judgment will not be set aside on the ground merely that respondent was examined and arraigned for trial at the same term, though bound over to answer "at the next term."—People v. Mason, 63 Mich. 510.

¶ 1524. Even if Comp. L. 1897, § 303, requires an ending of the term at the end of five days, when the judge does not appear at the beginning of the term, the court will not assume that the judge was not present each day, although no business was done; and there was no presumption in the case in question that the judge did not attend on a record showing adjournment on a certain day to a day stated and the signature of the trial judge to it.—People v. McGarry, 136 Mich. 316.

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§ 330. Attendance and functions and duties of attorneys and officers.

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Contempt by counsel by delaying proceedings by absence on trial day, see Contempt § 3, ¶ 6.
Administrative and judicial functions in the prosecution, powers of the prosecuting attorney, see Constitutional Law § 64.
Power to ask and make amendments, see ante § 68.
Conduct of preliminary examination for competency, see post ¶ 1547.
Necessity of presence at trial, see ante § 328.
Authority and functions on review, see post § 582.
Appearance and functions of prosecuting attorney in trials before justices, see post § 649.
Approval of prosecution as factor in justice's jurisdiction, see ante § 92.
Duty to call state's witnesses, see post § 349 et seq.
Duty to withhold improper offers prejudicial to accused, see also post ¶ 1573.
Asking improper disparaging or discrediting questions as error, see post § 343.
Insulting and intimidating witnesses as error, see post § 393.
Opening statements and final arguments to jury, see post, IX, C.
Duty of court to prevent improper arguments and remarks tending to prejudice jury, see post § 370.
Duty to refrain in argument from asserting personal knowledge and belief or experiences, see post § 378.
Effect of misstating principles of law in argument, see post § 387.
Suggesting in argument that court's instructions be ignored, see post ¶ 1782.
Objections to qualifications of attorneys, see ante § 102.
Right of accused to counsel for defense, see Comp. L. 1915, § 15623; Const. art. II, § 19.

¶ 1527. It is the duty of the public prosecutor to see that the person charged with crime receives a fair trial, so far as it is in his power to afford him one, and it is likewise his duty to use his best endeavor to convict persons guilty of crime; and in the discharge of his duty an active zeal is commendable, yet his methods to procure conviction must be such as accord with the fair and impartial administration of justice.—People v. Dane, 59 Mich. 550.

¶ 1528. The agreement of the attorney-general or of the prosecuting attorney of the proper county for the continuance of the hearing of a criminal case in the supreme court is binding upon both of those officers.—People v. Bussey, 80 Mich. 501.

¶ 1529. Attorneys are officers of the court, and it is their duty to be in court upon the trial of causes duly set for trial, of which they have had due notice.—In re McHugh, 152 Mich. 505.

§ 331. Presence
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Confrontation of witnesses by accused, see post §§ 339, 340.

Offering and introducing evidence and witnesses, see post §§ 341-348.

Duty of state to call witnesses, see post §§ 349-351.

Calling witnesses whose names are not indorsed, see post § 352.

Objections and rulings thereon, see post §§ 353-355.

Scope and subjects of defensive and rebuttal evidence, see post §§ 356, 357.

Order and sequence of proofs and reception out of order, see post §§ 358-364.

Exclusion or striking out of evidence, see post §§ 365, 366.

Recalling witnesses and opening case for further proofs, see post §§ 367, 368.

Taking testimony by deposition, see post § 369.
Impropriety of witness' testifying during taking of view, see ante ¶ 1539.
Misconduct of judge in interrupting examination, see post § 395.
Things seen by jury on view as evidence, see ante § 150.
Sending or allowing books, papers or exhibits to be taken to jury room, see post § 460.
Suspending trial to investigate bribery and subornation, see ante § 332.
Election between counts, and time and manner of electing, see ante § 46 et seq.
Harmless error in improper offers or examination, see post § 544.
Improper exclusion of evidence or witness as harmless error, see post § 542.
Erroneous admission or exclusion of evidence cured by other evidence or action, see post § 552 et seq.
Exclusion of evidence cured by later reception or offer to receive, see post § 559.
Reviewableness of discretionary rulings on questions of examination and reception of proof, see post § 628.
Number of counsel permitted to examine and change in counsel conducting examination, see Examination of Witnesses, § 4.
Questions by judge to witness, see Examination of Witnesses § 5.
Refreshing memory of witness, see Examination of Witnesses, § 20 et seq.
Exhibition of memorandum for refreshment of memory of witness to witness and counsel before using, see Examination of Witnesses § 26.
Witness reading from book used to refresh memory and admissible in evidence, see Examination of Witnesses § 28.
Reading former testimony on pretense of refreshing memory as error, see Examination of Witnesses ¶ 118.
Leading questions to accused by his counsel, see Examination of Witnesses, § 17.
Discretion to regulate and control cross-examination, see Examination of Witnesses § 38.
Right to cross-examine notwithstanding admission in open court of disputed fact, see Examination of Witnesses § 35.
Practice in civil cases, see Trial, V.
Subpoenas to witnesses, see Witnesses, I.
Provision for employment and compensation of interpreters, see Comp. L. 1915, § 15915.

¶ 1547. Preliminary examination by a court of witnesses to determine the admissibility of the declarations of a deceased party as dying declarations may be conducted by the court itself or by the prosecuting attorney in the court's presence, and it is discretionary with the court as to conducting such examination in the presence of the jury.—People v. Cutler, 197 Mich. 6.

¶ 1548. It is improper for the court to dismiss a witness summarily where the counsel for accused expresses a desire to cross-examine further and the assigned rea the court for such action is that "I wait."—People v. Kindra, 102 Mich.

§ 338. Separation and exclusion of wi

Seating expert witnesses within rail taking of testimony, see also ante
Competency of testimony of witnesse violated rule, see ante § 157.

¶ 1549. The exclusion of witnesse the court room during a trial is wholl in the discretion of the court.—Pe Burns, 67 Mich. 537.

¶ 1550. In a criminal case the co fused to exclude from the court roo ing the examination of other witne witness for the people, who, being a tive, had caused respondent's arrest; was allowed to remain and suggest prosecuting attorney facts relating testimony. Held, that there was no al discretion.—People v. Burns, 67 Mich.

¶ 1551. Respondent's request, in a homicide, that the witnesses may be ined separately and not in one an presence, should be granted, if seas made.—People v. Hall, 48 Mich. 482.

¶ 1552. Refusal of the request of a on trial for larceny that one of th officers who arrested respondent be ex from the court room while the other i fying, is not error, being entirely with discretion of the court.—People v. M 101 Mich. 400.

¶ 1553. It is matter of discretion to a witness for the prosecution to rem court during the trial.—People v. Cor 105 Mich. 149.

§ 339. Confrontation of witnesses.

Validity of laws affecting right of a see Constitutional Law, IX.
Right to confront witnesses, see Co 1915, § 15623; Const. art. II, § 19

¶ 1554. Evidence against a person a or convicted of a penal offense can received in his absence for the purp imposing or increasing his sentence.- Fowler, 49 Mich. 234.

¶ 1555. This right of confrontation violated by allowing the prosecution a witness whom it is compelled to call adverse, to read to such witness, and t rogate him upon his testimony befo examining magistrate; respondent been confronted by, and having cross ined, such witness upon the preliminar amination.—People v. Case, 105 Mich

§ 340. ——Documentary and depositi dence.

Competency of depositions taken on inary hearing and of other docu see ante § 282 et seq.

Reading testimony at preliminary examination to witness as basis of present examination, see ante ¶ 1555.

¶ 1556. Const. art. VI, § 28, securing to the defendant in a criminal prosecution the right "to be confronted with the witnesses against him," does not apply to the proof of the facts in their nature essentially documentary, and which can only be proved by the original or by a copy officially authenticated in some way; and especially not when the fact to be thus proved only comes up collaterally.—People v. Jones, 24 Mich. 215.

¶ 1557. A certificate of marriage, signed only by the minister or officiating officer, or the record thereof, cannot avail as evidence of the marriage in a criminal prosecution for bigamy, where the defendant is entitled to be confronted with the witnesses against him.—People v. Lambert, 5 Mich. 349.

¶ 1558. It is improper to admit in evidence against the respondent in a criminal case, for the purpose of showing the state of the weather at a particular time, the official record kept at the United States signal station, without the presence on the witness stand of the man who made the observations and the record. Accused has the right to confront the witness.—People v. Dow, 64 Mich. 717.

¶ 1559. Witnesses in civil cases are not required by any constitutional rule to be produced in open court, and in equity the prevailing practice is against it, depositions being taken when witnesses cannot be present. But the constitution does not permit this to be done in criminal cases.—People v. Sligh, 48 Mich. 54.

¶ 1560. Respondent's constitutional right to be confronted with the witnesses against him is not infringed by the admission, in a trial for rape, where the prosecuting witness is dead, of her deposition taken on the preliminary examination before the justice where respondent was present.—People v. Dowdigan, 67 Mich. 95.

¶ 1561. A conviction cannot be set aside for the admission of a deposition in pursuance of a voluntary stipulation by the parties or their counsel, even if the respondent is represented only by counsel assigned to him; in making such a stipulation the respondent waives his constitutional right to be confronted by the witness.—People v. Murray, 52 Mich. 288.

¶ 1561a. The right to confront witnesses is not denied by reading the testimony of a witness, properly proved by the stenographer, which the witness gave at a former trial of accused on the same information, where the witness at the time of the second trial is by reason of sickness not able to attend.—People v. Farrell, 146 Mich. 264.

§ 341. Offers and introduction of proof.

Duty to admit offered confession and submit voluntariness to jury, see also ante § 261.
Improper offers prejudicial to accused as error, see post § 342 et seq.
Repeating offers as error, see post § 348.
Election between counts, see ante § 46 et seq.
Election of counts to meet objections, see ante §§ 65, 66.
Offer of evidence as election to rely on count to which it relates, see ante § 48.
Preliminary proofs of competency as expert, see also ante § 211.
Reception of evidence on promise to supply connecting evidence, see post § 364.
Objections and rulings thereon, see post § 353.
Objection proper to reach too narrow offer, see post ¶ 1636.
Exclusion of evidence offered out of time, see post § 365.
Reading from documents and writings in evidence as a part of argument to jury, see post § 389.
Necessity and sufficiency of offer to make question for review, see post §§ 514, 523.
Admission of improper evidence as harmless error, see post § 540 et seq.
Production and inspection of documents before trial, see ante § 103.
Admissions by counsel, see ante § 334.

¶ 1562. Where respondent in a criminal case seeks to show good faith by putting in evidence a conversation between himself and his counsel, his offer must be distinct as to the nature of the conversation in order to render it admissible; and there should also be an offer to show that respondent followed the advice given.—People v. Long, 50 Mich. 249.

¶ 1563. In a prosecution for aiding and assisting a girl to leave the state knowing her to be a subject of the industrial home for girls, without the consent of the board of control of such home, the introduction of the commitment is sufficient to bring into evidence an indorsement of the approval of the circuit judge thereon since this is a part of the commitment and hence did not require to be offered separately.—People v. Kuney, 137 Mich. 436.

¶ 1564. A conviction will not be reversed because the prosecuting attorney, in making proof of the service upon respondent of notice to produce a certain paper in his possession which the people desired to introduce in evidence, was permitted to read such notice in the presence of the jury.—People v. Brown, 110 Mich. 168.

§ 342. Offer of incompetent witness.

¶ 1565. Where the wife of a defendant in a criminal case is called to the witness stand without the consent of the defendant, and the defendant is forced to prejudice himself with the jury by objecting to her testimony.

reversible error is thereby committed.—People v. Trine, 164 Mich. 1.

¶ 1566. Where the offering of an attorney as a witness against his client charged with perjury and the asking of questions convey an intimation that if the attorney was permitted to testify his evidence would not sustain the evidence of the client, the mere fact that the accused was compelled to interpose an objection upon the ground of privilege tends to prejudice him with the jury, and that the attorney did not testify to any prejudicial fact will not preclude a reversal. —People v. Dahrooge, 173 Mich. 375.

§ 343. Questions tending to disparage or suggest improprieties.

Offer of improper character evidence in presence of jury as error, see also ante ¶ 1297.

¶ 1567. It is error in a criminal case for the prosecuting attorney to attempt, in the cross-examination, to throw discredit upon witnesses for the defense by asking questions not with the design of eliciting facts but to cast suspicion upon the character and credibility of such witnesses.—People v. Gotshall, 123 Mich. 474.

¶ 1568. Attempts in an arson case to discredit respondent by asking questions designed to convey to the jury the impression that the prosecutor believed that respondent was guilty of other like crimes, are improper and the practice is condemned.—People v. Gotshall, 123 Mich. 474.

¶ 1569. Propounding in good faith improper questions to impeach a witness is not reversible error.—People v. Tubbs, 147 Mich. 1.

¶ 1570. Defendant in a criminal case set up an alibi. The prosecuting attorney in examining his alibi witnesses asked them if, in a trial of defendant on another charge, they did not witness to an alibi, and made other irrelevant insinuations calculated to arouse a prejudice against said witnesses. Held, this constituted reversible error.—People v. Lieska, 161 Mich. 630.

§ 344. Evidence capable of improper use.

Offers of evidence not admissible for some purposes, see post § 346.

¶ 1571. On a trial for receiving stolen goods it is error to allow the prosecution to introduce under the pretext of rebuttal the minutes of respondent's testimony on the trial of another person, for an entirely different crime, in the shape of a long and rambling cross-examination upon matters irrelevant to either record, the purpose being to assail injuriously respondent's general history, and to infer perjury from the conviction of the other prisoner; error.—People v. Moyer, 77 Mich. 571.

¶ 1572. In a prosecution for murder, where the people are forced to call the mother of defendant as a witness, it is error to admit testimony ostensibly to impeach witness implying that the mother was an accomplice in the crime, where the intended impeachment is not as to the witness' competent testimony, but as to testimony which is immaterial, the effect being to create a false issue between the people and the witness, and by suggestion and inference making the defendant and the witness stand together, so that if the false issue is determined favorably to the people, defendant will be correspondingly affected.—People v. Lahnala, 193 Mich. 144.

¶ 1573. Where respondent in a criminal case is unpopular and there is great feeling and prejudice in the community against him, it is the special duty of the prosecuting attorney to see that the respondent has a fair trial and not to introduce in evidence matters which would permit the jury to entertain an unjust suspicion of the character and truthfulness of the witnesses for the defense and it is the duty of the judge to restrain attacks upon such witnesses.—People v. Gotshall, 123 Mich. 474.

§ 345. Evidence not offered on preliminary hearing.

¶ 1574. A ruling that "it is the duty of a respondent, when he has a good defense in the nature of an alibi, to interpose that defense at the earliest moment possible, and a respondent should offer his defense of an alibi before the examining magistrate, with a view to saving himself anxiety and trouble, and the people the great expense of a trial," is held erroneous, especially in the absence of any showing that the witnesses sworn on the trial on that subject were present or obtainable at the examination.—Sullivan v. People, 31 Mich. 1.

§ 346. Evidence admissible for restricted purposes.

Offers of evidence capable of improper use, see ante § 344.

Admissibility for some and not for other purposes, see ante § 159.

¶ 1575. Where an information contains two counts, one for larceny and the other for receiving the stolen goods, it is error to submit under the second count evidence of distinct larcenies of similar goods, as it tends to show respondent to be a common thief, and prejudices him upon the charge in the first count.—People v. Jacks, 76 Mich. 218.

§ 347. ——Reception with caution or limitations on purpose.

Instructions as to proper uses, see post § 449.

Instruction against misuse of evidence, see post § 449.

Admissibility for limited or specific purpose, see ante § 159.

¶ 1576. In a prosecution for larceny, certain testimony in regard to the possession of the stolen property after the time of the alleged theft was held proper to go to the jury on proper instructions to meet the uncertainty of time and the claim of an alibi.—People v. Le Munion, 64 Mich. 709.

¶ 1577. Evidence in a wife murder trial tending to show incompetently that accused had sustained improper relations with another woman ought to be given to the jury, when proper as impeaching a witness, under an instruction to consider it only for that purpose.—People v. Foglesong, 116 Mich. 556.

¶ 1578. Where a witness for the defense admitted his friendly relations with the accused a letter showing witnesses' connection with him wherein he posted accused and gave information concerning the efforts of the police to arrest him is properly admitted to discredit him, even though statements of facts made therein might be incompetent as evidence, where the court discriminated clearly between the proper and improper use of the letter.—People v. Thorne, 148 Mich. 203.

¶ 1579. In a prosecution for manslaughter, where a witness wanted to correct his testimony, it was proper for the court to exclude statements made by the attorney for the accused, as such statements were unimportant, the material thing being whether the witness wanted to correct his evidence.—People v. McArron, 121 Mich. 1.

§ 348. Repeating offers and questions after ruling.

Necessity of renewing objections to save question for review, see post § 525.
Repetition of questions and requestioning witnesses, see Examination of Witnesses § 29.

¶ 1580. Where the court in a murder trial has excluded certain evidence, it is improper for defendant's counsel persistently to attempt to get the evidence before the jury by leading questions, and his offers of such proof should be submitted in writing to the court.—People v. Bowen, 165 Mich. 231.

§ 349. Duty of state to call witness or adduce proofs.

Where witness is accomplice or under indictment for same crime, see post § 350.
Production of witness without swearing or examining as a sufficient calling, see post § 351.
Calling witnesses not named on information, see post § 352.
Necessity of indorsement of names of witnesses on informations, see ante § 20.
Necessity of request to call state's witnesses to save objection for review, see post § 519.
Nonproduction of state's witness as harmless error, see post § 538.

¶ 1581. Prosecuting attorneys are sworn ministers of justice, bound to protect the innocent as well as to see that guilty are punished; they must stand indifferent as between the accused and private interests; and they cannot suppress testimony.—People v. Evans, 72 Mich. 367; People v. Swetland, 77 Mich. 53; People v. Bussey, 82 Mich. 49; People v. Deitz, 86 Mich. 419.

¶ 1582. The public prosecutor has no right to suppress testimony that favors respondent.—Wellar v. People, 30 Mich. 16; People v. Gordon, 40 Mich. 716.

¶ 1583. A prosecuting attorney is not at liberty to call only such witnesses as are most favorable to the prosecution, when there are others who are in a situation to know, and do in fact know, as much about the transaction.—People v. Etter, 81 Mich. 570.

¶ 1584. In a homicide, and in cases where analogous reasons exist, those witnesses who were present at the transaction, or who can give direct evidence on any material branch of it, should always be called by the prosecution, except, perhaps, where they are too numerous; the fact that the witnesses may not be favorable to the prosecution is no excuse for not calling them, although it may authorize the prosecuting attorney to press them, when necessary, with searching questions.—Wellar v. People, 30 Mich. 16.

¶ 1585. The prosecution is bound to call all the eyewitnesses to the transaction, unless the number was so great as to make the testimony merely cumulative.—People v. McCullough, 81 Mich. 25.

¶ 1586. The prosecution must call as a witness a person who was present in the room where the shooting which resulted in the homicide for which respondent is on trial took place.—People v. Harper, 83 Mich. 273.

¶ 1587. The refusal of the prosecution to call as witnesses all persons who witnessed the affray in which an assault complained of was committed is ground for reversal.—People v. Deitz, 86 Mich. 419.

¶ 1588. In a prosecution for assault and battery the court has power to compel the prosecution to call as a witness one who has seen the affray where there are few such witnesses.—People v. Kenyon, 93 Mich. 19.

¶ 1589. It is the duty of a prosecuting attorney to call all eyewitnesses unless in cases of misdemeanor the testimony will be merely cumulative.—People v. Upton, 169 Mich. 31.

¶ 1590. Generally, all attainable witnesses should be called for the prosecution before the prisoner is put to his defense, unless their evidence is merely cumulative.—Hurd v. People, 25 Mich. 405.

¶ 1591. The rule requiring the prosecution to call every attainable witness where testimony is needed to disclose any part of the transaction is to prevent the suppression of evidence, and does not make it always necessary to call all witnesses, particularly where their testimony would be only cumulative, and the offense is not a crime of violence.—Bonker v. People, 37 Mich. 4.

¶ 1592. The prosecution may refuse to call a witness whose name is indorsed upon the information, where proof of the fact to which he was to testify has become unnecessary.—People v. Berry, 107 Mich. 256.

¶ 1593. The prosecution is not obliged to call a witness whose name was placed upon the information at respondent's request, such witness being present in court.—People v. Resh, 107 Mich. 251.

¶ 1594. The prosecution in a criminal action is not obliged to call all the witnesses that are named on the information.—People v. Quick, 51 Mich. 547.

¶ 1595. The prosecution in a criminal case cannot be required to call respondent's wife as a witness in order that she may be cross-examined, even though her name has been indorsed on the information as one of the witnesses for the prosecution.—People v. Wolcott, 51 Mich. 612.

¶ 1596. On the trial of a youth for the larceny of a pocket-book the fact that an officer had seen the prisoner's father search him immediately after the theft and take from him what seemed to be a goldpiece and put it into his own pocket, was a part of the res gestæ; and the prosecution was not bound to call the father as a witness, as it was not claimed that he knew anything more about the transaction than the finding; and as he was actively aiding the defense, his position in regard to the facts was not such as to make him a necessary witness for the prosecution to protect defendant against a false accusation.—People v. Long, 44 Mich. 296.

¶ 1597. Where felonious homicide is charged it is both the right and the duty of the prosecution to give evidence of all the circumstances surrounding the discovery of the body of deceased which have any bearing upon the manner of the death, and any tendency to show whether it was natural, accidental or felonious. Such evidence is a necessary preliminary to any which shall be offered to connect any particular person with the homicide.—Brown v. People, 17 Mich. 429.

¶ 1598. In a case of homicide the prosecution must connect the prisoner with the injury claimed to have been the cause of death, and must give all the testimony in its power going to prove the corpus delicti.—Wellar v. People, 30 Mich. 16.

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complaining witness testifies that, at the time the shot which inflicted the injury complained of was fired, but one person aside from respondent and himself was in the room where the shooting occurred, and that witness did not see the shot fired, and the evidence as to who fired it is purely circumstantial, it is the duty of the prosecuting attorney to call and examine said third party as a witness; and this is so even though such third party is respondent's sister, it appearing also that she was the betrothed of the complaining witness.—People v. Germaine, 101 Mich. 485.

¶ 1606a. In a criminal prosecution for selling intoxicating liquors without having paid the tax required under Comp. Laws, 1897, § 5385, men named by a witness for the prosecution as being present at respondent's place of business when he drank liquor there, and as drinking liquor there themselves, are not res gestæ witnesses within the meaning of the rule which requires that such witnesses shall be produced and examined by the prosecuting attorney.—People v. Moore, 155 Mich. 107.

§ 350. ——Accomplices and witnesses under indictment for same crime.

¶ 1607. It is not obligatory upon the prosecution to call an accomplice of respondent as a witness, under the rule requiring the production of eye witnesses of the transaction.—People v. Resh, 107 Mich. 251; People v. Baker, 112 Mich. 211.

¶ 1608. Respondent cannot insist upon the prosecution's calling as witnesses for the people two of his accomplices whose names were indorsed on the information; especially where their testimony would be merely cumulative.—People v. Considine, 105 Mich. 149.

¶ 1609. Three respondents were jointly informed against for manslaughter, and demanded separate trials. The theory of the prosecution was that the deceased came to his death by being hit with a stone thrown by one of the respondents. No concert of action was shown between them, and, at the time the stone was thrown, the other two were some distance from the one who threw it, and were nearer to the deceased, and, according to the testimony of some of the witnesses, had their hands raised, but the witnesses did not testify that they struck the deceased. The testimony failed to show any marks or bruises upon the person of the deceased. Held, that it was the duty of the prosecution either to put the two respondents on trial first, or tender them as witnesses for the people on the trial of the third respondent, and thus enable him to cross-examine them if he so desired.—People v. McCullough, 81 Mich. 25.

¶ 1610. There is no rule requiring the prosecution to call accomplices as witnesses; that rests largely in the sound discretion of the prosecuting officer.—People v. McCullough, 81 Mich. 25.

¶ 1611. It was prejudicial error for the court, after refusing to require the prosecution to produce the only supposed eyewitness of the murder, to testify as to the identity of the criminal, subsequently, after both parties had rested, to order such witness to testify, when the defense, by attacking this witness and developing the theory that she was implicated in the crime, had furnished an incentive to her to color her testimony.—People v. Harper, 145 Mich. 402.

§ 351. ——Production of witnesses without swearing or examining.

¶ 1612. The fact that the name of a witness is indorsed upon an information as one of the people's witnesses does not of itself involve any necessary obligation to do any more than to have the witness in court ready to be examined.—Wellar v. People, 30 Mich. 16.

¶ 1613. The prosecuting attorney should not only have all persons who witnessed the affray present in court but should have them sworn in behalf of the people, and he may then examine them much or little, as he chooses, thus affording respondent an opportunity of cross-examination without prejudice by bias.—People v. Deitz, 86 Mich. 419.

¶ 1614. The prosecution upon a trial for murder having rested without calling certain witnesses, whose names were indorsed upon the information, respondent's counsel demanded that they be called and examined, so that he could cross-examine them. Held, that by producing said witnesses, and tendering them to the defense for cross-examination, the prosecuting attorney performed his full duty, it appearing that none of them was an eyewitness to the transaction.—People v. Pope, 108 Mich. 361.

¶ 1615. The prosecuting attorney is not obliged to place upon the stand one whose name is indorsed on the information, unless such person is a res gestæ witness; his duty in the premises being fully performed by producing the person in court, and giving respondent an opportunity to examine him.—People v. Grant, 111 Mich. 346.

¶ 1616. Upon a trial for assault and battery, the prosecuting attorney does all that is required of him when he calls the witnesses who were present at the time the offense is claimed to have been committed, swears them on behalf of the people, and tenders them to the defense for cross-examination; he cannot be compelled to examine them as to the affray.—People v. Hughes, 116 Mich. 80.

¶ 1617. In a manslaughter error cannot be assigned upon the failure of the prosecutor to call two witnesses who aided in

carrying the body home, where the prosecutor claimed that they knew nothing about the res gestæ, but offered to produce them.—People v. McArron, 121 Mich. 1.

§ 352. Calling witnesses not named on information.

Indorsements of names, addition or striking names, and time and showing for leave to indorse, see ante §§ 20, 21.

Competency of testimony of witnesses not named, see ante § 156.

Mode of objection to testimony, see post § 355.

Right to object that rebuttal testimony might have been given in chief, see also post ¶ 1645.

¶ 1618. Where the prosecuting attorney shows that he had not known before trial began that a certain person was a material witness, such person may be sworn on behalf of the people, even though his name had not been indorsed upon the information as that of a witness.—Hill v. People, 26 Mich. 496.

¶ 1619. Where an immaterial matter testified to by a witness for the people is denied by respondent, the prosecution cannot introduce witnesses in rebuttal whose names are not indorsed on the information.—People v. Deitz, 86 Mich. 419.

¶ 1620. Under Comp. L. 1897, § 11934, it is error in a criminal case to permit the people to swear a witness in rebuttal without the name of such witness being indorsed upon the information and without requiring any showing as to why it was not indorsed.—People v. Casey, 124 Mich. 279.

¶ 1621. Where on a trial for uttering an alleged forged instrument the persons whose names purported to be affixed as witnesses were not produced nor their names indorsed on the information, and where no showing was made that the names were fictitious, their testimony was a necessary part of the people's case, which could not be omitted without good excuse.—People v. Swetland, 77 Mich. 53.

¶ 1622. Where, in a prosecution for keeping a saloon open after hours, three witnesses testify in behalf of the people that, after the hour for closing, they, in company with three women, whose names are not indorsed on the information, went into a room back of the bar-room kept by respondent, and there purchased lager beer of respondent's barkeeper, it is not error for the court to deny respondent's motion to place the names of the women upon the information, and produce them as witnesses for the people; it appearing that the prosecution has not failed to put all parts of the transaction before the jury by the testimony of the three men, and that the introduction of the testimony of the women would be merely cumulative.—People v. Kindra, 102 Mich. 147.

magistrate without having it read, see post § 511.
Necessity of objection in trial court to save question for review, see post § 514 et seq.
Sufficiency of objections to save question for review, see post § 523.
Specification necessary to save question for review, see post § 523.
Waiver or cure of objections, see post § 551 et seq.
Construction of answer of witness on objection or motion to strike, see Examination of Witnesses § 31.
Reframing questions to avoid objections or to elicit better answer, see Examination of Witnesses § 31.

¶ 1627. The rule that only the questioner may object for irresponsiveness of answer may be different when testimony is taken by deposition, as counsel may in such case lose the opportunity of putting further questions to follow it up.—Hamilton v. People, 29 Mich. 173.

¶ 1628. A defendant tried separately may object to any testimony concerning the acts or sayings of another defendant, when there has been no evidence introduced to connect them together in a conspiracy, and no assurance that such proof will be made.—Hamilton v. People, 29 Mich. 195.

¶ 1629. Where a power of attorney as described in an indictment for forging the names of the attesting officers has not been preceded by proof of forgery of at least one of the names thereon, it is proper to object to the introduction of the paper itself in evidence on the ground that it is not the paper described in the indictment, notwithstanding it might be read and the evidence introduced afterwards if the court so ruled.—People v. Marion, 28 Mich. 255.

¶ 1630. It seems that an objection to a question that it is leading should be taken before the question is answered.—Morrissey v. People, 11 Mich. 327.

¶ 1631. Whether or not, in a trial for larceny from the person, it is an admissible method of identifying a bank-bill found on the defendant, for the prosecuting attorney to pick it up by itself and show it to the witness for identification, quære. But where the witness has previously recognized the bill without objection, the objection to this method of identification comes too late to have any force.—People v. Morrigan, 29 Mich. 4.

¶ 1632. On a trial for robbery a fellow prisoner of the accused testified to an account of it given by the latter, and named other prisoners who were present. One of these was asked as to conversations with the accused in the presence of the witness, but the questions were ruled out as not referring to the particular conversation. He was at length allowed to answer that he heard a statement by the accused in the witness' presence, and counsel for the respondent dropped the inquiry at that point, although no adverse ruling had been made. Held, that as no one understood there was any objection to testimony which would contradict the witness or explain what he referred to, there was no error in the previous rulings, which were not meant to exclude proper questions.—McGuire v. People, 44 Mich. 286.

¶ 1633. Where the answer to a question admissible as preliminary inquiry contains incompetent or immaterial matter, the proper practice is by motion to strike out such matter and not by general objection.—People v. Pope, 108 Mich. 361.

§ 354. ——Specification of grounds.

Mode and sufficiency of objection to hypothetical question to save question for review, see post ¶ 2460.

¶ 1634. Objection to admission of testimony must state a reason against its admission.—People v. Summers, 115 Mich. 537.

¶ 1635. An objection to the admission of any evidence on the ground that the justice never acquired jurisdiction to issue his warrant, and that the complaint, warrant or information did not charge any offense known to the laws of the state, is too general, even in a criminal trial.—People v. Haas, 79 Mich. 449.

¶ 1636. An objection for incompetency and immateriality will present the question whether a newspaper article offered in evidence ought to be received where all of it is not included in the offer.—People v. Coughlin, 67 Mich. 466.

¶ 1637. It seems that a general objection for incompetency and irrelevancy will not raise the question that offered evidence is self-incriminatory.—People v. Ecarius, 124 Mich. 616.

¶ 1638. An objection that a question calling for the judgment of a witness as to whether respondent was sane or insane was too narrow, and should have included all of the observations of the witness during the entire period of his acquaintance, is overtechnical, when respondent's counsel did not take the trouble to modify the evidence by cross-examination.—People v. Borgetto, 99 Mich. 336.

¶ 1639. Objections to a hypothetical question must be stated specifically to the trial court showing the precise fact omitted.—People v. Foglesong, 116 Mich. 556.

¶ 1640. An objection to testimony of physicians on the ground that it was "incompetent as the record stands" and "because there is nothing in this record that qualifies

it and makes it competent, and it is after the fact also," does not raise the question that such physicians are incompetent to testify because it had not been made to appear that they had the qualifications required by Comp. L. 1897, § 5280, and hence such question will not be considered on appeal.—People v. Farrell, 137 Mich. 127.

¶ 1641. In a prosecution for rape, the testimony of a mother as to remarks made to her by her three-year-old son who witnessed the assault will be held incompetent without considering whether the objection to it was technically correct.—People v. Beech, 129 Mich. 622.

§ 355. Objections to witnesses.

Necessity of taking objections to witnesses below, see post § 514.
Forcing objections to competency as prejudicial error, see ante § 342.
Mode of objecting to competency of witnesses in general or to their competency because of privileged relationship, and waiver of such objections, see Witnesses, II-V.

¶ 1642. After a witness has been sworn and examined his testimony cannot be objected to on the ground that his name does not appear on the information.—People v. Harris, 95 Mich. 87.

§ 356. Scope and subjects of defendant's evidence.

See also post ¶ 1666.
Evidence on defense not touched in preliminary hearing, see ante § 345.
Relative order and sequence of proofs offered by the state and accused, see post § 358 et seq.
Scope and subjects for cross-examination and redirect, see Examination of Witnesses, II, III.
[Note. The relevancy and competency of evidence to a particular issue made by or pursued by defendant is treated ante VIII, B.]

¶ 1643. If the prosecution fails to go fully into evidence of the res gestæ it is the right of defendant to do so, either by cross-examination of the people's witnesses or by the testimony of his own.—Patten v. People, 18 Mich. 314.

§ 357. Scope and subjects of rebuttal.

Explanation of explanatory testimony, see also ante ¶ 883.
Calling witnesses not named on information to give rebutting evidence, see ante § 352.
Order and sequence of proofs, see post § 358 et seq.
Order of proofs in rebuttal, see post § 362.
Proper matter for redirect examination, see Examination of Witnesses, III.

¶ 1644. Where a witness has testified on the introduction of the people's case to his acquaintance with respondent, and to circumstances showing some opportunity to judge as to his mental condition, it is unnecessary to repeat such testimony in connection with the opinion of the witness as to the sanity of the respondent, given on rebuttal of the defense of insanity.—People v. Borgetto, 99 Mich. 336.

¶ 1645. Respondent cannot complain that the testimony of a witness not indorsed on the indictment was taken in rebuttal instead of in chief, where it only developed by the testimony of other witnesses that such witness was present with them at the time of the offense and where her testimony was merely corroborative of the other testimony and was objected to only on the ground that it was prejudicial by reason of being taken at the time instead of earlier in the trial.—People v. Kindra, 102 Mich. 147.

¶ 1646. Defendant gave evidence tending to show an alibi. To meet this the prosecution gave evidence tending to contradict it. To rebut this defendant offered to prove that the witnesses for the prosecution were mistaken as to the time when an occurrence sworn to by them, and supposed to be inconsistent with the alibi, took place. This evidence was rejected by the court on the ground that defendant should have given it as a part of his evidence in chief to establish the alibi. Held error. This late evidence formed no part of the alibi, and did not become material or relevant until the prosecution put in evidence to contradict it. It then became defendant's right to rebut.—Brown v. People, 17 Mich. 429.

§ 358. Order and sequence of proofs.

Reception out of order, when proper or permissible, see post §§ 359-364.
Exclusion of offer made out of time, see post § 365.
Proper subjects for defendant's proofs, see ante § 356.
Recalling witness or reopening case, see post §§ 367, 368.
Rules applied in civil cases, see Trial, V.
Necessity of first showing foundation for dying declarations, see also Homicide ¶¶ 187, 196.

¶ 1647. It is especially important in criminal cases that the proper order for the admission of testimony be observed and th the connection of the defendant with a f be established before permitting the i duction of evidence of the fact.—Peo Morgan, 124 Mich. 527.

¶ 1648. The order of proof in cases is to some extent, if not wh the judicial discretion, and t admission of evidence in a brib ing a conspiracy to corruptly pal action of which the br

was an incident, before there was other evidence showing defendant's complicity, was not error.—People v. McGarry, 136 Mich. 316.

¶ 1649. The prosecutor in a murder case cannot be confined to proving dying declarations made at one time if there were others made at other times and all were competent; nor can he be confined to proving what was said at one time where the statement was reduced to writing and signed at another.—People v. Simpson, 48 Mich. 474.

§ 359. Reception of evidence out of order.

Various classes of proofs receivable out of order, see post §§ 360-363.

Reception on condition that connecting evidence be adduced, see post § 364.

Exclusion of offer made out of time, see post § 365.

Necessity of objection to proofs out of order to save question for review, see post § 518.

Harmless error in taking proof out of order, see post § 546.

¶ 1650. It is within a trial court's discretion, even in a murder case, to admit evidence out of its strict order.—People v. Wilson, 55 Mich. 506.

¶ 1651. The order in which the testimony of a physician in a prosecution for homicide, as to the appearance of the corpse and the cause of death, should be received, is within the discretion of the court.—People v. Hare, 57 Mich. 505.

¶ 1652. The court, after refusing to allow a witness to testify in a murder trial as to statements of another witness, in impeachment of testimony, on the ground that the proper foundation had not been laid, erred subsequently in refusing to allow the foundation questions to be put on the ground that the whole matter had been traversed.—People v. Harper, 145 Mich. 402.

§ 360. ——Testimony of witness before proofs of qualification.

¶ 1653. The admission of testimony of an expert witness, before an opportunity has been given opposing counsel to examine him as to his competency, lies in the discretion of the court.—People v. Kimbrough, 193 Mich. 330.

§ 361. ——Evidence as to guilt before proof of corpus delicti.

¶ 1654. No evidence of motive, and no testimony beyond the main issue itself, should be allowed before the corpus delicti has been shown, and this is particularly necessary, so far as the testimony can be separately given, in prosecutions for homicide.—People v. Hall, 48 Mich. 482; People v. Millard, 53 Mich. 63.

¶ 1655. An objection against allowing a witness to identify an instrument alleged to be forged until after it had been shown to be false only concerns the order of proof, which is within the discretion of the trial court.—People v. Marion, 29 Mich. 31.

¶ 1656. Evidence that a man on trial for poisoning his wife had formerly had illicit relations with another woman is not admissible, if at all, until the testimony concerning the corpus delicti is all in.—People v. Millard, 53 Mich. 63.

¶ 1657. Where the corpus delicti depends for its existence upon respondent's acts and intent, it need not be proved before proving respondent's admissions.—People v. Swetland, 77 Mich. 53.

¶ 1658. Where the corpus delicti on a murder trial could be proved only by circumstantial evidence and the circumstances by which it could be established were so interwoven with the testimony tending to establish the defendant's connection with the crime that it was difficult to show one without showing the other, held that the failure to establish the corpus delicti before the introduction of proof of the defendant's guilt was not reversible error, though some items of testimony, tending to establish the corpus delicti, might have been separated and introduced first.—People v. Kimbrough, 193 Mich. 330.

¶ 1659. Upon a trial for uttering a forged indorsement of a check, the check and the invoices of the goods in payment for which it was drawn are admissible in evidence to show the uttering of it, and forgery in connection with evidence of the condition they were in when presented and paid. The corpus delicti need not be otherwise first proved.—People v. Kemp, 76 Mich. 410.

¶ 1659a. There was no abuse of discretion, on a prosecution for forgery of a check, in admitting such check in evidence before the people had proved the forgery; where it does not appear that the admission of the check at such time was prejudicial to the defendant.—People v. Tollefson, 145 Mich. 444.

¶ 1660. It is not necessary to prove the corpus delicti beyond a reasonable doubt before evidence connecting defendant with the crime is admissible.—People v. Trine, 164 Mich. 1.

§ 362. ——Matters in chief, in defense and in rebuttal.

Subjects for defense and rebuttal, see ante §§ 356, 357.

¶ 1661. The evidence on which the prosecution relies in a criminal case must all be put in, if possible, before the prosecution rests, though testimony that could not be had earlier may be admitted afterwards on cause shown. But none of that which properly be-

longs to the case in chief can be reserved until after the defense rests, to be then introduced as rebutting evidence.—People v. Quick, 58 Mich. 321.

¶ 1662. It is error to permit the prosecuting attorney to prove his principal case under the head of rebutting evidence.—People v. Hillhouse, 80 Mich. 580.

¶ 1663. On a trial for murdering one who was assisting to arrest respondent, the officer who sought to make the arrest and the deputy county clerk may testify as to the time of such officer's appointment and his acceptance and qualification, and the court has discretion to admit such testimony in rebuttal.—People v. Gosch, 82 Mich. 22.

§ 363. ——Impeaching or corroborating proofs.

¶ 1664. Impeaching testimony against a person not yet called as witness cannot be admitted.—People v. Whitson, 43 Mich. 419.

¶ 1665. After a case has been closed on both sides, a dispute arose as to what a witness had sworn to, and he was recalled to repeat it, and stated it as the judge understood him to have sworn before. One of the parties then proposed to call a witness to contradict him on the fact sworn to, but the judge refused to allow it. Held no error.—People ex rel. Dickinson v. Sackett, 14 Mich. 320.

¶ 1666. Where, on the cross-examination of one of the people's witnesses in a criminal case, part of his testimony taken on the preliminary examination is read to him, and he denies so testifying, the testimony, if used for the purpose of impeachment, should be reserved and offered in evidence as a part of respondent's defense.—People v. Oblaser, 104 Mich. 579.

§ 364. Reception on promise to supply connecting evidence.

Propriety of objection to document where it might be received and connecting proof afterward supplied, see ante ¶ 1629.

Failure to furnish connecting evidence as ground for striking, see post § 366.

Instruction against consideration of evidence when connection is not supplied, see post § 450.

¶ 1667. Where the theory of the people in a prosecution for murder was that the defendant shot the deceased believing him to be the husband of a woman at whose farm the defendant worked and with whom it was claimed that he had criminal relations, and that the purpose of this woman and the defendant was to obtain insurance for $1,000 upon the life of the husband, but there was no evidence that the defendant knew of the insurance, it was error to permit evidence that the husband's life was insured, upon the unfulfilled promise of the prosecuting attorney that he would connect this evidence with a statement of the defendant that there was a thousand dollars in it for anyone who did away with the husband.—People v. Morgan, 124 Mich. 527.

¶ 1668. In a criminal prosecution against a father for manslaughter of his child, alleged to have been effected by a course of ill treatment by defendant and his second wife and by malnutrition, held that the admission of evidence of a neighbor that she heard the cries of a child being whipped in defendant's home was proper, where the trial judge stated that he would strike out the testimony unless it was connected with defendant, that testimony as to what the mother did was immaterial, that the charge was that the defendant by his cruel conduct, etc., was responsible for the death of the child and that it would be idle to charge him with acts that were committed by someone else.—People v. Eaton, 196 Mich. 715.

§ 365. Exclusion of evidence offered out of time.

¶ 1669. A defendant has always a right to suppose that evidence will be offered and received in its logical order, and he is not bound to meet it before it becomes relevant to the case.—Brown v. People, 17 Mich. 429.

¶ 1670. It is not a matter of discretion with the court to reject evidence because it was not offered before the proper time for its admission.—Brown v. People, 17 Mich. 429.

§ 366. Striking out evidence.

[Note. None of the matter turning on the relevancy of evidence or its competency has been retained here, even though the question was raised by a motion to strike. See such matter, ante VIII, B.]

Striking as proper practice where improper matter is contained in partly proper answer, see ante ¶ 1633.

Illness preventing completion of cross-examination as ground, see post ¶ 1678.

Reception of evidence subject to be strick if not connected or supported by pro foundation, see ante § 364.

Instruction against consideration of evid ruled out, see post § 450.

Necessity of motion to strike to save tion for review, see post § 514.

Necessity of motion to strike volunte swer to save objection on re post § 515.

Cure of errors in evidence by st evidence, see post § 561.

Necessity of renewing objection by moving to strike, see po

¶ 1671. The refusal of the strike out a statement made ent to the officers at the tim not error, where such state with his testimony in his tarily given on the trial ford, 181 Mich. 659.

¶ 1672. While it is competent for a court to admit evidence which will not be relevant unless brought home to the prisoner by further proof, if such further proof is not given the court cannot refuse to strike out the evidence.—Dillin v. People, 8 Mich. 357.

¶ 1673. Where, in a prosecution for assault with intent to do great bodily harm less than the crime of murder, the testimony offered by respondent does not show a present intention of inflicting the threatened injury, but merely shows that the threat was conditional, depending for its execution upon the action of the injured party, and that the parties have for three years since been friends, evidence of such a threat has no tendency to show ill-feeling, and should be stricken out.—People v. Deitz, 86 Mich. 419.

¶ 1674. In a prosecution for murder where it is alleged that deceased's wife and respondent were on friendly terms, that deceased was heavily insured, and that the wife was the beneficiary, it is prejudicial error to refuse to strike out the evidence on the subject of life insurance where such subject is considered a strong element in the case, and there is no evidence that respondent had knowledge of the insurance at the time of the death of deceased.—People v. Auerbach, 176 Mich. 23.

¶ 1675. The defendant in a criminal case cannot complain of the action of the court in refusing to strike out testimony which is drawn out on the cross-examination of a witness.—People v. Maczulski, 194 Mich. 193.

¶ 1676. Where a witness testifying through an interpreter, gives an ambiguous answer on the subject of reputation, the court does not err in refusing to strike out the answer, but it is the duty of the objecting attorney to cross-examine the witness as to his meaning, pursuant to a suggestion of the court.—People v. Meert, 157 Mich. 93.

¶ 1677. One witness, who purchased a bottle of beer of the man in the buggy, testified that it was his impression that it was respondent from whom he purchased the beer, but that such impression was gained wholly from what he heard the boys say at the time. A motion to strike out all of his testimony was denied. Held, that, if the motion had been directed to the striking out of the testimony as to the impression of the witness regarding the identity of the party, it should have been granted—not because the statements of the boys, made under the circumstances they were, right at the buggy, and as a part of the occasion of purchasing the beer, were not admissible as a part of the res gestæ, but because the jury should have been left to draw whatever inferences might be drawn from the facts testified to; but that the motion was broader than this, and sought to exclude the entire testimony of the witness, part of which was admissible, and was properly denied.—People v. Stanley, 101 Mich. 96.

§ 367. Recalling witnesses for further examination.

Reopening case for further proofs, see post § 368.

Recross-examination and redirect-examination of witness and re-examination in chief, see Examination of Witnesses.

¶ 1678. Where a witness becomes ill before her cross-examination is finished, so that it cannot be completed, the remedy is by motion to strike out her testimony, and an exception to the refusal of the court to compel the production of the witness for further cross-examination will not be sustained.—People v. Pope, 108 Mich. 361.

¶ 1679. In a criminal case, where a child ten years old called by the prosecution stated that she did not know the nature of an oath, and thereupon counsel for defendant having been told that they might examine her, stated that they did not care to ask any questions, it was not error for the court thereafter to refuse to permit the witness to be recalled and cross-examined, as an opportunity of examining the witness as the defendant's witness had thus been given.—People v. Hossler, 135 Mich. 384.

§ 368. Opening case for further proofs.

Practice in civil cases, see Trial, V.

¶ 1680. The trial court may, in the exercise of a sound discretion, reopen a criminal case for the purpose of admitting testimony on behalf of either the prosecution or defense, and such discretion is not abused where opportunity is afforded to object to the testimony as it is offered, and to put in any further testimony which the introduction of evidence so admitted may make necessary.—People v. Blake, 157 Mich. 533.

§ 369. Taking testimony by depositions.

Deposition as denial of right to confront witness, see ante § 340.

Competency of transcript of testimony taken on preliminary hearing, see ante § 290.

Admissibility of former testimony or of testimony taken down at preliminary examination, see ante §§ 222, 236.

Reading from depositions in argument to jury, see post § 389.

Practice in taking depositions for civil cases, see Depositions.

Taking down testimony in preliminary examination, see Arrest, VII.

Provision for commission to examine witnesses out of state, or to take testimony conditionally, see Comp. L. 1915, § 15736 et seq.

¶ 1681. The prosecution in a criminal case cannot take proofs outside of the state, though the respondent may do so.—People v. Howard, 50 Mich. 239.

¶ 1682. A deposition did not, upon its face, show that any interpreter was employed, but it was shown by oral proof that one was employed and properly sworn; held, that it could not be objected that there was nothing to show that the interpreter was sworn to interpret truly.—People v. Dowdigan, 67 Mich. 95.

C. ARGUMENTS, REMARKS AND CONDUCT OF COUNSEL, JUDGE AND OTHERS.

§ 370. In general; regulation and control.

Time allowable to counsel for statements and arguments, see post § 371.
Opening statements, see post § 372.
Law arguments and colloquies on offers and motions, see post § 373.
Final arguments to jury, see post §§ 374-391.
Making argument after waiving it, see post § 392.
Misconduct in insulting and intimidating witness, see post § 393.
Interruptions of counsel, see post § 394.
Improper remarks by judge, see post § 395.
Duty to be zealous but fair in prosecuting, see ante § 330.
Direction of verdict on concession of counsel without argument, see post ¶ 1872.
Manner of objecting to and disposing of objections for impropriety, see also post ¶ 1805.
Improper remarks in reproving counsel or cautioning him, see post § 395.
Necessity of objection at time to save question of improper argument for review, see post § 520.
Necessity for ruling on objections to make question on review, see post § 524.
Necessity of record showing of the argument, objection thereto and action or opportunity to court to act on objection in order to save question for review, see post §§ 595, 596.
Harmless error in restricting argument, see post § 547.
Briefs and arguments on review in supreme court, see post § 589.
Arguments of counsel and opening statements in civil cases, see Argument of Counsel.

¶ 1683. A trial judge should prevent the abuse of the functions of counsel.—People v. White, 53 Mich. 537.

¶ 1684. The trial court must keep counsel within the boundaries of legitimate argument, and must see to it that no injustice is done to the respondent by the prosecutor's intemperate language or improper conduct.—People v. Lange, 90 Mich. 454; People v. Montague, 71 Mich. 447.

¶ 1685. The trial court has ample power and a large discretion in relation to remarks of counsel.—People v. German, 110 Mich. 244.

§ 371. Time allowable to counsel.

¶ 1686. On a trial for assault with intent to murder, the time to be occupied by respondent's counsel in addressing the jury should, within the time limits of Circuit Court Rule 63 (first rules), be left discretionary with such counsel when acting in good faith.—People v. Labadie, 66 Mich. 702.

¶ 1687. Under Circuit Court Rule 63 (first rules) as amended in 1885, providing that counsel shall be allowed no less than one hour, if desired, to sum up the case, and not more than two hours, unless the court shall otherwise order, it is error for the court to limit the argument on each side to one hour in a criminal case in which two counsel are engaged for the defense who request longer time where the trial had lasted two days and six witnesses' names were on the information besides two sworn for the defense.—People v. Labadie, 66 Mich. 702.

¶ 1688. In a prosecution for the illegal sale of liquor in local option territory, limitation of an hour on each side for argument was not error.—People v. Van Alstyne, 157 Mich. 366.

¶ 1689. Under 1897 C. C. Rule 24, subd. b, providing that counsel upon either side of a case shall be allowed at least a half hour argument, and that no more than two hours shall be allowed unless the court otherwise orders, the stopping of the argument for respondent in a criminal case at the end of thirty-five minutes was discretionary.—People v. Smith, 122 Mich. 284.

§ 372. Opening statements.

Error in opening statement cured by evidence or charge to jury, see post § 563.
Interrupting opposing counsel, see post § 394.
Election between counts and time and manner of electing, see ante § 46 et seq.

¶ 1690. Circuit Court Rule 24 as to the duty of plaintiff's counsel to make an opening statement is merely directory.—People v. Koharski, 177 Mich. 194.

¶ 1691. In a prosecution for the illeg sale of intoxicating liquor, counsel for defense has the right in his opening s ment to the jury to state his unders ing of the law as bearing upon the that will be brought out in defense.— v. Smith, 177 Mich. 358.

¶ 1692. The prosecuting attorney ing the case laid great stress on th and narrow means of the comp ness, and the necessity of us means to obtain proof to overc ger that respondent's wealth might enable him to secure Reference was also made to say, and to an imaginary which was never attempte an objection by responden

ceived by an outbreak of laughter and applause. Held, that the conviction should be set aside.—People v. Montague, 71 Mich. 447.

¶ 1692a. Where the prosecuting attorney, in opening the case, said to the jury that one reason why he was "more prejudiced against" respondent was "because he had committed perjury in another court for the purpose of assisting one of his fellow-prisoners," and where the court, upon objection being made, said that considerable of that had come under his own notice, respondent was entitled to a new trial.—People v. Moyer, 77 Mich. 571.

¶ 1693. The prosecuting officer's duty is to explain to the jury the nature and elements of the issue that they are to try, and not to make statements that will not be supported by the evidence.—People v. Fowler, 104 Mich. 449.

¶ 1694. In a prosecution for adultery, the prosecuting attorney, in opening the case to the jury, stated that the people would show that, in the winter prior to the commission of the alleged offense, respondent was found, by the husband of the woman with whom the adultery was alleged to have been committed, concealed behind the door of her sleeping room. No evidence was given on the trial in support of said statement. Held, that if the statement was made in good faith, and on the trial the prosecuting attorney found that his proofs did not substantiate the statement, a conviction should not, for that reason alone, be set aside.—People v. Fowler, 104 Mich. 449.

¶ 1695. Upon the trial of a druggist for an unlawful sale of intoxicating liquors, the prosecuting attorney offered to show that the complaining witness, who claimed to have procured the liquor, immediately thereafter related the circumstances to a third person, whom he proposed to call for the purpose of showing that the sale occurred at the time charged in the information. Upon objection to the statement of the proposed testimony in the presence of the jury, the court ruled that it was the right of counsel to state to the court what he proposed to prove, but that the jury should disregard his statement, and declared the testimony inadmissible for the reason that the name of the proposed witness was not indorsed on the information. The only testimony to support a conviction was that of the complaining witness; that of respondent and of the only other person claimed to have been present being in direct denial. Held, that the remarks were, under the circumstances, prejudicial to respondent. —People v. Abell, 113 Mich. 80.

¶ 1696. A statement by the prosecuting attorney in his opening to the jury upon the trial of a woman for the murder of her husband, that respondent had procured an assignment to herself of certain policies of insurance on her husband's life, is not prejudicial, although it afterwards appears that, instead of the policies having been assigned to her, she was the beneficiary named therein.—People v. Pope, 108 Mich. 361.

¶ 1697. In a prosecution for assault, remarks by the prosecuting attorney, that it is expected to be proven that the intent in making the assault was to do great bodily harm and defendant is charged in a charitable way less than the crime of murder, and that defendant is a man, a large percentage animal, are not commended but will not reverse where it is not satisfactorily shown that prejudice resulted.—People v. Singer, 174 Mich. 361.

¶ 1698. The failure of the prosecuting attorney in a murder case to prove all that he had stated in his opening statement he would prove, is not ground for reversal.—People v. Ecarius, 124 Mich. 616.

¶ 1699. Reversal will not be granted upon isolated extracts from the opening statement of the prosecuting attorney which were expressly made to explain reasons why certain witnesses would be produced, and not to influence the jury.—People v. Shoemaker, 131 Mich. 107.

¶ 1700. In a prosecution against a physician for causing death by abortion, a statement by the prosecuting attorney that he could show defendant continued the practice of causing abortions to the very hour of his examination, and that he was then in the practice, is improper.—People v. Fritch, 170 Mich. 258.

§ 373. Law arguments and colloquies in presence of jury.

Making argument to jury in guise of arguments on requests for instructions, see also post ¶ 1800.

Offering and arguing on character evidence in jury's presence, see also ante ¶ 1297.

Reception of testimony with exclusion of counsel's statements accompanying offer, see ante ¶ 1579.

Improper remarks cured by corrective charge to jury, see post § 564.

¶ 1701. In a prosecution for murder, where the accused in cross-examination had been asked if she had not stolen a muff, and other goods from the store of a certain merchant, whether the goods had been charged to her and upon demand she settled for them and she had denied it all, it was prejudicial error for the prosecuting attorney in rebuttal to call the merchant with his books, to proceed to the point of impeachment, to argue in the presence of the jury the right to impeach, and to use in his argument alleged hypothetical statements covering the very facts claimed to exist.—People v. Collins, 144 Mich. 121.

¶ 1702. It is not reversible error for counsel to make certain argument to the court in the presence of the jury, where what was said does not disclose to the jury the result of a trial in the justice's court, and whatever facts were disclosed were in support of the argument addressed to the court and based upon the record, and it was not evident how the disclosure could have prejudiced the defendant.—Quinlan v. Heyboer, 171 Mich. 228.

¶ 1703. Language of the prosecutor in which he combined objection to the introduction of proof of a release, respecting collateral matters and dealings which passed from the complaining witness to one accused of embezzling her funds, with a protest against its introduction and with notice that if it was admitted the prosecution would go into all that led up to the release, and would thereby show that accused got other money from complaining witness and her mother to a large amount giving nothing for it, is not subject to objection by the defendant whose counsel nevertheless went into such matters and invited it; though the colloquy put before the jury the fact that there was a claim that accused had defrauded complaining witness out of other funds than those charged.—People v. Thorne, 148 Mich. 203.

¶ 1703a. In a criminal prosecution for selling intoxicating liquor without having paid the tax required, the sheriff of the county having testified that at the time of the arrest respondent stated that he had paid the tax, and exhibited a federal license, the prosecuting attorney demanded counsel for respondent to produce the license. Upon refusal, the court sustained counsel for respondent in refusing to produce the paper, but stated that there was nothing improper in the request of the prosecuting attorney. Held, that respondent was in no manner prejudiced by the oral demand, or by what the court said upon the subject.—People v. Moore, 155 Mich. 107.

§ 374. Final arguments to jury.

Particular methods and matter of argument, see post §§ 375-389.
Prejudicial effect of particular improprieties in argument, see post §§ 375-389.
Statements, quotations and readings as part of argument, see post §§ 378, 387-389.
Answering and closing arguments, see post §§ 390, 391.
Making argument after waiving same, see post § 392.
Duty of court to regulate and control, see ante § 370.
Aggravation of errors in trial by argument to jury, see also post § 534.
Instructions cautioning jury not to be influenced by improper argument, see post § 451.
Improper argument regarded as harmless error, see post § 548.
Improper argument cured by corrective charge, see post § 564.
Opening address and statements by counsel, see ante § 372.
Arguments to justice or to jury in trials before justices, see post § 654.
Arguments in civil cases, see Argument of Counsel.

¶ 1704. The argument of the case belongs to the close of the testimony, and not to the opening, and must be based on what actually appears in proof.—People v. Montague, 71 Mich. 447.

¶ 1705. In the argument of criminal cases attorneys have no more justification for departing from proper practice than in other cases.—People v. McArron, 121 Mich. 1.

¶ 1706. If the argument of counsel is general in character, and does not appeal to the individual juror's prejudices or passions although it is heated, it is not prejudicial and the court correctly allows it to be given.—People v. Neely, 171 Mich. 249.

¶ 1707. An argument of the prosecuting attorney as to the defense of an alibi, held not prejudicial to the respondent.—People v. Frontera, 186 Mich. 343.

§ 375. ——Appeals to jurors' knowledge or prejudice.

Charge as to being moved by personal feelings, see post § 448.

¶ 1708. A prosecuting attorney urged the jury to apply their common sense to the evidence. Held, that this was not appeal to use imagination and to go outside of the legitimate proof to draw unwarranted inferences.—People v. Ringsted, 90 Mich. 371.

¶ 1709. It is prejudicial error to permit the prosecuting attorney to request the jury to act "as detectives" in considering the evidence; it being the jury's duty, after retiring for deliberation, to give respondent the benefit of every reasonable doubt.—People v O'Brien, 96 Mich. 630.

§ 376. ——Abusive and inflammatory langu

Appealing to jurors' personal knowledg experiences and feelings, see ante
Assumption of prejudicial facts not in see also post § 381.
Abusive comments on or aspersions nesses, see post § 377.
Provoked and invited abuse, see p
Incitement of prejudice in opening see ante § 372.

¶ 1710. Error does not lie o the prosecuting attorney of m language in reference to the argument to the jury; it is the trial judge will restrain due limits.—People v. Winsl

¶ 1711. Where the prosecuting attorney, in his closing address, assumed to instruct the jury on the law of the case as one authorized to do so, stated his personal convictions on the evidence, and introduced irrelevant and prejudicial matter to inflame the jury, the conviction was set aside.—People v. Montague, 71 Mich. 447.

¶ 1712. Reversal will not be granted because the prosecuting attorney in his closing address to the jury called the defendant a "monumental liar and bluffer," where it cannot be said that there was no evidence to justify the remarks.—People v. Shoemaker, 131 Mich. 107.

¶ 1713. In a prosecution of a deputy township treasurer for embezzlement, a statement by the prosecuting attorney in his argument that the treasurer committed a gross indiscretion in trusting defendant, and that he put his trust in "this young thief," is legitimate.—People v. Sanders, 139 Mich. 442.

¶ 1714. The characterization by the prosecutor in his argument, of the respondent as a "bad man," and "as bright a man of his kind as was ever before any jury on earth," was not error, where the defense had argued that there was no evidence that the respondent was a bad man; it being proper for the prosecutor to draw inferences from the circumstances and conduct.—People v. McDonald, 133 Mich. 366.

¶ 1715. In a prosecution for seduction, statements by counsel in argument, designating the defense as "brutal, cowardly and contemptible," and stating that counsel had raked "the purlieus of hell" for evidence against complaining witness, and that defendant gloried in the ruin he had wrought, and that if she had a father or brother, defendant would not be on trial, are improper.—People v. Payne, 131 Mich. 474.

¶ 1716. The characterization by the prosecuting attorney in a rape case of the defendant as "this thing here" and "that brute" is not reversible error where the entire testimony, including that of defendant, showed him to be of the character described.—People v. Lambert, 144 Mich. 578.

§ 377. ——Abuse and disparagement of witness.

See also post ¶ 1726.
Abuse of accused, see ante § 376.
Abuse of witness or intimidation during trial, see post § 393.
In answering arguments and in provoked or invited arguments, see post §§ 391, 392.

¶ 1717. It is not error, though it may be bad taste, for the prosecuting attorney, in commenting on the testimony of a witness, to say to the jury that he had lied.—Driscoll v. People, 47 Mich. 413.

¶ 1718. Where on a trial for selling liquor to a minor the prosecuting attorney in his address to the jury said of one of the defendant's witnesses "he has admitted that he drinks, and I don't know that a man who drinks is any more to be believed than the man who sells the liquor," and also said of respondent "you know what to expect of a man engaged with such a thing, you understand this saloon business—what to expect of them," such remarks were erroneous.—People v. Kahler, 93 Mich. 625.

¶ 1719. Remarks by a prosecuting attorney, accompanying a request to swear impeaching witnesses whose names are not indorsed on the information, calculated to impress the jury with the belief that the people are prepared to impeach the respondent by his own neighbors, and that, while the procurement of witnesses for that purpose is usually difficult, it is an easy matter in his case, are indefensible, as is his action in recalling the respondent after the refusal of the court to admit the proposed impeaching testimony, and questioning him as to whether he had not been impeached in other cases, and if, in a number of other instances, his neighbors had not been brought into court for the purpose of impeaching him.—People v. Cahoon, 88 Mich. 456.

¶ 1720. In a case where the defense was insanity, the prosecuting attorney, speaking of the testimony of respondent's expert witness, who was in charge of a private insane asylum in the city where the trial was being held, and who had testified that respondent was insane, said, in substance, that the motive of the witness was to assist his hospital. Held, that respondent's case could not have been prejudiced.—People v. Margeson, 99 Mich. 146.

§ 378. ——Assertions of personal knowledge, belief or experience.

See also ante ¶ 1711.
Suggesting what witnesses might have testified had they been called, see also post ¶ 1766.

¶ 1721. A prosecuting attorney cannot be permitted to assert to the jury, "under the solemnity of his official oath," his belief in the guilt of a respondent since such an expression of personal opinion is both improper and prejudicial in its tendency.—People v. Quick, 58 Mich. 321.

§ 1722. It is improper, and ground of reversal, for a prosecuting attorney to make a statement to the jury of a material fact as of his own knowledge which has not been introduced in evidence.—People v. Dane, 59 Mich. 550.

¶ 1723. It is not proper for the prosecuting officer to tell the jury that he believes that the respondent is guilty, but he may rightfully argue from the testimony the fact

of his guilt, and may state to the jury what evidence convinces him.—People v. Hess, 85 Mich. 128.

¶ 1724. Where the prosecuting attorney in his address to the jury, on a trial for murder, said, "As I felt that the defendant should not be convicted of any greater offense than manslaughter, and with my associate have so advised the court, and asked an instruction to that effect; so, if I believed the defendant was not guilty of the crime of manslaughter, or if I had a reasonable doubt of his guilt of that offense, I would not stand before you and ask you to convict him," such remarks did not require a reversal; defendant should have requested a charge to remove the effect of any supposed prejudicial influence.—People v. Welch, 80 Mich. 616.

¶ 1725. A prosecuting attorney cannot be said to have expressed an opinion as to the guilt of a respondent charged with larceny, by stating to the jury that if they believe the testimony of certain witnesses, corroborated by the facts as they are found concerning the stolen property, he thinks they would be justified in convicting respondent, if they have no reasonable doubt about it.—People v. Hanifan, 98 Mich. 32.

¶ 1726. Where the testimony in a criminal case is conflicting, the result depending upon which witnesses the jury find to be truthful, it is not error requiring reversal for the prosecuting attorney to state, in his argument to the jury, that he believes the evidence shows the witnesses for the defense to be "a lot of liars."—People v. Wirth, 108 Mich. 307.

¶ 1727. For the prosecuting attorney to tell the jury in his argument on the trial of a criminal case that he believes that the evidence submitted shows the respondent guilty beyond all reasonable doubt, is not erroneous.—People v. Ponsford, 181 Mich. 659.

¶ 1728. A statement by a prosecuting attorney to the jury that he knows from personal knowledge that a witness told the truth, is fatal error.—People v. Nichols, 159 Mich. 355.

¶ 1729. Upon a prosecution for keeping a place for the sale of intoxicating liquors in violation of the local option law, the contents, occupants and appliances of respondent's place of business, and their adaptability to traffic in liquor, are proper matters of inquiry, and the prosecutor, therefore, does not err in his argument by stating, "I submit to you" that the room which respondent is charged with keeping was fitted up for the express purpose of violating the law.—People v. Barnes, 113 Mich. 213.

¶ 1730. In a criminal prosecution for selling intoxicating liquor without a license,

violation of the Local Option Law (§ 5412, Comp. Laws, 1897), it is error for the court to permit the prosecuting attorney to refer to the respondent as a person addicted to the excessive use of intoxicating liquors.—People v. Converse, 157 Mich. 29.

§ 380. ——Allusion to other offenses and prosecutions.

Accusing witness of other crimes, see also post ¶ 1770.
Provoked or invited allusions, see post § 391.

¶ 1737. Where, in a prosecution for keeping a saloon open after hours, respondent was called as a witness in his own behalf, and testified that he had once been convicted of a like offense, his case cannot be said to have been prejudiced by the remark of the prosecuting attorney, in his closing argument to the jury, that the case followed another case, in which respondent pleaded guilty.—People v. Kindra, 102 Mich. 147.

¶ 1738. A statement made in argument by the prosecuting attorney, to the effect that respondent was committing adultery every day, the object being to discredit the respondent because of immoral relations, is not ground for reversal, though it was not proved that either respondent or the woman with whom he was traveling was married, where they were registered at hotels as man and wife, and were not married to each other.—People v. Ranney, 153 Mich. 293.

§ 381. ——Assumption of facts not in proof.

See also ante ¶ 1738.
Treating facts as admitted, see post § 382.

¶ 1739. It is error to permit the prosecuting attorney in his remarks to the jury to inflame their minds by dwelling upon an assumed fact which no evidence tends to support.—People v. Aikin, 66 Mich. 460.

§ 382. ——Treating facts as admitted.

Documents procured by illegal means, see ante § 155.

¶ 1740. It is not error for the prosecuting attorney in argument to say that it is undisputed "that this sort of conduct had been going on between the defendant and his daughter from the time she was eight years old," where several witnesses in a prosecution for incest testified to acts of sexual intercourse between them during that period and they were not impeached and no evidence was introduced by accused.—People v. Skutt, 96 Mich. 440.

§ 383. ——Comment on evidence.

Comment on inferences, see post § 384.
Comment on failure to testify or adduce proofs, see post § 385.
Comment on witnesses and credibility, see post § 386.
Comment in argument on weakness of foundation proofs for secondary evidence. see also ante ¶ 908.
Misstating evidence. see post § 387.

¶ 1741. Where, in a prosecution for carnally knowing a girl of fifteen, respondent's general character has been put in issue by the defense, it is proper for the prosecution to comment thereupon.—People v. Mills, 94 Mich. 630.

¶ 1742. For the prosecuting attorney in his argument to the jury to comment on the testimony in the case, and to draw warrantable inferences therefrom, is not improper.—People v. Cona, 180 Mich. 641.

¶ 1743. In a manslaughter case there was evidence that immediately after the shooting the defendant had no injury upon his face and that later, after he had been thrown headlong from a rig, there was such injury, defendant's plea being one of self-defense. Held, the prosecuting attorney was justified in arguing to the jury that the defendant got the bruise on his head from falling out of a rig on his right side.—People v. Collins, 166 Mich. 4.

¶ 1744. In a murder case where the clothing of the victims has been put in evidence for the purpose of showing the circumstances of the crime and the nearness of the parties at the time of the killing, it is proper to comment on the clothing as evidence of such facts.—People v. Wright, 89 Mich. 70.

¶ 1745. Upon a prosecution for larceny of money alleged to have been obtained on a forged draft, where the draft and certain receipts are in evidence, it is not error to permit counsel in his argument, to call attention to similarities in the handwriting on the two documents.—People v. Hutchings, 137 Mich. 527.

¶ 1746. The use by the prosecuting attorney in a murder case of the words "If this man goes free, no jury sitting in this box will find the murderer," is not objectionable, if it was under the circumstances to have been but a logical summing up of the effect of the testimony.—People v. Ecarius, 124 Mich. 616.

¶ 1747. Courts will be very slow to reverse a case for the language employed by a prosecutor in argument when in his judgment and that of the trial court it is based upon the evidence in the case.—People v. Tubbs, 147 Mich. 1.

§ 384. ——Comment on inferences.

See also ante ¶¶ 1742, 1743.

¶ 1748. Counsel for the prosecution in a trial for larceny argued to the jury that it should consider why respondent did not go to his father for certain money in reference to which subject testimony had been given;

whether his failure to do so was because he knew his father had no confidence in him, and whether that lack of confidence was due to his idle habits or vagabond life; and he insisted that a son brought up by an honest and respectable father should be as certainly convicted, if guilty of a crime, as if he were the son of the greatest rascal in the community. Held, not sufficiently objectionable to be error.—People v. Harrison, 93 Mich. 594.

¶ 1749. The prosecuting attorney may properly comment on the flight of the companion of accused on escape from arrest, where it appeared that they had slept in a barn on the night of a burglary and that the stolen property was found near where they slept.—Cummins v. People, 42 Mich. 142.

¶ 1750. Comments by the prosecutor in his argument, upon the respondent's attitude after his arrest, in reference to his denial of his identity and as to explaining his whereabouts, were fair argument.—People v. McDonald, 133 Mich. 366.

§ 385. ——Commenting on failure to testify or to adduce proofs.

Comment on failure to call wife of accused, see also ante ¶ 655.
Provoked and invited comments, see post § 391.
Remarks by court touching on failure to testify, see also post § 395, ¶ 1813.
Improper comment on failure to testify cured by corrective instruction, see post § 565.

¶ 1751. The refusal of a witness to answer a question tending to criminate him cannot be commented on by counsel or considered by the jury.—Carne v. Litchfield, 2 Mich. 340; Foster v. People, 18 Mich. 266; People v. Maunausau, 60 Mich. 15.

¶ 1752. In a prosecution for embezzlement comments by the prosecuting attorney and the court concerning the failure of the accused to take the stand when he had taken advantage of his privilege under Const. 1909, art. II, sec. 16, and Comp. L. 1897, § 10211, How. Ann. St., 2nd Ed., § 12855, constitute reversible error in the absence of remarks by counsel for accused which would justify the criticism of the prosecutor.—People v. Lay, 193 Mich. 17.

¶ 1753. The prosecuting attorney, after refusal to call and swear a witness who was present at the assault for which respondent was on trial, cannot comment upon the fact that such witness was sworn upon a preliminary examination, or that he was present in court and was not called by respondent.—People v. Deitz, 86 Mich. 419.

¶ 1754. In a prosecution for adultery with another's wife the prosecuting attorney has no right to attempt to prejudice respondent by referring in his closing argument to the fact that the wife has not been sworn as a witness in the case, and the court should direct the jury not to weigh that fact against respondent.—People v. Fowler, 104 Mich. 449.

¶ 1755. A remark of the prosecutor, in a prosecution for obtaining money under false pretenses and representations, that "there has no excuse been offered," held not error, as a comment on the fact that the defendant had not testified in his own behalf as to the truth of his representations that certain goods sold had been shipped.—People v. Perry, 197 Mich. 47.

¶ 1756. A public prosecutor has no right to urge to the jury that respondent's failure to discredit an adverse witness by the testimony of others, instead of relying alone on cross-examination, is significant against him, and that he could show the facts if they existed.—People v. Quick, 58 Mich. 321.

¶ 1757. The failure of a witness for the defense to prove the existence of a third person cannot properly be used as an argument by the prosecution; though if the existence of such person is material to the defense the failure of the defense to show it is a proper subject of comment.—People v. Lyons, 49 Mich. 78.

¶ 1758. A prosecuting officer ought not to allude before the jury to the fact that respondent has put himself upon his privilege and declined to answer a question, even though it concerned a collateral inquiry of questionable relevancy; but such a remark is not sufficient ground for disturbing a verdict against respondent.—People v. Wilson, 55 Mich. 506.

¶ 1759. The right of the prosecuting attorney to comment upon the failure of a party to produce witnesses is not an unqualified right, and depends upon the circumstances of the case, and it applies to a deposition taken by the party and not used, and to a complices and other witnesses within the control, or with whom they have been clos associated, especially where such witne are in a position to speak on matters da ing to such party, already in evide People v. McGarry, 136 Mich. 316.

¶ 1760. Comment by the prosecuti ney upon the non-appearance of a to the effect that he did not know v that was dragging witnesses aw no foundation, is prejudicial to t ent.—People v. Gottshall, 123 M

¶ 1761. A statement by the "Defendant's counsel, when h people's witnesses and God ones who knew the contents forgot his client, whom it grams were sent to, and sent one of them" is not commenting upon defen

the stand in his own behalf, where the jury were instructed that the fact that he did not take the stand should not weigh against him in any manner.—People v. Hammond, 132 Mich. 422.

¶ 1762. The rule forbidding the prosecutor from commenting upon the failure of defendant to take the stand, is not infringed by a statement that the testimony of the people's witnesses stands undisputed.—People v. Hammond, 132 Mich. 422.

¶ 1763. For a prosecuting attorney in argument to remark that there were some things about a witness' testimony which he would like to have shown but was not permitted to do so, and that counsel for defense knew what they were and that they would not be safe for his case, is reversible error when not rebuked by the court and when no reference is made thereto in the charge to the jury.—People v. Cahill, 147 Mich. 201.

¶ 1764. To argue that "defendant has not taken the stand, and he does not need to if he don't want to," violates Comp. L. 1897, § 10211.—People v. Cahill, 147 Mich. 201.

¶ 1765. Where a declaration of the father of accused exculpating him was wrongly admitted as an implied admission by accused, who was present, and the father then in court was not called in behalf of accused, it was error to allow counsel to argue that failure to call the father should raise an inference against accused, there being nothing in the case to show that the father could have testified in any way that would have thrown light on the case or have aided accused.—People v. O'Brien, 68 Mich. 468.

¶ 1766. It is improper for counsel to refer, in their arguments, to witnesses whose testimony has been excluded by the court, or to suggest what they might have testified to if placed upon the stand.—People v. De France, 104 Mich. 563.

¶ 1767. It seems that failure to call witnesses, who could have corroborated the wife of accused in a material element of time in a claimed alibi, is a legitimate subject of comment by the prosecuting attorney.—People v. Smith, 106 Mich. 431.

¶ 1768. The omission on preliminary examination to call a complaining witness in a case of seduction is not to be criticized on the trial.—People v. Clark, 33 Mich. 112.

§ 386. ——Comment on witnesses and credibility.

Abusive comment on witnesses, see ante § 377.
Provoked and invited comments, see post § 391.

¶ 1769. A statement by the prosecuting attorney in his closing argument to the jury that the people are not bound by the testimony of a witness whom they were compelled to call, except so far as such testimony is believed by the jury to be true, is not objectionable.—People v. Harper, 83 Mich. 273.

¶ 1770. Argument by the prosecuting attorney in a prosecution for larceny warrants reversal where there is nothing in the evidence to warrant his charges that a witness for respondent was guilty of either larceny or receiving stolen goods from respondent with knowledge that they were stolen.—People v. Huff, 173 Mich. 620.

¶ 1771. In a prosecution for assault with intent to do great bodily harm, it is not reversible error for the prosecuting attorney to state that it may fairly be inferred from the evidence that the people's witnesses were telling the truth, and that unless a verdict is found against defendant, the people will not have had their just dues.—People v. Kirk, 151 Mich. 253.

¶ 1772. Where it was sought to discredit a justice's testimony by showing that his docket was written at different times with different colored inks, it is proper for opposing counsel in argument to point out to the jury that the different shades of ink appear at the several times of adjournment.—People v. Kenyon, 93 Mich. 19.

¶ 1773. Upon a prosecution for larceny, it is error to permit the attorney for the people to use the expression "invidiously" in regard to a character witness for respondent, "a pal of his," there being nothing in the record to show that respondent had done anything requiring him to have a "pal."—People v. Hutchings, 137 Mich. 527.

¶ 1774. It is not improper for the prosecuting attorney in a criminal case in undertaking to explain in argument the discrepancies between the testimony that the complaining witness gave on the trial and that given on the preliminary investigation, as shown by the justice's return, to suggest that the justice who wrote in longhand did not write everything that the witness had testified to.—People v. De Camp, 146 Mich. 533.

¶ 1775. Under Comp. L. 1897, § 10211, providing that in a criminal case the court shall not permit any reference to or comment upon defendant's failure to testify, it is objectionable for counsel to state in his argument in a prosecution for seduction where defendant did not testify, that there was no one who saw what occurred except "this girl, this boy, and the all-seeing eye of God," and that there was not a word to prove that the girl's story was not true.—People v. Payne, 131 Mich. 474.

¶ 1776. Where impeaching evidence was elicited on cross-examination of a defendant in a criminal case, relating to his false swear-

ing as to his pecuniary responsibility on a liquor bond, the subsequent argument by the prosecution that the testimony proved the commission of perjury, was not error.—People v. Gray, 135 Mich. 542.

¶ 1777. In a prosecution against a foreigner for murder, it is not reversible error for the state's attorney to argue to the jury that people of a foreign country are more apt to side with live men than with the dead, where there is evidence to sustain this contention with respect to the particular witnesses which the state's attorney and the jury had before them at the time.—People v. Sartori, 168 Mich. 308.

¶ 1778. In a prosecution for seduction, a witness for defendant testified in contradiction of the complaining witness that he had had intercourse with her at the house of his brother-in-law, where she was at the time assisting witness to take care of the sister of the brother-in-law. The prosecution asked him if his brother-in-law had not sued him for board; and, upon objection, stated that he proposed to show that such suit had been brought and witness had defended by claiming a per diem for nursing plaintiff's sick sister, and added "now he is testifying that this woman was helping" and then he swore that he had no assistance at such nursing. Held, that the explanation by the prosecution was proper.—People v. Jensen, 66 Mich. 711.

§ 387. ——Misstatement of law or evidence.

Assumption of facts not in proof, see ante § 381.

Treating facts as admitted which are not, see ante § 382.

Misstatement or overstatement in opening address, see ante § 372.

¶ 1779. Language of a prosecuting attorney in his argument to the jury, based upon the theory that the prosecution had made out a case of probable guilt, and that the burden of proof was then shifted upon respondent to overcome it, is objectionable.—People v. Lange, 90 Mich. 454.

¶ 1780. Misstatements of the evidence by a prosecuting attorney in a homicide case, are not prejudicial error where the court causes the stenographer's notes to be read to the jury and cautions them to rely only on the evidence given in the case.—People v. Swartz, 118 Mich. 292.

¶ 1781. It is not a ground for reversal that the prosecuting attorney in argument to the jury made a statement of law which was incorrect, where the statement was in good faith on a subject which he had a right to comment on.—People v. Boyd, 151 Mich. 577.

¶ 1781a. In an action for violation of the liquor law requiring saloons to be closed on Sundays, a claim made in good faith by the prosecuting attorney, in his argument to the jury, that under a certain state of facts the People would be entitled to a conviction under the statute, although not unassailable, is not reversible error.—People v. Boyd, 151 Mich. 577.

¶ 1782. It is reprehensible conduct meriting immediate discipline for counsel in his argument to the jury to state that they may ignore instructions of the court.—People v. Howard, 179 Mich. 478.

§ 388. ——Reading statutes and decisions.

¶ 1783. In a prosecution under the statute prohibiting the opening of saloons, etc., on Sunday, it is not improper for the prosecuting attorney to read parts of the statute, laying particular stress upon the passage, "It shall not be necessary to prove that any liquor was sold."—People v. Ringsted, 90 Mich. 371.

§ 389. ——Reading from depositions and documents.

See also ante ¶ 1735.

¶ 1784. It is proper to deny respondent's counsel permission to read, on the argument to the jury, extracts from medical books that have not been made evidence in the case.—People v. Glover, 71 Mich. 303.

¶ 1785. Where, upon respondent's offering in evidence a part of the deposition of a witness taken upon the preliminary examination, the court rules that the entire deposition must be received, to which ruling no exception is taken, it is not error to permit the prosecuting attorney to read therefrom in his argument to the jury.—People v. Smith, 106 Mich. 431.

¶ 1786. The deposition of the complainant witness made at the preliminary examination, held properly read to the jury by t prosecuting attorney in his argument, wh the deposition was introduced by the cou for the respondent for the express pu of reading it to the jury in his argu although not so used by him.—People rington, 186 Mich. 482.

¶ 1787. In a prosecution for hom reading of previous testimony of at the coroner's inquest cannot b from counsel's argument to the ground that it is not sufficient as such, where it has been ob ceived in evidence without o ple v. Dowd, 127 Mich. 140.

¶ 1788. In a prosecution wrongful prevention of co ment from the use of pre a witness at the coroner dicial error where the testimony before the c mony at the trial mi

credibility in the hands of the jury—People v. Dowd, 127 Mich. 140.

§ 390. Answering and closing arguments.

¶ 1789. In a prosecution for rape, closing argument by the prosecuting attorney that, after the case was closed, the testimony all in, defendant's attorney had declaimed against the prosecuting witness and pilloried her as a young prostitute, a liar, and an evil thing, held reversible error, where the record failed to show defendant's attorney had made such attacks on the complaining witness' character but tended to show he had called her a liar.—People v. La Londe, 197 Mich. 76.

§ 391. ——Provoked or invited arguments.

¶ 1790. After provoking comment and criticism counsel for the respondent cannot have a reversal because charges and insinuations are resented and criticisms made.—People v. Mills, 94 Mich. 630.

¶ 1791. A conviction will not be reversed for improper remarks of the prosecuting attorney in his argument to the jury, where they were made in reply to the argument of respondent's counsel.—People v. Savant, 112 Mich. 297.

¶ 1792. A conviction will not be reversed because of the improper remarks of the prosecuting officer in his argument to the jury, where they were provoked by the intemperate language of respondent's attorney, and where the jury was instructed that all such remarks should be disregarded.—People v. Parmelee, 112 Mich. 291.

¶ 1793. During his argument, the prosecuting attorney, referring to respondent's counsel and his argument, stated that said counsel had said that respondent had as good a record as any one in the court room, and added, "Why don't he show it?" No evidence of good character had been given. Held, that the statement of the prosecuting attorney was invited by respondent's counsel, who, in referring to the question of good character, went outside of the record.—People v. Oblaser, 104 Mich. 579.

¶ 1794. A reference by the prosecuting attorney in his argument to the fact, appearing in evidence without objection, that at the time of respondent's arrest for the offense charged he was in jail for another offense, is not such an abuse of legitimate argument as to justify a reversal, where the statement was apparently made in reply to the argument on behalf of respondent that he had led a life of usefulness.—People v. Smith, 106 Mich. 431.

¶ 1795. Where the remarks of prosecuting attorney in his final argument to the jury are in answer to the argument of opposing counsel and not for the purpose of calling attention to the fact that respondent did not testify in the case there is no prejudicial error.—People v. Boyd, 174 Mich. 321.

¶ 1796. In a prosecution for assault, argument of the prosecuting attorney concerning the punishment apparently in reply to an argument of defendant's counsel is not error, nor is it error for the court thereafter to make an accurate statement of the law and of the duty of the court concerning the matter of punishment which supports the general proposition that the jury should not be concerned therewith.—People v. Singer, 174 Mich. 361.

¶ 1797. Complaint cannot be made of language used by a prosecuting attorney although severe where it was made in response to that of the attorney for the defense, and it seems to have been justified by the evidence.—People v. West, 146 Mich. 537.

¶ 1798. Intemperate language of prosecution was held not prejudicial in the light of repeated provocation by the defendant's counsel.—People v. Salsbury, 134 Mich. 537.

¶ 1799. For counsel in argument in a murder case to call the story of a witness "a damnable yarn," and to say that the accused was as "vicious as a rattlesnake and active as a hornet," and that if affairs of this kind should go unrebuked and are justified by the verdict of a jury, each man would better protect himself, and they would better discharge officers, and buy ammunition for the purpose of self-protection, said in the heat of argument and at the end of a hotly contested case, is not reversible error.—People v. Tubbs, 147 Mich. 1.

§ 392. Making argument after waiving same.

¶ 1800. Where the prosecuting attorney, after his suggestion to respondent's counsel that the case be submitted without argument had been agreed to, argued questions of fact to the jury under the pretense of answering respondent's requests for instructions, and told the jury that there could be no doubt as to the facts or the law, such conduct was ground for reversal, especially where he had already prejudiced the jury by persisting in leading questions and imputations on the witnesses.—People v. O'Brien, 96 Mich. 630.

§ 393. Insulting and intimidating witnesses.

Asking insinuating and discrediting questions, see ante § 343.

Abusive language in argument to jury, see ante § 377.

¶ 1801. The use of improper and insulting language to and about witnesses by the counsel on the trial of a criminal case is an abuse and is not to be tolerated.—People v. Bielfus, 59 Mich. 576.

¶ 1802. Where the trial court, against objection, permitted the prosecuting attorney to treat respondent's witness offensively, and

to assert repeatedly that the witness was not telling the truth, and that he was testifying contrary to his former testimony—no foundation being shown for such impeachment, and the jury not being cautioned on the subject—the conviction was set aside.—People v. Carr, 64 Mich. 702.

¶ 1803. It is error to permit the prosecuting attorney to criticize respondent's witnesses in the presence of the jury by asking them whether they know the penalty of perjury, or by asserting that they are swearing falsely, no foundation being laid for such impeachment.—People v. O'Brien, 96 Mich. 630; People v. Carr, 64 Mich. 702.

¶ 1804. Mere impudence to a witness is not ground for reversal.—People v. Roat, 117 Mich. 578.

§ 394. Interruptions of counsel.

Improper remarks in reproving counsel for interruptions, see post § 395.

¶ 1805. The interruption of an opponent's opening to the jury to raise questions of its competency, or the restriction of such an opening by the court, is unjustifiable unless in very clear cases of abuse; and any question raised upon it should be disposed of summarily and without argument.—People v. Wilson, 55 Mich. 506.

§ 395. Remarks and conduct by judge.

Harmlessness of improper remarks by court, see post § 548.

¶ 1806. A long examination by the court of the principal witness for the prosecution after he had been cross-examined by respondent's counsel, coupled with the remark that an objection by respondent's counsel to certain questions was made because the facts would be prejudicial to respondent, was held objectionable as tending to prejudice respondent's rights and as conveying to the jury the idea that if the facts were drawn out as proposed by the court, they would be injurious to respondent's case.—People v. Hull, 86 Mich. 449.

¶ 1807. In a prosecution for highway robbery, the conduct of the trial judge in continually interrupting the defendant's counsel in his examination of witnesses, in using language tending to belittle such counsel and to prejudice defendant in the estimation of the jury, held such error as to require a new trial.—People v. Leonzo, 181 Mich. 41.

¶ 1808. A retort by the court, "Don't interrupt counsel's argument," when counsel for accused took exception to a proper summing up by the prosecutor, though needlessly discourteous, is not ground for reversal, where the record shows that numerous trivial objections might have tried the judge's patience.—People v. Ecarius, 124 Mich. 616.

¶ 1809. The statement by the court to respondent's counsel on a criminal trial in the words, "Now listen: no more interruptions; take your exceptions to his (the prosecutor's) argument if you have got any to make; he didn't interrupt you; let him finish," is not error, when justified by frequent interruptions of the prosecutor's argument to the jury.—People v. Cona, 180 Mich. 641.

¶ 1810. In overruling objections to testimony in a manslaughter trial on the ground that it was immaterial, the court said he thought the testimony material and said to defendant's counsel: "Do not be so quick about taking your exception." Held, the remarks did not constitute prejudicial error.—People v. Burkhart, 165 Mich. 240.

¶ 1811. A remark of the trial judge in a criminal case in admitting a plan in evidence that he did so because he thought the situation could be cleared up, was not a comment on the weight of the evidence.—People v. Mindeman, 157 Mich. 120.

¶ 1812. A prosecuting counsel commented adversely upon the prisoner's neglect on preliminary hearing to put in his defense of an alibi; the prisoner's counsel objected, and the judge in overruling the objection, and in the jury's presence, made certain remarks to the prisoner's counsel in adverse criticism of such neglect; held, that on error these remarks are to be treated precisely as if addressed to the jury and embodied in the charge. Whether a prisoner's neglect to put in an alibi before the examining magistrate may ever be commented on against him on the trial and considered by the jury, quære.—Sullivan v. People, 31 Mich. 1.

¶ 1813. Where, in a prosecution for ravishing a girl less than fourteen years old, she has testified that she had never before had intercourse with any man, that it did not hurt her at all, that no blood followed, and that she was not lame or sore the next day, it is error to permit the jury to infer from remarks to them that accused is forbidden from contradicting her by a physician's testimony that the natural result of such intercourse would be a flow of blood, soreness and lameness.—People v. Duncan, 104 M 460.

¶ 1814. Comments by the court in of a colloquy with counsel for accus failure to produce an alleged witn sold the stolen goods to accused, w ments evinced a belief on the p court that there was no such pers the story of accused and oth was a fabrication, and state court that counsel had been g fessional practice in aiding of perjury, are error.—Peop Mich. 515.

¶ 1814a. In a prosecu liquor store in violation law, where evidence

fendant used liquor to excess, a remark of the judge, in overruling an objection to testimony, that if defendant was drunk all the time in a prohibition town it would show that he had whisky to give to someone else, was error.—People v. Converse, 157 Mich. 29.

D. PROVINCE OF COURT AND JURY; QUESTIONS OF FACT; TAKING CASE OR ISSUE FROM JURY.

§ 396. In general; duty of jury to follow instructions.

Weighing and considering the evidence, see post § 397.
Particular questions and crimes as presenting court or jury questions, see post § 398.
Directing verdict and practice on motion to direct, see post §§ 399, 400.
Demurrer to reception of any evidence, see post § 401.
Instructions encroaching on province of the jury, see post § 429 et seq.
Cautionary instruction on duty to obey instructions, see post ¶ 2180.
Propriety of remarks and alleged misconduct by judge, see ante § 395.

¶ 1815. Certainty in the law, as far as attainable, is necessary for private and public security, and this can only be had by leaving it to the courts to declare the law, and not by leaving it open to the varying opinions of different juries.—Hamilton v. People, 29 Mich. 173.

¶ 1816. The jury is bound to receive the law from the court in criminal as well as civil cases. They are only judges of law and fact in the sense that their verdicts are not always open to correction when they choose to disregard the law.—Hamilton v. People, 29 Mich. 173; People v. Mortimer, 48 Mich. 37; People v. Waldvogel, 49 Mich. 337.

¶ 1817. The jury are, in criminal cases, judges of the law as well as of the facts, in the sense that a verdict of acquittal may be found in spite of the direction of the court, and that the court cannot enter a different verdict or order a new trial.—People v. Neumann, 85 Mich. 98.

¶ 1818. In criminal as in civil cases it is the duty of the court to instruct the jury upon the law, and the jury should accept the ruling and be governed by it.—People v. Repke, 103 Mich. 459.

¶ 1819. It is for the court to say what testimony is admissible and for the jury to say what weight shall be given to it.—People v. Goodrode, 132 Mich. 542.

¶ 1820. The question of the sufficiency of an indictment cannot be referred to the jury as one of fact.—People v. Cook, 10 Mich. 164.

¶ 1821. The jury must accept the law from the court and be governed thereby.—People v. Mortimer, 48 Mich. 37; People v. Waldvogel, 49 Mich. 337.

¶ 1822. It is the duty of the jury to follow the instructions of the court as given upon the law in criminal cases.—People v. Smith, 145 Mich. 530.

§ 397. Considering and weighing evidence.

See also post ¶ 2074.
Admissibility as court question, see ante ¶ 1819.
Credibility of accomplice testimony as jury question, see also ante § 317; post ¶ 2126.
Order of inquiry in considering confessions, see also post ¶ 2164.
Duty to admit confession and submit voluntariness to jury, see ante § 261.
Instructions on weighing and considering evidence and on drawing inferences, see post § 430 et seq.
Questions of sufficiency and weight of evidence open on review to appellate court, see post § 633 et seq.
Credibility of witness in general as jury province, see Witnesses, VI.

¶ 1823. The weight of conflicting evidence is for the jury in criminal as well as in civil cases.—People v. Pitcher, 15 Mich. 397; People v. Henssler, 48 Mich. 49; People v. De Fore, 64 Mich. 693.

¶ 1824. A comparison of evidence by offsetting that which is given for one party against that which is given for his adversary, and subtracting one from the other, is weighing the evidence, and is solely for the jury.—People v. Howard, 50 Mich. 239.

¶ 1825. In an information for obtaining a note by means of a false accusation, charging that the representation was relied upon, where the prosecuting witness attempted to explain his testimony given in another case, indicating that he knew that he did not rely upon the representation, the reasonableness of the explanation was for the jury, as at most the discrepancy affected the witness' credibility.—People v. Stockwell, 135 Mich. 341.

§ 398. Particular questions and crimes.

Voluntariness of confession as court or jury question, see ante § 261.
Competency of experts as law question, see ante § 212.
Admissibility of document as court question, see ante ¶ 1321.
Directing verdict, see post §§ 399, 400.
Sufficiency of alibi proofs to go to jury, see also ante ¶¶ 1426, 1427.
Sufficiency of proof connecting accused with stolen goods to take question to jury, see ante ¶ 1429.
Opinions of witnesses on issues within the province of the jury, see ante §§ 200, 205.
Sufficiency of evidence of the various crimes, see ante §§ 324a-324w.

[Note. The paragraphs in this section from and after paragraph 1835 are arranged in order corresponding to alphabetical order of the crimes involved. For a like arrangement of cases on sufficiency of the evidence, see ante §§ 324a-324w.]

In assault and battery cases, see Assault § 11.
In homicide cases, see Homicide § 70.
In larceny cases, see Larceny, II.
In rape cases, see Rape.
In seduction cases, see Seduction, II.
In prosecutions under liquor laws, see Intoxicating Liquors, VI.
Court and jury questions in prosecutions for violations of health regulations, see Health § 3.
Jury questions in civil cases, see Trial, VI: and see specific topics treating of subject to which the question relates.

¶ 1826. The fact of guilty knowledge should be left to the jury to determine from all the circumstances.—Bonker v. People, 37 Mich. 4.

¶ 1827. Felonious intent is a question for the jury to determine from all the facts and circumstances shown.—People v. Griffin, 77 Mich. 585.

¶ 1828. Where an information for assault with intent to do great bodily harm less than the crime of murder, includes the lesser offense of simple assault and battery, the question of criminal intent is one of fact for the jury.—People v. Durham, 170 Mich. 598.

¶ 1829. Where the law has defined what shall be reasonable time, the question of such reasonable time, the facts being found by the jury, is one of law for the court; but where the law has made no such definition the question is for the jury.—Maher v. People, 10 Mich. 212.

¶ 1830. Whether the provocation was adequate or reasonable, and whether a reasonable time had elapsed for the passion to cool and reason to resume its control, are questions of fact for the jury.—Maher v. People, 10 Mich. 212.

¶ 1831. Where a person charged with larceny pleads the statute of limitations and there is some evidence tending to show that he was absent from the state after the larceny, the question whether there was any period during the six years when he was usually and publicly a resident within this state, under How. St. § 9507, is for the jury.—People v. Price, 74 Mich. 37.

¶ 1832. Evidence of experiments to prove that liquor had been tampered with, in a prosecution for murder, held insufficient to support a request for an instruction on the subject of involuntary intoxication and temporary insanity.—People v. Slack, 90 Mich. 448.

¶ 1833. Where, on the trial of a woman for keeping a house of ill fame, a witness testifies to her calling a certain inmate "a pimp" or "her pimp," it is error for the court to determine which language was used, that being a question for the jury.—People v. Gastro, 75 Mich. 127.

¶ 1834. The question whether a warrant on a criminal charge was, within the time prescribed by statute, issued and delivered to an officer to be served, is for the jury.—People v. Clement, 72 Mich. 116.

¶ 1835. Whether one accused of setting fire to a mill was, as claimed by him, merely jesting when he made a statement capable of being construed as a threat to burn it, is a question for the jury.—People v. Pichette, 111 Mich. 461.

¶ 1836. Where one is prosecuted under How. St. § 9134, for breaking and entering in the nighttime a store not adjoining a dwelling-house, etc., the question whether the store was adjoining to or occupied with a dwelling-house is a question of fact for the jury.—People v. Shaughnessy, 89 Mich. 130; People v. Smith, 92 Mich. 10.

¶ 1837. It is a question of fact and not of law whether a space in the rear of a building used for living quarters by subtenants of a merchant and the store room in the front of the building are not "adjoining to or occupied with" each other, where there is a partition with a door separating them and, though the sublease gives no permission to pass through the store, there is evidence that on various occasions the sublessees were allowed to pass through it and the merchant was allowed to pass through the living quarters. The prosecution was for burglary under How. St. § 9134.—People v. Shaughnessy, 89 Mich. 130; People v. Smith 92 Mich. 10.

¶ 1838. Where a merchant enters his s in a city at the usual hour in the mor though it be after daylight, and finds t has been broken open and entered fr front door or window, it cannot be matter of law that the crime might h committed after daylight, and that a respondent, charged with breakir tering the building in the nighttin acquitted.—People v. Dupree, 98

¶ 1839. In a prosecution for entering a store in the nigh dence indicated that the act time between 9 p. m., the the store, and 7 a. m., the it. The sun rose after 7 was daylight before that question was for the jur

was committed in the nighttime.—People v. Trine, 164 Mich. 1.

¶ 1840. Enough having been proved to sustain an inference of fraudulent intent in a prosecution for embezzlement under Comp. L. 1897, § 11570, consisting in the conversion to his own use by accused of money supplied for purchasing corporate stock, the submission of that issue to the jury was proper although there was evidence of a relationship thereafter of debtor and creditor respecting the transaction.—People v. Thorne, 148 Mich. 203.

¶ 1841. In a prosecution for larceny by embezzlement under Comp. L. 1897, § 11570, where the accused converted to his own use money supplied him with which to purchase mining stock, the court properly submitted the intent to the jury when the evidence showed there had been misrepresentation regarding the stock as an inducement to purchase, that all of the money turned over was not required or used in payment for the stock, and that the stock had never been either received by the accused or delivered to the prosecuting witness, but had been sent in the name of the accused to a local bank with a collection charge against it, which he did not conceal or deny.—People v. Thorne, 148 Mich. 203.

¶ 1842. In a prosecution of an officer of a corporation for embezzlement of funds of the corporation by receiving an excessive salary, held that it was a question for the jury whether the accused knew of the company's insolvency at the time he signed an annual report which showed an impairment of the corporation's capital where he stated that he never read the report and did not know what it contained and did not know of the company's insolvency.—People v. Lay, 193 Mich. 476.

¶ 1843. In a prosecution for embezzlement it appeared that respondent had collected and retained certain funds. Respondent claimed he had a joint interest in the funds as compensation for such collection, while his employer testified that no compensation was payable until the funds were paid over. Held, that the case was properly submitted to the jury.—People v. Wolff, 157 Mich. 242.

¶ 1844. Where an indorsement was obtained by false pretenses resting on positive statements to which surrounding facts gave color, it could not be charged, as matter of law, that no offense had been committed in obtaining it on the ground either that the pretenses were such as would not impose on persons of ordinary prudence, or that other considerations, known to the respondent, aided them.—People v. Henssler, 48 Mich. 49.

¶ 1845. In a prosecution for false pretenses, the question as to whether the defendants honestly believed the representations is for the jury.—People v. Bird, 126 Mich. 631.

¶ 1846. In a prosecution for obtaining goods on credit under false pretenses of financial standing, where the evidence of the value of property owned by defendant was conflicting, the question of such value was one for the jury.—People v. Andre, 157 Mich. 362.

¶ 1847. Where a principal forwarded to an agent a check on receipt of an invoice of lumber alleged to have been purchased by the agent, payable to the vendor's order, and on the trial of the agent for the alleged forgery of the vendor's name to the check the testimony was conflicting as to the existence of any such person as the vendor, which question was fully gone into upon both sides, it became one solely for the jury to determine under the testimony.—People v. Kemp, 76 Mich. 410.

¶ 1848. Guilty knowledge that paper is forged may be found if the jury is satisfied that the accused had reason to believe it was; but the inference is for the jury and does not follow of necessity.—Carver v. People, 39 Mich. 786.

¶ 1849. In a prosecution for incest where the woman testified on trial that she consented, detailing the circumstances, but her testimony taken on the preliminary examination was also put in evidence wherein she stated that on the date of the commission of the crime, accused, her father, threatened to kill her if she ever told of it, and that she would not otherwise than in fear have submitted, whether the intercourse complained of as incest took place under such circumstances as to constitute the crime of rape was properly left to the jury.—People v. Skutt, 96 Mich. 449.

¶ 1850. In a prosecution under Pub. Acts 1911, Act No. 62, How. 2nd Ed. § 5299, prohibiting the advertising of treating "venereal diseases," "lost manhood," and "lost vitality," it was properly left to the jury to determine whether the publication complained of contained words that were synonymous with or equivalent to those terms.—People v. Kennedy, 176 Mich. 384.

¶ 1851. On a trial for perjury in which the claim that defendant made a statement at the time that he was examined as a witness before a justice in a criminal case which was contradictory to a statement made after the complaint was made and before the warrant was issued when he was examined by the justice as a witness, held that the question whether the statement made by the defendant before the magistrate at the time of his first examination, and other statements in the presence of the other witnesses were not freely made or were induced by duress and the exercise of the

"third degree" and were not true in fact should have been submitted to the jury.—People v. McClintic, 193 Mich. 589.

¶ 1852. What constitutes prize fighting is a question of law.—People v. Taylor, 96 Mich. 576.

¶ 1853. If the evidence that the respondent, in violation of § 11510, Comp. L. 1897, How. Ann. St., 2nd Ed., § 14559, relating to the careless use of firearms, pointed and fired a gun at a passing street car and injured a passenger, is controverted, it should be submitted to the jury.—People v. Kreidler, 180 Mich. 654.

§ 399. Directing verdict.

See also post ¶ 1993.
Direction on concession of counsel, see also post ¶ 1872.
Demurrer to reception of any evidence, see post § 401.
Peremptory or binding charges on probative effect of evidence, see post § 429 et seq.
Instructions invading province of jury or improperly taking questions from jury, see post § 429 et seq.
Direction of verdict for wrong reason as harmless error, see post § 535.
Instructions to convict of certain degree of homicide or to acquit, see also Homicide § 76.
In civil cases, see Directing Verdict.

¶ 1854. It is only where there is no evidence, upon a material point, that the court can take the case from the jury.—People v. Eaton, 59 Mich. 559.

¶ 1855. Where, upon a prosecution for a misdemeanor, the facts are admitted or undisputed, and the only question is one of law as to whether the facts proved constitute the offense charged, the court may properly direct the verdict.—People v. Elmer, 109 Mich. 493.

¶ 1856. Only when the facts are undisputed should the court say that under the law no crime has been committed.—People v. Hubbard, 92 Mich. 322.

¶ 1857. In a criminal prosecution if upon the conceded or undisputable facts there is no ground to sustain a verdict of guilty, the court should direct a verdict for respondent.—People v. Minney, 155 Mich. 534.

¶ 1858. Where all the facts essential to a conviction are admitted, there is nothing for a jury to pass upon and it is not error for the court to direct a verdict of guilty.—People v. Ackerman, 80 Mich. 588.

¶ 1858a. There is no error in directing a verdict in a criminal prosecution where the facts proved will sustain a conviction as a matter of law.—People v. Neal, 143 Mich. 271.

¶ 1859. A verdict of guilty may be directed in a criminal case when the facts are uncontroverted.—People v. Damskey, 180 Mich. 664.

¶ 1860. Whenever there is no question of intent in a criminal case, and no inferences about which reasonable men might differ, and when, upon the admitted facts, the only question to be determined is whether under the law the statute has been violated, the trial judge may state to the jury that the law applied to such undisputed facts shows defendant to be guilty of the offense charged, and that it is their duty so to find under the facts and law.—People v. Neumann, 85 Mich. 98.

¶ 1861. An acquittal will not be directed in an arson case although the testimony for the prosecution rests entirely upon very unsatisfactory evidence as to the identification of respondent, as it cannot be said that there was no evidence for the jury to act upon.—People v. Gotshall, 123 Mich. 474.

¶ 1862. In a prosecution for malicious injury to a fence, where the testimony indicated that the use made of the land by respondent was not inconsistent with the use made of the property by the owner, and that an adverse right was not built up, the refusal to direct a verdict on the ground that the proceeding was an attempt to try disputed rights was not error.—People v. Ferguson, 119 Mich. 373.

¶ 1863. Respondent in a prosecution for assault with intent to do great bodily harm less than the crime of murder was the father of the boy alleged to be assaulted. The evidence showed that respondent and the boy were in the barn together; that the boy stated that he was struck by something, and upon recovering consciousness at first thought his father hit him, but later thought it might have been the horse; and that the father went away in a buggy soon afterwards and sent the horse and buggy back. The circumstances created the suspicion that the boy and the other witnesses were seeking to absolve the respondent at the trial. Held, the court properly refused to direct a verdict for respondent.—People v. Hennard, 162 Mich. 225.

¶ 1864. In a prosecution under Comp. L. 1897, § 5395, How. St., 2nd Ed., § 5074, for keeping a saloon open on Sunday where it was undisputed that defendant's son had entered such saloon on Sunday, it was proper for the trial judge to direct the jury to return a verdict of guilty.—People v. Damskey, 180 Mich. 664.

¶ 1865. In a criminal prosecution for keeping, storing and possessing intoxicating liquor in other than his own residence, where defendant was professedly engaged in the sale only of nonintoxicating liquors in a room

of a building, the remainder of which was his mother's residence, but had at one time been engaged in the sale of intoxicating liquors, and liquor was found under the floor of his mother's room, which defendant claimed belonged to his mother, although it had originally belonged to him while in the saloon business, because he had transferred it to her in satisfaction of a debt, held that the court did not err in refusing to direct a verdict.—People v. Calliari, 196 Mich. 475.

¶ 1866. The fact that the people have been at large expense in the prosecution should have no weight with the court in leaving the case with the jury where the evidence is insufficient to sustain a conviction.—People v. Montague, 71 Mich. 318.

§ 400. ——Practice and procedure on direction of verdict.

Recalling jury to direct verdict according to undisputed evidence, see post § 452, ¶ 2195.

Recalling jury to direct verdict after disagreement, see also post § 453, ¶ 2198.

Necessity of motion to direct verdict to save defect of proof for review, see post § 516.

Necessity for remand for new trial where verdict directed on motion of both parties is erroneous, see post ¶ 2917.

¶ 1867. In criminal cases upon a plea of not guilty, the trial court may instruct the jury that it is their duty to bring in a verdict of guilty, but it is error to go further, and compel them to do so.—People v. Doyle, 160 Mich. 423.

¶ 1868. Where, at the close of the evidence in a prosecution for misdemeanor in the unlawful sale of liquor, the court instructed the jury that they should find a verdict of guilty as charged against respondent, without leaving their seats, and stating to the counsel for defendant that if they wished to lodge exceptions before sentence he would give them an opportunity to do so, and that they might go to the supreme court to see whether he was right or not, such charge compels the jury to render a verdict of guilty, and a conviction by them will be set aside.—People v. North, 153 Mich. 612. (Grant, C. J., and Montgomery and Hooker, JJ., dissenting.)

¶ 1869. Respondent was tried for violating the local option law. The court instructed the jury that under the facts respondent was guilty, and directed the clerk to take a verdict against the respondent. Held, such course violated respondent's constitutional right to a jury trial.—People v. Curry, 163 Mich. 180.

¶ 1870. In a prosecution for a violation of the local option law where none of the facts is in dispute, it is proper to charge the jury as to the law applicable to the admitted facts, to advise them that their duty is to find a verdict of guilty and then to permit them to retire and deliberate.—People v. Hatinger, 174 Mich. 333.

¶ 1871. In a prosecution for a violation of Local Acts of 1885, Act No. 329, forbidding the use of spears, firearms, nets and jacks in taking fish from Gun Lake, it was held not error to have refused an instruction to acquit the defendants; but where the court, the facts on respondent's trial for a misdemeanor being undisputed, discharged the jury and directed the clerk to enter a verdict of guilty, thus giving the jury no opportunity to follow, or to refuse to follow, the court's direction to enter such a verdict, the conviction was reversed.—People v. Collison, 85 Mich. 105.

¶ 1872. Where defendant has testified to his own guilt, and his counsel has remarked, after a ruling of the court, "Of course that ends the case," it is not error to direct a verdict of guilty without argument to the jury.—People v. Richmond, 59 Mich. 570.

§ 401. Demurrer or objection to reception of any evidence.

Objection to reception of any evidence for want of legal warrant or accusation, see also ante ¶ 1635.

¶ 1873. One who is tried on an information for an offense for which no information is allowable has a right to decline to introduce evidence and to claim discharge.—Byrnes v. People, 37 Mich. 515.

¶ 1874. In a prosecution for keeping open a saloon on Sunday in violation of the statute regulating the sale of intoxicating liquors, an objection to the introduction of any evidence in the case for the reason that the return of the magistrate purporting to contain all the evidence taken on the preliminary examination disclosed no testimony to the effect that defendant was a saloon keeper within the meaning of the statute, it not being shown that he had filed a bond or taken out a license, is properly overruled where it does not come until after the jury is sworn.—People v. Davis, 171 Mich. 241.

E. INSTRUCTIONS AND SUBMISSION THEREOF.

§ 402. In general; duty to instruct and necessity for request.

Giving instructions on motion of court itself, see post § 403.

Charges required in absence of any request, see post § 404 et seq.

Necessity for request to correct improper argument, see also ante ¶ 1724.

Duty to instruct on diverse theories of the case, see post § 423.

Duty of jury to follow instructions, see ante § 396.

Mode and sufficiency of request, see post § 417.

General requisites and scope of charge, see post § 404 et seq.
Form, phrasing and manner of charge, see post § 411 et seq.
Construction and effect of charge as a whole, see post §§ 415, 416.
Applicability and conformity of charge to issues and evidence, see post § 422 et seq.
Assumptions and misstatements in charge, see post §§ 427, 428.
Encroachment or invasion of jury province, see post § 429 et seq.
Charging on evidence or weight of evidence, see post § 433 et seq.
Undue emphasis or prominence or singling out, see post §§ 442, 443.
Charges on confessions and admissions and character, see post §§ 444, 445.
Admonitory and cautionary charges, see post § 446 et seq.
Instructions on the specific offenses arranged in alphabetical order of crimes, see post §§ 455a-455w.
Propriety of granting, denying or modifying requests and grounds or reasons for grant, denial or modifications, see post §§ 419-421.
Propriety of denying request where same matter is covered by charge in other parts or terms, see post § 419.
Refusal of requests because incorrect in law, see post § 419.
Right to give request in words different from request but of equivalent meaning, see post § 420.
Repeating or adding instructions after retirement of jury, see post §§ 452-454.
Necessity of request, ruling thereon, and exception to ruling to save question for review, see post §§ 521, 524, 526.
Right to raise question on review without exception, see post § 526.
Harmless error in charging or refusing to charge, see post § 549.
Instructions or refusal to instruct cured by verdict, see post § 567.
Mode and sufficiency of assignments of error in charge, see post § 586 et seq.
Instructions in civil cases, see Instructions.
Statutory duty and power of court as to charging jury, see Comp. L. 1915, § 14573.

¶ 1875. The omission of specific instructions for the respondent in a criminal case is not error if they were not asked for and the charge was not misleading.—Driscoll v. People, 47 Mich. 413; People v. Willett, 105 Mich. 110.

¶ 1876. Where a defendant in a murder trial claims that another did the deed, and requests no instruction on the question of self-defense, no error is committed in omitting it.—People v. Droste, 160 Mich. 66.

¶ 1877. Where a criminal case for murder is tried on the theory of murder while attempting to rob, and the defense is an alibi, and no instruction that defendant might under the information be found guilty of manslaughter, is requested, any claim of error on the part of the trial court in failing to give such an instruction is untenable.—People v. Page, 198 Mich. 524.

¶ 1878. The court may properly direct the jury's attention to the character of an accomplice's testimony, but failure to do so when a proper request is not presented is not error requiring reversal.—People v. Considine, 105 Mich. 149.

¶ 1879. Reversal of a conviction will not be had because the trial judge failed in his instructions to comment on the credibility of an accomplice used as a witness against defendants, no requests for such comment being preferred.—People v. Dumas, 161 Mich. 45.

¶ 1880. Failure of the charge to call the attention of the jury to the denial of the charges by the respondent in a prosecution for rape was not error, where respondent stood contradicted by four witnesses and no request to charge upon the point was made by his attorney.—People v. Smith, 122 Mich. 284.

§ 403. Instructions on court's own motion.

Power to charge of own motion, see Comp. L. 1915, § 14573.

¶ 1881. On facts justifying it, it is correct for the court on his own motion to charge that if accused and another were associated in planning and perpetrating the crime, the guilt of accused would not be lessened by the fact that the other also was guilty.—People v. Parsons, 105 Mich. 177.

§ 404. General requisites and scope of char

Form, phrasing and manner of charge, post § 411 et seq.
Construction and effect of charge as a w
see post §§ 415, 416.
Applicability of instructions to issues
evidence, see post § 422 et seq.
Encroaching on province of jury and
ing on weighing and considering e
see post § 429 et seq.
Undue emphasis or prominence to
case, see post §§ 442, 443.
Assumptions and misstatements
see post §§ 427, 428.
Admonitions and cautions in char
§ 446 et seq.
Charges on specific crimes, see
455w.
On presumptions, burden of p
sonable doubt, see post §§
On burden and sufficiency c
fenses, see post § 407.
On alibi, insanity and intox
§§ 408, 409.
On participation or comp
abetting, see post § 4
Defining "good faith," see
Duty to charge on presu
than that of innoc
et seq.

Necessity of request for specific instructions, see ante § 402.
Giving additional instructions requested by jury without further complementary charges, see post ¶ 2196.
Further charge as to agreement after return into court, see post § 453.
Omissions supplied by construction from charge as a whole, see post § 416.
Definition of Latin term supplied by intendment from other parts of charge, see post ¶ 1977.

¶ 1882. In a criminal prosecution the trial judge should, even though no request be made, instruct the jury by covering the general features of the case, defining the offense, and indicating what is essential to prove to establish the particular offense.—People v. Prinz, 148 Mich. 307.

¶ 1883. A judge is not obliged, in charging a jury, to comment on facts at all; but may, if he chooses, confine himself strictly to laying down such rules of law as must guide their action.—People v. Wallin, 55 Mich. 497.

¶ 1884. Even in the absence of requests from counsel, the trial court should see to it that the case goes to the jury in a clear and intelligent manner, so that they may clearly understand what they are to decide; and the law applicable to the facts should be fully stated.—People v. Murray, 72 Mich. 10.

¶ 1885. The defense in a criminal case cannot insist that the judge shall charge the jury argumentatively or comment on the evidence, or point out the weak points in the case for the prosecution so far as they involve questions of fact and not of law. It can only demand that the instructions on the legal points shall be correct, and that the evidence shall not be commented upon or presented in an incorrect or unfair way.—People v. Crawford, 48 Mich. 498.

¶ 1886. A charge undertaking to define prize-fighting should use language that can be interpreted by one unskilled in the profession of prize-fighting, and that will enable a court of review to ascertain whether respondent was prejudiced by the terms employed. So held of the use of the term "knock out."—People v. Taylor, 96 Mich. 576.

§ 405. ——On presumption of innocence and burden of proof.

On burden of proof of voluntariness of confession, see post ¶ 2167.
Cure of omission by charge as a whole, see post § 416.

¶ 1887. The presumption of innocence is present in every criminal case, and the jury should be so instructed, and that it stands good until overcome by evidence convincing the jury beyond a reasonable doubt of respondent's guilt.—People v. De Fore, 64 Mich. 693.

¶ 1888. The charge may omit a definition of reasonable doubt where respondent asks no explanation of the term.—People v. Waller, 70 Mich. 237.

¶ 1889. In the absence of requests to charge on the part of respondent's counsel it is the duty of the trial court to see that the presumptions of law in favor of the accused are clearly and impartially laid before the jury.—People v. Murray, 72 Mich. 10.

¶ 1890. It is the duty of the court to instruct as to the presumption of innocence in a criminal case.—People v. Rogulski, 181 Mich. 481.

¶ 1891. Failure to charge that the respondent on trial for homicide was entitled to the presumption of innocence is not reversible error, in the absence of a request upon the subject, where the court fully cautioned the jury as to the burden of proof, and the rights of the respondent.—People v. Rogulski, 181 Mich. 481.

¶ 1892. In all criminal cases, whether the defense charged is statutory or one recognized at the common law, the presumption of innocence obtains in favor of the respondent, and the failure of the court so to instruct the jury, whether requested to do so or not, is reversible error; and this rule applies to statutory misdemeanors where intent is not an element of the offense charged.—People v. Potter, 89 Mich. 353.

¶ 1893. A conviction will not necessarily be reversed in every case where, there being no request for an instruction on the point, and the court's attention not being called thereto, the jury is not informed in so many words that the presumption of innocence remains with the accused until he is proved guilty.—People v. Graney, 91 Mich. 646; People v. Smith, 92 Mich. 10.

¶ 1894. In a trial for murder a request for an instruction is valid that goes to the jury's starting out with the presumption of the defendant's entire innocence, which presumption must be overcome by evidence so convincing that they can say, beyond any reasonable doubt, that the defendant is guilty.—People v. Stewart, 75 Mich. 21.

¶ 1895. A charge which states that the prosecution must satisfy the jury, beyond a reasonable doubt, of respondent's guilt, and that the evidence should be plain and satisfactory in proportion as the crime is detestable (respondent being informed against for the crime against nature), and that the jury must acquit respondent unless satisfied that his guilt has been strictly and impartially proved,—that it is true beyond a reasonable doubt,—informs the jury, in substance, that the presumption of innocence is with respondent until the jury finds that he is proved guilty beyond a reasonable doubt.—People v. Graney, 91 Mich. 646.

¶ 1896. An instruction, that "the law presumes every man innocent of the crime charged, and of every offense included in the formal charge, that this presumption surrounds and abides with him throughout the entire trial, and should be borne in mind at each successive step in your deliberations as to your verdict," coupled with instructions, both general and special, that the prosecution must, by proofs, establish respondent's guilt beyond a reasonable doubt, and that the jury must give respondent the benefit of all reasonable doubts, and of the presumption of innocence, to which the law entitles him, is sufficiently specific as to the presumption of respondent's innocence without telling them to start with that presumption uppermost in their minds.—People v. Willett, 105 Mich. 110.

¶ 1897. An instruction as to the presumption of innocence held sufficient, in the absence of a request for more specific instructions.—People v. Rogulski, 181 Mich. 481.

¶ 1898. In a criminal prosecution an instruction that the burden of proof rests on the people and "a man comes into court clothed with the presumption of innocence and he stands innocent in your minds until the people or the prosecuting attorney have convinced you of his guilt beyond a reasonable doubt" held to be erroneous.—People v. McClintic, 193 Mich. 589.

¶ 1899. It is error to charge that if satisfied beyond a reasonable doubt of defendant's guilt by the evidence of the prosecution, the jury should examine the defendant's evidence, because the presumption of evidence having been removed the burden is then on him to restore the original presumption of innocence.—People v. McWhorter, 93 Mich. 641.

¶ 1900. Where on a trial for murder it was admitted that respondent was guilty of manslaughter, but the theory of the defense was that he was innocent of the higher offense charged because of a want of criminal intent, a charge which gives to respondent the presumption of innocence of such intent, and the benefit of any reasonable doubt the jury might entertain as to the intent with which he acted, is not open to objection that the court did not instruct the jury that the presumption of innocence was with the respondent.—People v. Harper, 83 Mich. 278.

¶ 1901. An instruction in a prosecution for an assault with intent to commit murder, which in the definition of murder states that defendant could not be found guilty if there is evidence to convince the jury beyond a reasonable doubt that he did not premeditate the crime or that he did not intend to kill when the shots were fired by him, is erroneous as placing the burden of proof on defendant to convince the jury beyond a reasonable doubt that he did not premeditate the crime.—People v. Cismadija, 167 Mich. 210.

§ 406. ——On reasonable doubt.

Sufficiency of the charge taken as a whole, see post §§ 415, 416.
Omission or defect supplied by construction from charge as a whole, see post § 416.
Charging on circumstantial proofs, see also post § 434.
On reasonable doubt of alibi, see also post ¶ 1923.
In perjury case, see also post § 455p.
On information for careless use of weapons, see also post ¶ 2231.

¶ 1902. In a criminal prosecution it is not error for the court in his charge to the jury to omit a definition of "reasonable doubt," where respondent asks no explanation of the term.—People v. Waller, 70 Mich. 237.

¶ 1903. Juries are presumed to have common sense enough to need no metaphysical explanations of what will constitute a "reasonable doubt." It is not desirable in jury trials to introduce such subtleties and technicalities of language as are more likely to confuse than to instruct them.—Hamilton v. People, 29 Mich. 173; People v. Stubenvoll, 62 Mich. 329.

¶ 1904. A charge that the prisoner's guilt must be proved to the exclusion of all reasonable doubt, and that he is entitled to acquittal if the testimony can be reconciled with any rational theory other than his guilt, is as much as he is entitled to.—Hall v. People, 39 Mich. 717.

¶ 1905. An instruction defining reasonable doubt as a doubt built upon substantiality, or as having a reasonable basis, is not erroneous.—People v. Cox, 70 Mich. 247.

¶ 1906. An instruction that a respondent is presumed to be innocent of the offense charged in the information; that such presumption surrounds him until removed by evidence that satisfies the jury beyond any reasonable doubt of his guilt: that by proof beyond a reasonable doubt is meant such proof as precludes every reasonable hypothesis except that of guilt: that it is proof to a moral certainty, as distinguished from an absolute certainty: that it is not proof beyond all imaginary doubt, but is such proof as satisfies the judgment and conscience of the jury, as reasonable men applying their reason to the evidence before them, that the crime charged has been committed by the respondent: so satisfies them as to leave no other reasonable conclusion possible—correctly and clearly covers the entire subject of reasonable doubt.—People v. Ezzo, 104 Mich. 341.

¶ 1907. Instruction upon the law of reasonable doubt held sufficient.—People v. Lalonde, 171 Mich. 286.

¶ 1908. An instruction to the jury in a criminal case, that if a certain fact is true, respondent is not guilty, and that the jury should say so, or, if it have a reasonable doubt about it, it should say so, is equivalent to an instruction that, if the jury has a reasonable doubt upon the subject, it should acquit.—People v. Pichette, 111 Mich. 461.

¶ 1909. The court properly refused to instruct the jury in a criminal case that if a reasonable doubt of any of the facts necessary to convict the accused was raised in the minds of the jurors by the evidence itself, or by the "ingenuity of counsel" upon any hypothesis reasonably consistent with the evidence, it should acquit.—People v. Wells, 112 Mich. 648.

¶ 1910. An instruction defining reasonable doubt as a fair doubt growing out of the testimony, not a mere imaginary or possible doubt, but a fair doubt based on reason and common sense, such as may leave the minds of the jury in a condition that they cannot say that they have an abiding conviction to a moral certainty of the truth of the charge made against the accused, is proper.—People v. Swartz, 118 Mich. 292.

¶ 1911. A charge in a prosecution for perjury, that "Whatever would convince you beyond a reasonable doubt in the judgment which you use in your ordinary affairs of life, is all that is necessary to convince you sitting as jurors in any criminal case," is misleading since it might lead to the notion that they might convict on such evidence as would convince their judgment in the ordinary affairs of life.—People v. Albers, 137 Mich. 678.

¶ 1912. A charge defining reasonable doubt (too long to be set out here, but containing the expression "To be reasonable, a doubt must be founded upon reason, and must be created, not by an outside source, but must grow out of the evidence in the case"), held not to have been misleading in that it excluded a doubt arising from the want of evidence or that it required the jury to be able to assign a reason for the doubt; where a request by accused on the same subject was given and in view of the charge as a whole, notwithstanding might with propriety have been refused if requested in the exact language as that used.—People v. Hoffmann, 142 Mich. 531.

¶ 1913. It is error to charge that proof beyond a reasonable doubt does not require the jury to be satisfied beyond a reasonable doubt "of each link in the chain of circumstances relied on" to establish guilt, and that it suffices if taking all the testimony together the jury is satisfied beyond such a doubt; where the court had refused to charge that proof of any material fact inconsistent with guilt would require an acquittal.—People v. Aikin, 66 Mich. 460.

¶ 1914. In a trial for murder the defendant may properly request an instruction defining a reasonable doubt as such a doubt, arising out of the evidence, that one cannot say to a moral certainty that he is guilty, and that acquittal must follow the failure of any other reasonable explanation of the death of the decedent than the guilt of the defendant.—People v. Stewart, 75 Mich. 21.

¶ 1915. An instruction as to the effect of a chain of circumstances, and the necessity of proving each material fact, in order to convict for manslaughter, held improperly refused, as the conviction of the accused depended upon a number of facts, all of which should be proved beyond a reasonable doubt.—People v. McArron, 121 Mich. 1.

¶ 1916. An instruction in a rape case stating that it was not essential that "every fact and every circumstance and every link in the chain must be proven beyond a reasonable doubt" was not error when taken together with a clear definition of the meaning of reasonable doubt; where the case did not depend upon circumstantial evidence but upon the direct statement of the injured girl in question and that of respondent.—People v. Rich, 133 Mich. 14.

¶ 1917. An instruction that the burden is upon the people to prove respondent's guilt beyond a reasonable doubt and that he is presumed innocent until he is proved guilty, and that all of the jury must be satisfied of his guilt beyond a reasonable doubt in order to convict, is all that is required.—People v. Curtis, 97 Mich. 489.

¶ 1918. A general charge in a prosecution of larceny reciting the elements of offense and circumstances, to the effect that the jury must be convinced beyond a reasonable doubt of defendant's guilt, without impressing each juror with that fact, held sufficient.—People v. Hammond, 177 Mich. 416.

§ 407. ——On burden and sufficiency of proof of defenses.

Sufficiency of charge as a whole to overcome defects, see post § 416.

On defenses of alibi, insanity and intoxication, see post §§ 408, 409.

¶ 1919. An instruction that the defense of insanity must be established by the accused on a criminal trial by a preponderance of the testimony, is erroneous.—People v. Eggleston, 186 Mich. 510.

¶ 1920. In instructing the jury as to the evidence of an alibi the judge told them that the defense, if made out, was perfect and was conclusive of respondent's innocence, and that they must be satisfied of respondent's guilt by proofs beyond reasonable doubt, but that as the proof of the alibi was in conflict with the direct proof offered by the prosecution, they should weigh the testimony thereof

in connection with the other testimony in the case and consider it as met or explained by that of the defense, and determine whether, in view of all the testimony, the witnesses to an alibi were mistaken or that they were able to say from the testimony of the prosecution, as explained by that of the defense, that there was no reasonable doubt that respondent was guilty. Held, that it could not be said that the jury might have been misled by this charge into thinking that the alibi must be affirmatively shown, and that a reasonable doubt of the prisoner's presence would not warrant his acquittal.—People v. Pearsall, 50 Mich. 233.

¶ 1921. On an issue whether respondent took the horse, for the larceny of which he was tried, from a stable or from the roadside where it was at large, it was error to charge that if the jury believes beyond reasonable doubt that the horse was taken without running at large in the road, and that defendant supposed the possessor had allowed it to run at large and thus gave up his possession, there can be no conviction of larceny. It is enough that such facts appear by a preponderance of proof.—People v. Hillhouse, 80 Mich. 580.

¶ 1922. An instruction that the defense in a rape case claimed that the charge in question was a conspiracy and that there was no truth in it whatever, and that such evidence went into the case to be considered with other evidence and that the defense was not required to have a theory except as they saw fit to adopt one, and that the defense rested upon the plea of not guilty, and that the burden of proof remained with the prosecution, where it started, goes as far as the evidence on such alleged conspiracy warranted, it being weak and doubtful.—People v. Rich, 133 Mich. 14.

§ 408. ——On alibi.

Instruction sufficient with remainder of charge, see post ¶ 1981.

On burden of proving alibi, see ante § 407.

¶ 1923. Where respondent interposes an alibi, it is proper for the court to direct the attention of the jury to the nature of such defense, and to instruct them that all of the evidence bearing thereon should be carefully considered, "and if, in view of the evidence, the jury have any reasonable doubt as to whether the defendant was at some other place at the time the crime was committed, they should give the defendant the benefit of any doubt, and find him not guilty."—People v. Resh, 107 Mich. 251.

¶ 1924. An instruction in a criminal case that the jury should carefully scrutinize any evidence in relation to an alibi, for the reason that an alibi is a defense that is easily proved and hard to disprove, is not erroneous. —People v. Tice, 115 Mich. 219.

¶ 1925. An instruction is correct as to an alibi claimed as a defense to a criminal action in which time was not of the essence and the offense was charged under a videlicet as occurring "heretofore to wit" on a day mentioned, where such defense is properly defined, and the weight to be given it where the time of the commission of the offense is not of the essence is correctly stated under the facts.—People v. Swift, 172 Mich. 473.

§ 409. ——On insanity or intoxication.

Sufficiency of charge as a whole, see post § 416.

Request embracing charge encroaching on jury, see post ¶ 1990.

On burden of proof of insanity, see ante § 407.

Charge on insanity, see also Crimes ¶ 65.

Charge on intoxication as affecting conscious intent, see also Crimes ¶ 72.

¶ 1926. It is not error to charge in connection with other instructions, that mental unsoundness, to constitute a defense, must be the result of disease and not of the respondent's having allowed his passions to run until they have become uncontrollable.—People v. Durfee, 62 Mich. 487.

¶ 1927. Where the defense is that the homicide was committed after an assault by deceased upon respondent so aggravated in nature as to render the latter temporarily insane, the testimony offered in support of such defense should be treated with the same respect as that offered to establish any other fact, and the use, in the charge to the jury, of language calculated to convey the impression that the defense of insanity is unworthy of consideration is error requiring reversal.—People v. Holmes, 111 Mich. 364.

¶ 1928. A charge that if respondent was too drunk to be capable of forming the statutory intent he would be free from the statutory guilt, but not otherwise, is as much as he can ask.—People v. Haley, 48 Mich. 495.

¶ 1929. Under an information charging respondent with intentionally and without malice discharging a firearm, it is error to instruct that although the respondent might be so intoxicated that he was incapable of forming an intent, he might still be guilty of the offense charged.—People v. Peterson, 166 Mich. 10.

¶ 1930. An instruction on a prosecution for burglary that the voluntary intoxication of the accused irrespective of its degree, would not relieve him from criminal liability, is erroneous.—People v. Eggleston, 186 Mich. 510.

§ 410. ——On participation, aiding and abetting.

Substantive law on aiding and abetting and principals and accessories, see Crimes § 10 et seq.

¶ 1930a. A charge on principalship is correct, which tells the jury, "if he was there for the purpose, intending to aid and encourage the commission of this crime, he would be equally guilty with the person or persons who inflicted the mortal wound."—People v. Repke, 103 Mich. 459.

¶ 1931. It is not error to instruct the jury that if, at the time of the killing, respondent actively participated, met, went forward or aided, either by being present on guard or by counselling and encouraging others to commit the crime while thus present with that intent, he is equally guilty with those who inflicted the mortal wound.—People v. Repke, 103 Mich. 459.

¶ 1932. Upon the trial of one of those jointly charged with the offense, an instruction that, if respondent did not participate in the assault, he should be acquitted, unless it was part of the arrangement between the parties that the assault should be committed if necessary to accomplish the robbery or to protect themselves from capture or injury while attempting it, sufficiently protects the rights of the respondent.—People v. Cleveland, 107 Mich. 367.

¶ 1933. It was error for the court to instruct the jury in a trial for robbery, where the evidence tended to show a brutal assault by respondent and two others upon the complainant, during which his vest was torn off, and his pocket-book containing money taken therefrom, that it made no difference which one of the assailants tore off the vest, that from the fact the vest was torn off the jury might determine for what purpose it was taken off; where there was no testimony of any opportunity for, or in fact, of any conference, before the attack between respondent and his coassailants, beyond the fact that on a sudden word of attack the assault was committed, nor of the subsequent possession by any of them of the pocket-book or money; since such instruction was practically telling the jury that men who combine for an assault are liable for any felony committed by one of them, whether participants in the actual felonious design or not, which is not sound law.—People v. Foley, 59 Mich. 553.

¶ 1934. In a prosecution for an assault with intent to rob, the evidence indicated that in a saloon brawl the defendant joined in an assault upon one Mundt. In the general fracas Mundt was robbed of his pocketbook and money. The court charged to the effect that if defendant joined in the assault he was guilty of the crime charged, although some other person in the fracas did the act of robbing. Held, that this instruction was erroneous as making defendant liable for the crime in question without proof that he shared the specific intent to rob.—People v. Belton, 160 Mich. 416.

¶ 1935. A charge to the effect that if several persons conspire to commit "any unlawful act" and murder results, all are guilty, is improper as including a conspiracy to commit a misdemeanor, which, if resulting in murder, would only involve the active conspirator.—People v. Koharski, 177 Mich. 194.

§ 411. Form, phrasing and manner of charge.

Use of emphatic words, see post § 412.

Narratives, recitals and quotations, see post § 413.

Argumentative charges, see post § 414.

Accompanying charge with remark that court might discharge accused as error, see also post ¶ 2879.

Inflammatory instruction describing atrocity of murder, see Homicide ¶ 237.

Repeating charge to jury after retirement, see post §§ 452, 454.

Submission of additional instructions after retirement, see post §§ 452-454.

Necessity of written charges and forbiddance of oral charges or modifications, see Comp. L. 1915, § 14575.

Provision for reading charge to jury and filing same as part of record, see Comp. L. 1915, § 14575.

¶ 1936. The style and spirit of a charge are not open to criticism by the supreme court if the charge is correct.—Keator v. People, 32 Mich. 484.

¶ 1937. In giving requests of a party to instruct, it is proper for the court to give such instructions not as coming from said party, but as representing the law as laid down by the court.—People v. Lewis, 166 Mich. 513.

¶ 1938. A charge on the failure to resort to all available means to produce a witness for the defense, whom defendant testified had sold the stolen goods to defendant, is error where it amounted to a partisan argument against accused.—People v. O'Hare, 124 Mich. 515.

§ 412. ——Use of emphatic words.

Undue emphasis or prominence to specific matters, see post § 442.

¶ 1939. In the prosecution of a person for keeping a drug store for the illegal sale of liquor, an instruction to the jury that it was his duty to make such sales in "perfect good faith * * * not good faith but perfect good faith" goes too far. Only good faith is required and there are no degrees of good faith. Such an instruction is reversible error because of the emphasis on the distinction.—People v. Thompson, 147 Mich. 444.

§ 413. ——Narrative recitals and quotations.

¶ 1940. Where there is evidence in a criminal case tending to support the judge's version of the facts, and the fair construction of it is not misleading, his direct narration of the facts in his charge, though hardly proper,

is not clearly ground for disturbing the judgment.—People v. Clarkson, 56 Mich. 164.

¶ 1941. If the charge to the jury in a criminal prosecution specially refers to and narrates any of the testimony given by the people's witnesses, it should also refer to the testimony and explanations relating to the same subject on respondent's part.—People v. Murray, 72 Mich. 10.

¶ 1942. A trial judge has a right to introduce into his charge the remarks of the supreme court or other authority or author as to the value of expert evidence and to read them to the jury.—People v. Niles, 44 Mich. 606.

§ 414. ——Argumentative and hypothetical charges.

See also ante ¶ 1938, post ¶ 2061.
Supposititious charge, see also post ¶ 2068.
Duty to charge on theory or hypothesis supportable by evidence in the case, see post § 423.

¶ 1943. Argumentative instructions are not permissible.—People v. Brown, 142 Mich. 622.

¶ 1944. The court may properly refuse to give a requested instruction when it is clearly argumentative.—People v. Thorne, 148 Mich. 203.

¶ 1945. An instruction is objectionable if it is argumentative and if it tends to impress upon the jury that in the court's opinion respondent has not testified truthfully.—People v. Hull, 86 Mich. 449.

¶ 1946. While, within bounds, requests to charge may properly allude to the effect of certain testimony, they should not be argumentative.—People v. Hanaw, 107 Mich. 337.

¶ 1947. Argumentative requests to charge, covering a question which has been fully argued to the jury, are of doubtful propriety.—People v. Palmer, 105 Mich. 568.

¶ 1948. A charge which as a whole is eminently fair, will not be condemned as argumentative and as unnecessarily condemning the admitted conduct of the parties where the part objected to was given to avoid possible danger that testimony of earlier transactions might be misapplied by the jury, and to limit the offense to the one charged in the information.—People v. Gorsline, 132 Mich. 549.

¶ 1949. To allude to the testimony of the attending physician that when attending he had not contemplated the possibility of arsenical poisoning, and to leave it to the jury to decide if death was due to that cause, is error; where the effect is an argument that the theory of the defense is false and that such was the cause of death.—People v. Vanderhoof, 71 Mich. 158, per Morse, J., and Sherwood, C. J., tw result.

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§ 415. Construction a whole.

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¶ 1956. Although an excerpt from a charge is objectionable in itself, if when read in connection with the whole charge it fairly presents the case, error cannot be assigned thereon.—People v. Campbell, 173 Mich. 381.

¶ 1957. Error cannot be predicated upon detached sentences in a charge, which when construed with the rest are not objectionable.—Driscoll v. People, 47 Mich. 413.

¶ 1958. In a prosecution for embezzlement where the charge to the jury is full and fair, and preserves every substantial right of the accused, it will not be considered erroneous on the ground that isolated sentences may be subject to criticism.—People v. Lay, 193 Mich. 17.

¶ 1959. Where a full and correct charge was given, certain introductory phrases and cautionary comments on the mode employed in impeaching testimony were held not prejudicial.—Keator v. People, 32 Mich. 484.

¶ 1960. In a prosecution for an assault with intent to murder, the complaining witness testified that the respondent had struck at him as he was sitting on horseback, and had cut his clothes and the horse; the defense suggested that the complaining witness might have inflicted the wound himself, and the judge charged that if it was not done at the time sworn to by the prosecution it remained for the other side to show when and where it was done. He also charged that the case for the prosecution must be made out, not by a mere preponderance of evidence, but beyond a reasonable doubt. Held, that the former suggestion, though loosely made, might be regarded as meaning only that the defense could advance by suggestion or argument any theory as to when and where the injury was committed, if not as alleged by the prosecution, but not as requiring them to show when and where it was done, as that would be irrelevant if the prosecution did not establish defendant's guilt at the time and place and in the manner alleged.—People v. Niles, 44 Mich. 606.

¶ 1961. A charge, that the interest of the witnesses for accused might be considered as affecting the weight of their testimony, is not objectionable as omitting to similarly charge the jury respecting the state's witnesses, where other parts of the charge fully cover that feature of the case, leaving the credibility of all the witnesses solely with the jury.—People v. DeFrance, 104 Mich. 563.

¶ 1962. Upon a trial where respondent offered no evidence, the circuit judge, in the course of a charge which fairly and fully instructed the jury upon the questions of reasonable doubt and presumptive innocence, said, "You have heard the testimony for the prosecution; that is all there is to this case—the testimony for the prosecution." Held, that this language, taken in connection with the rest of the charge, could not be construed as an intimation that the people's case had been established.—People v. Machen, 101 Mich. 400.

¶ 1963. A charge in a prosecution of a druggist's clerk for selling beer to be used as a beverage—that the law allows druggists to sell liquor for medicinal, etc., purposes "and for that alone," and that "the law absolutely forbids the sale of liquor by druggists to be used as a beverage or to be drank on the premises"—does not mislead the jury into believing that conviction may be had for the distinct offense of selling it "to be drank on the premises," other parts of the charge having told them that "the vital question" was sale as a beverage.—People v. Hilliard, 119 Mich. 24.

¶ 1964. An instruction to the jury in a prosecution for rape is not erroneous because the court said, "the people should be protected against such outrages if they have been perpetrated," when he concludes the sentence with the statement that "every citizen should be protected against being convicted of such an outrage if he is not guilty," and no harm could result to the defendant thereby.—People v. Lambert, 144 Mich. 578.

§ 416. ——Effect to cure erroneous part or omission.

See also post ¶ 2230.

Sufficiency of charge in substance equivalent to request, see post § 420.

Sufficiency of charge given to cover refused request, see also post ¶ 2012.

Charge singling out particular witnesses, see also post ¶ 2148.

Charge on confessions taken with remainder of instructions, see also post ¶ 2165.

Cure of error in instructions by other acts or outcome of the trial, see post §§ 566, 567.

¶ 1965. In a prosecution for murder an erroneous instruction cannot be held to be cured by the general charge unless it clearly appears it could not have prejudiced the jury.—People v. Holmes, 111 Mich. 364.

¶ 1966. In a trial for an assault with intent to do great bodily harm less than the crime of murder, where defendant did not ask for particular instructions, no errors based on the omission to give instructions would be considered on appeal where the court's charge fairly covered the case.—People v. Robinson, 152 Mich. 41.

¶ 1967. Isolated portions of the charge concededly covered by other portions of the charge in which the correct rule was given, do not constitute error where on the entire charge the jury was not misled.—People v. Farrell, 146 Mich. 264.

¶ 1968. Even though not specifically requested, an instruction that the law pre-

sumes every man innocent until proved guilty should always be given; and the absence of such instruction is not supplied by an instruction that all the material facts essential to constitute the crime charged must be proved beyond a reasonable doubt before respondent can be convicted.—People v. Macard, 73 Mich. 15: People v. De Fore, 64 Mich. 693.

¶ 1969. Where the jury has been instructed that it must be satisfied, beyond all reasonable doubt, that respondent has committed the offense with which he is charged, he is not prejudiced by an omission to charge that respondent is presumed to be innocent; the court having already stated, in the jury's presence, that in a criminal prosecution nothing can be presumed against respondent.—People v. Parsons, 105 Mich. 177.

¶ 1970. Failure to instruct the jury as to the presumption of innocence is not error that requires reversal where the court's attention was not called to the omission, and where the charge as given was explicit to the effect that respondent's guilt must be proved beyond a reasonable doubt.—People v. Ostrander, 110 Mich. 60.

¶ 1971. Where witnesses had refused to answer whether they had had sexual intercourse with the prosecutrix, a charge that "the case, so far as these questions and answers were concerned, should stand in the minds of the jury as if the questions had not been asked, or the same as if they had been answered in the negative," though erroneous standing alone, because it gives a refusal to answer the effect of a positive denial, could work no harm in the absence of the fact of such intercourse, and is cured by a further charge that the refusal to answer was a failure of proof as to those witnesses, and that the jury were not at liberty to suppose, imagine or infer what would have been the answers to these questions if they had been given.—People v. Brewer, 27 Mich. 134.

¶ 1972. An instruction, in a prosecution for murder, where the evidence showed a quarrel between the defendant and the deceased because of the defendant paying attentions to a niece of the deceased, who was his housekeeper, the defense being self-defense, which gives the jury the impression that the defendant could not act upon his own belief of danger, and that he could not escape it in any other way than to do as he did do if he was mistaken and could in fact have escaped, is erroneous and confusing, although the jury are told in another charge that they might judge of the circumstances as they appeared to the defendant, as the giving of a correct charge does not cure the error, and the acts of the jury in being unable to agree and asking for further instructions as to justification for the shooting, showed their confusion.—People v. Bennett, 121 Mich. 241.

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¶ 1979. An instruction, in a prosecution for illegal sale of liquor by a druggist, to the effect that no druggist had the right to sell liquor in the county without acting in perfect good faith in view of the surrounding circumstances, was not erroneous in placing upon respondent the burden of establishing his good faith, instead of requiring the people to establish his bad faith, in view of the remaining portion of the charge fully stating the presumption as to innocence, and the requirement that the jury must be satisfied beyond a reasonable doubt as to respondent's guilt.—People v. Shuler, 136 Mich. 161.

¶ 1980. It is error for a judge to tell the jury that if he were in their place he should give no weight to the testimony of a certain witness and very little to that of another; and the error is not cured by his saying that they are sole judges of what the evidence is and of the weight of the testimony of every witness, and that it did not belong to him to say to them that they must or must not believe it.—People v. Lyons, 49 Mich. 78.

¶ 1981. Although an instruction to the jury upon the defense of an alibi might, if standing alone, or so separated from the rest of the charge as to impress the jury with the idea that such defense was to be considered by itself, have been regarded as holding that the burden was upon respondents to establish the alibi, yet the jury could not have been misled in view of the repeated instructions, both before and after, that the prosecution in a criminal case has the burden of proof, and that guilt must be established beyond a reasonable doubt.—People v. Fuhrmann, 103 Mich. 593.

¶ 1982. In a prosecution for murder, upon the defense of insanity an instruction which might be said to be somewhat obscure on the question, was held to be cured by the general charge setting out explicitly the proper tests.—People v. Quimby, 134 Mich. 625.

¶ 1983. Words, let fall by the court instructing the jury in a larceny case, implying that the defendant admits the possession of the goods, cannot mislead, if followed by an instruction to acquit, if the testimony of the defendant, in view of all the facts and surrounding circumstances, raises a doubt in their minds as to his guilt.—People v. Walters, 76 Mich. 195.

¶ 1984. A statement of the court in a prosecution under the statute punishing the careless use of firearms, made in the course of the trial, that "All that is necessary to constitute this offense is the fact that this young man pointed the gun at the other young man and that he was shot and maimed," is harmless where the charge given fully covered the law applicable to the case.—People v. Dudley, 131 Mich. 261.

¶ 1985. Where, upon a trial for abortion, the jury must have understood from the whole charge that the fact of a criminal abortion was not admitted, a statement that there was no dispute as to there having been an "abortion" in another part of the charge, to denote a miscarriage, whether proceeding from criminal or accidental causes, is not error.—People v. Aikin, 66 Mich. 460.

¶ 1986. Where the defendant on a charge of criminal assault to do great bodily harm less than murder testified that he struck the person with his knife, but did it in self-defense, it is not error for the court to state in his charge that the "assault" is admitted, when from the context it is evident that by "assault" the court meant simply that defendant "struck" the person and not that the crime was admitted as charged.—People v. Van Driesche, 154 Mich. 158.

¶ 1987. Instruction, on a prosecution for larceny, as to the presumption of guilt arising from the possession of recently stolen property held not misleading, when considered as a whole, on the question of the burden of proof, especially since there was direct and positive proof of the defendant's guilt and the presumption was not relied on to make a prima facie case.—People v. May, 199 Mich. 574.

¶ 1988. An instruction, in a prosecution for keeping a house of ill-fame, that if the inmates of the house were prostitutes, and if males were seen frequenting the house at night, the jury might convict, is not error where the charge further stated that the males must have resorted to the house for the purpose of prostitution or lewdness, and that it was the use of the house, and not merely the reputation of its inmates, that the statute was intended to reach.—People v. Russell, 110 Mich. 46.

¶ 1988a. Where an information in a prosecution under the local option law has been amended, confining the offense to intoxicating liquors, the failure of the trial court in his charge to call attention to such amendment is not error where the court and counsel overlooked the matter and nothing in the charge as given could have misled the jury.—People v. Adler, 169 Mich. 322.

§ 417. Manner, sufficiency and time of requests.

Necessity for request to make instruction essential, see ante § 402.

Numerous and frivolous requests, see post § 418.

Charging substance of request, see post § 420.

Making argument to jury in guise of requests and argument thereon, see ante ¶ 1800.

Provisions as to time and manner of filing requests, see Comp. L. 1915, § 14574.

¶ 1989. It is the duty of counsel to call the attention of the court specifically to points on which they desire the jury to be

instructed.—People v. Ezzo, 104 Mich. 341; People v. Murphy, 145 Mich. 524.

¶ 1990. A request for an instruction that, if respondent is insane, he is irresponsible, and should be acquitted, is too broad and is properly refused, his responsibility for the act charged being a question for the jury.—People v. Beverly, 108 Mich. 509.

¶ 1991. After argument to the jury in a criminal case had begun, the state handed certain requests to instruct to the court. Defendant's attention was not called to them, and no argument was had upon them. The record did not indicate that the charges were given. The charges as requested contained no error. Held, no reversible error was committed.—People v. Reycraft, 156 Mich. 451.

¶ 1992. The court cannot lay down an unbending rule that all requests to charge shall be submitted before the argument is begun.—People v. Garbutt, 17 Mich. 9.

¶ 1993. A person was charged with embezzlement to an amount exceeding $25, but there was no proof that part of the money came to his hands and the remainder was less than $25. Held, that a request for an acquittal was too broad, but that respondent should have had the benefit of the defect in proof under the request, and, as a punishment for felony was unwarranted, he was entitled to a new trial.—People v. Parkhurst, 49 Mich. 22.

§ 418. ——Numerous and frivolous requests.

¶ 1994. On a prosecution for receiving a bribe as a member of the board of education, it is improper to embarrass the trial by numerous requests bearing only on the question whether other officials were also guilty of like offenses, they not being coindictees and their acts having been put in evidence only to show whether defendant was guilty as charged.—People v. Liphardt, 105 Mich. 80.

¶ 1995. It would not be commendable practice for the court in a criminal case to give numerous unnecessary requests which might more properly go as matter from counsel direct to the jury, and thus allow himself to be made the mouthpiece of counsel.—People v. McGarry, 136 Mich. 316.

§ 419. Propriety of grant, denial or modification of requests.

[Note. Where the propriety of refusing a request turns on its sufficiency, correctness or applicability, the question is the same as if an instruction was being considered for its propriety. Cases of this kind have been treated accordingly and will be found in the appropriate sections in this division, ante §§ 404-414, post §§ 422-455w.]

Deviation from or conformity to exact words of request, see post § 420.

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¶ 2002. It is not error to refuse a charge requested in a criminal case, where portions of the charge given fully state the rule of law embodied in the request, in different verbiage.—People v. Mindeman, 157 Mich. 120.

¶ 2003. It was not error to refuse certain requests asks by counsel in a criminal case where the court gave some of those asked and also gave a general charge which did not omit anything essential to defendant.—People v. Hilliard, 119 Mich. 24.

¶ 2004. It is not error to refuse requests, some of them not warranted by the record, the others given together with the general charge having omitted no essential thing in favor of accused.—People v. Hilliard, 119 Mich. 24.

¶ 2005. The failure to give written requests in a criminal case is not error where, so far as the requests were applicable to the case, those that were proper statements of the law were fully and clearly stated.—People v. Slayton, 123 Mich. 397.

¶ 2006. Refusing requests to charge is not error where all the requests which were good law were fully covered in the general charge.—People v. Hutchings, 137 Mich. 527.

¶ 2007. The failure of the court to charge in an instruction on the burden of proof in a prosecution for desertion and abandonment of a wife and child that the defendant's failure to provide necessary and proper food, shelter and clothing should be found beyond a reasonable doubt, held not prejudicial where the court in other parts of the charge had stated clearly the nature of the offense and its necessary elements.—People v. Schelske, 187 Mich. 497.

¶ 2008. Under a charge that the rules governing evidence generally applied to the respondent, and that the jury were at liberty to give his testimony such weight as it was entitled to in view of the facts and circumstances in the case, and referring to the interest which a witness might have as bearing upon his credibility, error could not be assigned upon the refusal of the court to instruct upon the question of the weight to be given to respondent's testimony.—People v. Rich, 133 Mich. 14.

¶ 2009. It is not error to refuse to give a requested instruction, in a prosecution for larceny, that the jury could not consider testimony of other larcenies as any evidence of the larceny alleged, and that in arriving at a verdict they had no right to consider any testimony as to any offense other than the one charged, where the court had repeatedly stated that accused could be convicted only for the offense charged and there was no claim that testimony of other larcenies could be considered except upon the question of intent.—People v. Nagle, 137 Mich. 88.

¶ 2010. A requested instruction as to the defense of an alibi, held sufficiently covered by the general charge of the court.—People v. Frontera, 186 Mich. 343.

¶ 2011. It was not error in a prosecution for rape, to refuse to instruct that in considering the question of resistance the jury could take into consideration the relative size and strength of the parties, where there was no evidence as to the relative sizes and strength, and the judge in his charge fully covered the necessity of resistance, and the question of consent.—People v. Lambert, 144 Mich. 578.

¶ 2012. It was not assignable error in a prosecution for failure to remove screens and other obstructions from defendants' saloon on Sunday, under Comp. L. 1897, § 5409, for the court to refuse defendants' request to charge the jury that if they found from the evidence that such obstructions were so removed "as to give a free, fair, and open view of the bar and places in the room where liquors were usually sold or kept for sale," on such day, they must acquit defendants, where the court instructed the jury that if such obstructions are so removed that "a person could have a free, fair, open view as much as they could have if they were entirely removed as a person passes along the street or along the sidewalk, it is a compliance with the law, otherwise not."—People v. Smith, 145 Mich. 530.

§ 420. ——Deviation from exact words or qualified giving.

¶ 2013. Accused has no right to have requests given in the very language in which they are framed, even if they are correct in law and applicable to the evidence.—People v. Parsons, 105 Mich. 177.

¶ 2014. Embodying points in the general charge is preferable to the giving of separate requests.—People v. Salsbury, 134 Mich. 537.

¶ 2015. The action of a court in giving the substance of requested charges which is material and proper, in a general charge which is clear and fair and guards the rights of the accused, is to be commended.—People v. Swartz, 118 Mich. 292.

¶ 2016. The defendant's requests for instructions in a criminal trial should, if found correct, be given in their own language.—People v. Stewart, 75 Mich. 21.

¶ 2017. It is not error to refuse to give an instruction in the language of the request if it is substantially given in the charge and in such manner that the jury could not

be misled by the refusal.—Ulrich v. People, 39 Mich. 245; People v. Parsons, 105 Mich. 177.

¶ 2018. As a general rule where the law has been clearly and correctly stated by the trial court in a homicide case in the charge as given, a refusal to give such requests in the exact words as presented will not be error.—People v. Sauerbier, 173 Mich. 521.

¶ 2019. A respondent in a criminal case cannot complain that his requests to charge were not given in the exact language in which they were presented, where the trial judge carefully and correctly stated the law as applicable to the facts in the case and the different theories of counsel.—People v. Weaver, 108 Mich. 649; People v. Quimby, 134 Mich. 625.

¶ 2020. Where a request upon the law of reasonable doubt as proffered is proper, it is not error for the trial court to refuse to give it as framed, if the question which it raises is substantially covered by the charge given. —People v. Lalonde, 171 Mich. 286.

¶ 2021. The refusal to instruct that there was no testimony tending to show concerted action between three defendants in a prosecution for robbery, and that neither could be held responsible for what anyone else did in the circumstances, was not error where the jury were charged in substance that they must consider the case of each defendant separately and must be satisfied as to the guilt of each, beyond a reasonable doubt.—People v. Blanchard, 136 Mich. 146.

¶ 2022. Where the court turned over to the respective attorneys their special requests to be read by them to the jury, saying that he would afterward charge them generally upon the law of the case "and in some respects for the purpose of modifying some of the requests now granted," a conviction was not reversed, there having been no objection at the time and it appearing that the jury was not misled.—People v. Harper, 83 Mich. 273.

¶ 2023. A statement by the court in giving proper requested instructions in a trial for murder, that these requests were given as respondent's theory of the case, is prejudicial error since respondent had the right to have them given as the law to govern the jury in their deliberations.—People v. Farrell, 137 Mich. 127.

§ 421. ——Marking as "given," "refused," etc.

See also ante ¶ 1991.

¶ 2024. In a prosecution for the illegal sale of intoxicating liquor, a request for a charge marked "Refused except as covered in the general charge," instead of marking each request "refused" or "given," sufficiently complies with Comp. L. 1897, § 10245, How. 2nd Ed., § 11839, since Pub. Acts 1901, Act 52, How. 2nd Ed., § 12960, permits a review thereof without the necessity of taking an exception.—People v. Smith, 177 Mich. 358.

§ 422. Applicability and conformity to issues and evidence.

On diverse theories and included offenses, see post §§ 423, 424.

Charging on matters not in evidence, see post § 425.

Ignoring parts of case or evidence, see post § 426.

Sufficiency of evidence to go to the jury, see ante VIII, C.

Questions proper for jury, see ante § 398.

Sufficiency of evidence of insanity to warrant charge thereon, see also ante ¶ 1428.

Presumption as to proper application of charge by jury, see post § 627.

¶ 2025. A request to charge upon an assumption of facts which the jury would not be warranted to find should be refused.—Fisher v. People, 20 Mich. 135.

¶ 2026. A trial court, in charging the jury in a criminal case, cannot be limited to a part of the evidence and required to instruct them if they find the facts to be as stated therein, and that nothing further was done, they must acquit; the court is entitled to go further and instruct the jury that if they find the respondent did as the evidence tends to show he would be guilty.—People v. Howard, 50 Mich. 239.

¶ 2027. Where defendant was charged in the information with having entered a store in the nighttime with intent to commit larceny, and evidence was produced to show that larceny was committed, an instruction that defendant is charged with having broken into a named person's store, with intent to commit a felony therein, and is charged further with having committed larceny in said store after breaking and entering the same, is not erroneous, as it cannot be presumed that the jury was misled.—People v. Marks, 90 Mich. 555.

¶ 2028. In a prosecution for seduction the information charged the offense as of Oct. 22, and the proof showed it as of Sept. 22. The court charged with reference to the proof of the offense on Sept. 22. Held proper where it appeared that complaining witness before the magistrate fixed the date as Oct. 22 and also fixed it as on an evening after she had attended a show, and it later appeared that she was mistaken as to the date, it having been Sept. 22.—People v. Payne, 131 Mich. 474.

¶ 2029. On a trial for murder, it is error to refuse to instruct that if respondent was laboring under such defect of mind and reason as not to know the nature of his acts, and was incapable of forming a criminal in-

tent, he could not be convicted and that it was incumbent upon the people to prove the criminal intent and his mental capacity of forming such intent, where there was some evidence tending to support such theory.—People v. Muste, 137 Mich. 216.

¶ 2030. The court did not err if the charge as to the acts which occurred at the time of the alleged aiding and abetting conformed to evidence.—People v. Neely, 171 Mich. 249.

¶ 2031. Under a charge made under a videlicet, that bribe money was paid on a stated day, it was not error to tell the jury that defendant's conviction did not necessarily depend on their ability to find that he paid the money in question on the day stated, and that it would be sufficient if they were convinced that it was paid on some other day about that time.—People v. McGarry, 136 Mich. 316.

§ 423. ——Divergent theories of case.

Charging on theory of lesser degree or included offense, see post § 424.

Duty and propriety of charging on differing theories as to cause of death in homicide cases, see Homicide § 73.

¶ 2032. The defendant in a criminal prosecution is entitled to have the theory of his defense clearly recognized in the charge.—People v. Cummins, 47 Mich. 334.

¶ 2033. Neither judge nor jury is strictly confined to the theory of either the prosecution or the defense in a criminal case if other theories are consistent with the facts. And a casual suggestion in the charge, involving a different theory and implying the possible guilt of some other person, is not clearly prejudicial to respondent, and ought not to be made the subject of an exception unless objection is made to it at once so that the judge can correct it if he sees fit.—People v. Wallin, 55 Mich. 497.

¶ 2034. Instruction should be given directing jury's attention to circumstances sustaining respondent's theory.—People v. Marks, 90 Mich. 555.

¶ 2035. It is error for the court in its charge to the jury in a criminal case to ignore the theory of the defense supported by respondent's testimony which, if believed, would necessitate an acquittal.—People v. Hicks, 98 Mich. 86.

¶ 2036. Where respondent's requests to charge are inconsistent with the theory of the prosecution and the evidence which supports it, and are based on a different hypothesis unsupported by evidence, they are properly refused.—Maillet v. People, 42 Mich. 262.

¶ 2037. It is error for the court, on the trial of a respondent for rape, where the whole theory of the defense is that the charge of the prosecutrix is fabricated, to instruct the jury upon the theory that respondent claims a want of sufficient resistance on her part to constitute the offense, as shown by her failure to make an outcry or resistance at the time, or complaint afterwards, which evidence was drawn out upon her cross-examination.—People v. Evans, 72 Mich. 367.

¶ 2038. Under an information charging, in separate counts, rape and improper liberties with the person of a female child, where the evidence does not exclude either theory, the case may properly be submitted to the jury upon both counts.—People v. Walker, 113 Mich. 367.

¶ 2039. Where, in a prosecution for burglary, circumstances appear which tend to sustain the theory of the defense that the prosecution's witnesses were the guilty parties, and that they conspired to charge respondent with the crime so as to shield themselves, the court should direct the jury's attention thereto and to the defendant's claim.—People v. Marks, 90 Mich. 555.

¶ 2040. Giving the jury the two "theories" of the prosecution, to wit, first, that accused "purposely" overturned a boat and threw deceased into the water, and second, that it was "unintentionally" overturned in an attempt to commit rape, is not open to criticism because the second count charged a wilful attempt to ravish in course whereof the boat was overturned, the word "theories" not having been used in the sense of "count," and the second count not having charged that the boat was "purposely" overturned.—People v. Willett, 105 Mich. 110.

¶ 2041. Death having resulted from a bystander's kicking a man whom respondent, in an altercation, had knocked down, the prosecution claimed a concert of action between the bystander and respondent, which the latter denied, claiming that he had no reason to expect or anticipate assistance, and that he did not induce it. Held, that respondent was entitled to a proper submission of his theory, and to an acquittal if the jury found it correct.—People v. Elder, 100 Mich. 515.

§ 424. ——On lesser degrees and included offenses.

¶ 2042. On a prosecution for resisting an officer who was attempting to serve a warrant on the defendant while the latter was in his own house, where the defendant claimed that the warrant was void, held that, as under the information the defendant was either guilty of resisting an officer or not guilty of anything, it was not error for the court to refuse to charge that the defendant might have been guilty of a simple assault.—People v. De Meaux, 194 Mich. 18.

¶ 2043. In a prosecution under How. St. § 9314b, for taking improper liberties with

the person of a female child, where the evidence shows respondent to have been guilty either of the offense charged or of no statutory offense, it is error to instruct the jury that they may convict respondent of an assault and battery.—People v. Sheffield, 105 Mich. 117.

§ 425. ——Charging on matters not in evidence.

Charging on inference without support in evidence, see also post ¶ 2089.
Invoking personal feelings or judgment of jurors, see post ¶ 2186.

¶ 2044. A charge unsupported by any evidence in the case is erroneous.—People v. Jones, 24 Mich. 215.

¶ 2045. Instructions not supported by evidence are properly refused.—People v. Gosch, 82 Mich. 22.

¶ 2046. A request to charge that if the person who swore out the warrant for respondent's arrest was so intoxicated that he was unfit to do business, and if the officer who attempted to make the arrest knew it, then the warrant was void in the officer's hands, was properly refused where the only testimony on this subject was that the person took one drink several hours before swearing out the warrant.—People v. Gosch, 82 Mich. 22.

¶ 2047. In a prosecution for assault with intent to do great bodily harm, where the evidence failed to raise the question of intoxication, it is not error to refuse an instruction that if defendant was too intoxicated to be able to form a specific intent, he must be acquitted.—People v. Kirk, 151 Mich. 253.

¶ 2048. In the absence of evidence of character, a charge that defendant is presumed to be of good character, is properly refused.—People v. Kemmis, 153 Mich. 117.

¶ 2049. An instruction that an accused should be acquitted if acting in self-defense is properly refused where the evidence does not warrant such charge.—People v. Williams, 118 Mich. 692.

¶ 2050. On a trial for murder where the deceased had a right to enter upon the land and work and there is no evidence that on the occasion when the killing took place anything was being done by the deceased not within his right to enter the land, the court may properly refuse to charge as to trespassing beyond the distance to which the deceased could go.—People v. Tubbs, 147 Mich. 1.

¶ 2051. Where the prosecution alleges a conspiracy between respondent and deceased's wife to kill deceased on account of his heavy life insurance, and the evidence is not sufficient to carry the question to the jury, it is prejudicial error to charge as to the alleged friendly relations between respondent and deceased's wife, the opportunity for an agreement concerning the killing and the early inquiries made by them as to the life insurance.—People v. Auerbach, 176 Mich. 23.

¶ 2052. It is error to charge that the omission of a person on trial for adultery to summon the other party to the act as a witness must be taken against him, especially if there is nothing to show that respondent knows the latter's whereabouts.—People v. Hendrickson, 53 Mich. 525.

¶ 2053. A charge to the jury upon a trial for polygamy that if the parties went through a sham ceremony then it was no marriage, is erroneous where there was no allegation nor testimony of any sham marriage, the people claiming that no marriage was in fact performed between the parties.—People v. Goodrode, 132 Mich. 542.

¶ 2054. Where all of the testimony adduced upon a prosecution for assault with intent to murder tends to show that the assault was made in the furtherance of a common purpose on the part of several persons to perpetrate a robbery, it is not error to refuse an instruction as to the rule obtaining where an assault is committed by a co-conspirator in an attempt to escape.—People v. Cleveland, 107 Mich. 367.

¶ 2055. In a prosecution under Comp. L. 1897, § 11584, making it a crime to wilfully destroy a building, an instruction that if the respondent made it a pretense that the building blocked access to his premises but his motive was revenge or wantonness or malice, the act would come within the statute, is erroneous where there is no evidence to support it.—People v. Severance, 125 Mich. 556.

§ 426. ——Ignoring parts of case or of evidence.

See also post ¶ 2210.

¶ 2056. A charge to the jury that ignores the undisputed testimony of an acquitted co-respondent as to the identity of stolen coin, is erroneous.—People v. Marks, 90 Mich. 555.

¶ 2057. An instruction as to an identification of stolen coin from the discoloration thereof, is erroneous, if in disregard of uncontradicted testimony.—People v. Marks, 90 Mich. 555.

¶ 2058. Where the defense of temporary insanity proceeds upon the theory that it was induced by the operation of strong drink upon a mind rendered unsound by an injury to the brain, it is error to leave the question of criminal responsibility to be determined upon the facts of the injury and mental unsoundness alone, or upon the effect of intoxication apart from the other facts.—People v. Cummins, 47 Mich. 334.

¶ 2059. Upon an information for rape the court, in instructing the jury, defined the necessary elements of the crime, and, it appearing that none but respondent and the complaining witness was present at the commission of the offense, the court charged, "the people's case is established, as is claimed, by the testimony of the complaining witness. * * * It will be for you to say whether that is true under the instructions which I have given you." There was corroborative evidence of her story. A further charge was given: "In stating what the claim of the prosecution was, I referred to the testimony of the complaining witness only; I did not mean to exclude from your consideration any fact in the case which is before you as evidence," etc. Held, not objectionable as permitting a conviction solely on the testimony of the complaining witness.—People v. Bates, 70 Mich. 234.

¶ 2060. In a prosecution for embezzlement of township funds by a deputy township treasurer, it is not error to refuse to instruct that defendant could not be found guilty if he paid out for township orders, or had deposited in the bank, all the moneys received by him, since this excludes the claim that he drew from the bank and embezzled the funds.—People v. Sanders, 139 Mich. 442.

¶ 2061. An argumentative instruction in a criminal case to the effect that a phase of the defense, which was supported by evidence, may be disregarded by the jury, is improper.—People v. Jansma, 181 Mich. 62.

§ 427. Assumptions and misstatements of fact.

Sufficiency of evidence to support charge on theory assuming its truth, see ante § 422 et seq.

Charging on diverse theories, assuming either to be proved, see ante § 423.

Misnaming a statement as a "confession" or "admission," see post § 428.

Reference to a striking as an "assault," see ante ¶ 1986.

Reference to miscarriage as "abortion," see also ante ¶ 1985.

Correctness and propriety of charge as a whole, see ante §§ 415. 416.

Assumptions overcome by charge as a whole, see ante § 416.

Assumption that weapon was loaded, see also Homicide ¶ 239.

Erroneous reference in homicide case to related killing as "murder," see Homicide ¶ 226.

¶ 2062. It is error for the charge to assume as undisputed or admitted a fact that is controverted.—People v. Schick, 75 Mich. 592.

¶ 2063. A statement in a charge that a fact, important as evidence, was admitted, is reversible error where it had in fact been expressly denied by defendant in his testimony.—People v. Gorsline, 132 Mich. 549.

¶ 2064. In a criminal prosecution a request to charge assuming that a witness had changed his testimony without giving any reason is properly refused when as a matter of fact he had given a reason.—People v. Fox, 142 Mich. 528.

¶ 2065. Where upon a person's trial for larceny the undisputed testimony shows that some of the goods found in his possession were stolen, and where, without denying the fact, he seeks to explain such possession, it is not prejudicial error for the court to state to the jury that such fact is admitted.—People v. Walters, 76 Mich. 195.

¶ 2066. It is error in a prosecution for murder to charge that special attention should be given to the course of the bullet through the body, and that it is admitted that the bullet passed through horizontally when no such admission is made.—People v. Auerbach, 176 Mich. 23.

¶ 2067. A court can hardly know judicially that unchaste women in the streets are "apt to demonstrate acts of rudeness, or, in some way, throw out inducements for persons": hence such a charge is erroneous, since it usurps the functions of a jury in assuming a fact not judicially known to be true.—People v. Wells, 112 Mich. 648.

¶ 2068. In a criminal case a statement in the instructions that "it is possible and very likely that he tried to commit it so nobody else would see him," is error.—People v. Snyder, 173 Mich. 616.

¶ 2069. A defendant on trial for an attempt to commit rape, having stated under the statute that "all the allegations of the prosecutrix were false and untrue, and that he had never insulted her in his life," it was error to charge "that the statement of defendant does not, however, directly deny the assault. This silence would go far to confirm the testimony of the plaintiff." His assertion that "all her allegations"—of which the assault was one—were false and untrue, was a direct denial of the assault.—De Foe v. People, 22 Mich. 224.

¶ 2070. On a prosecution for receiving stolen goods, where it was not disputed that the crime, if committed, took place in a certain city, it was not reversible error in instructing the jury in relation to elements of the offense, to state that the place where the crime was committed must be established and that such place was in the designated city and was not disputed.—People v. Mullis, 200 Mich. 505.

¶ 2071. On a prosecution for receiving stolen goods, where it was an undisputed fact that the goods were stolen by a witness for the state who had previously pleaded guilty to larceny of the goods, it was not reversible error to instruct that the goods were stolen and that it was undisputed that they

were stolen by the witness.—People v. Mullis, 200 Mich. 505.

¶ 2072. On a prosecution for receiving stolen goods, where the undisputed evidence showed the value of the goods to be over twenty-five dollars, it was not reversible error to charge that the goods were of the admitted and undisputed value of over twenty-five dollars.—People v. Mullis, 200 Mich. 505.

§ 428. ——Allusion to statement as "confession" or "admission."

Assumption that fact is conceded, undisputed or proved, see ante § 427.

¶ 2073. It is error in a criminal case for the trial court to instruct the jury as to the weight to be given to a statement introduced in evidence as a confession of defendant and assumed by the court to be such a confession, where an examination of the statement in question indicates that it is not an admission of the guilt of the offense charged or of any knowledge of or connection with the alleged crime or the circumstances leading up to it.—People v. Rohl, 166 Mich. 315.

¶ 2073a. Where at the time defendant in a prosecution for an assault with intent to commit murder voluntarily surrendered himself to the officers he admitted his participation in the affray, but claimed to have acted in self-defense and that his revolver was accidentally discharged, it is error for the court in its charge to refer to such statements as a confession.—People v. Cismadija, 167 Mich. 210.

§ 429. Encroaching on jury province.

Charging that fact is admitted or established when it is not, see ante § 427.

Charging on inferences to be drawn or which are admissible on the evidence, see post § 430 et seq.

Charging on the weighing and considering of evidence or on its weight and effect, see post § 433 et seq.

Narrating evidence in way of inducement to charge, see ante § 413.

Directing verdict, see ante §§ 399, 400.

¶ 2074. The weight to be given to testimony, and all inferences to be drawn therefrom, are exculsively for the jury; and it is error for the court to weigh the testimony for them, or draw inferences from it.—People v. Gastro, 75 Mich. 127.

¶ 2075. A charge that a respondent has admitted all that was necessary to convict him, if not so insane or intoxicated as to be able to form no intent, and pointing out that his conduct did not indicate any lack of reasoning power, is erroneous, being practically an instruction to convict.—People v. McCord, 76 Mich. 200.

¶ 2076. It is proper to refuse to charge that the crime is not made out where there

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in breaking and entering the houses in question, acted under the belief that his companion had authority from the owner to do so, and where the testimony presented an issue of fact as to such authority, it is proper for the court to refuse an instruction that defendant's companion had such authority, this question being one for the jury.—People v. Evans, 150 Mich. 443.

¶ 2084. In a prosecution for highway robbery, the judge in his charge said that the officers took defendant into custody when they found him fleeing. Held, such statement was error, it being for the jury to determine whether the defendant was fleeing or not.—People v. Leonzo, 181 Mich. 41.

§ 430. Charging on drawing inferences and presumptions.

On presumption of coercion by husband of accused, see post ¶ 2209.

Instructions as to intent presumable in homicide or homicidal assault, see Homicide §§ 74, 78.

¶ 2085. The court should instruct the jury in reference to the presumptions of law applicable to the case, distinguishing those which are conclusive from those which are disputable.—People v. De Fore, 64 Mich. 693.

¶ 2086. It is the duty of the trial judge, in a criminal case, to instruct the jury in reference to the presumptions of law applicable to the case before them, distinguishing those which are conclusive from those which are disputable.—People v. Karamol, 173 Mich. 354.

¶ 2087. The weight of evidence is for the jury to decide; but where the circumstances must determine whether the evidence does or does not supply a presumption of guilt, the jury should be instructed as to their bearing upon such presumption.—Gablick v. People, 40 Mich. 292.

¶ 2088. It is going beyond the province of the court, on an issue of intent in a criminal proceeding, to suggest to the jury how far any extent of violence indicates an intent to do more than commit violence.—People v. Foley, 59 Mich. 553.

¶ 2089. In a trial for letting a house for purposes of prostitution it is error to allow a jury to infer guilt from the amount of rent received, when there is no evidence in the case to show it to be extravagant. They cannot consider such a point without proof.—People v. Saunders, 29 Mich. 269.

§ 431. ——On inferences from flight, concealment, falsification, or incriminating possessions.

Correctness of charge taken as a whole, see ante § 416, ¶ 1987.

¶ 2090. It is proper to refuse an instruction that the defendant having made false and contradictory statements concerning his whereabouts at the time of the crime was not sufficient to warrant a conviction; the question is for the jury.—People v. Stewart, 75 Mich. 21.

¶ 2091. The jury is not to be instructed to draw "unfavorable inferences" in a prosecution for receiving and concealing stolen goods, from the fact that the officers were afterwards present attempting to detect the crime through the intervention of the purchaser of the stolen goods.—People v. Considine, 105 Mich. 149.

¶ 2092. A jury were instructed that they might consider as evidence of guilt the fact that the stolen article was found in the defendant's possession within a short time after it was missed; that he was in a situation to enable him to steal it; and that he made no explanation to account for his possession as an honest one; it expressly stated, however, that the explanation referred to was not explanation by way of statement. Held, that the charge was not open to the objection that it left the jury to presume against the defendant because he elected not to make a statement on the trial to explain how he got possession.—People v. Wilson, 30 Mich. 486.

¶ 2093. Where in a prosecution for larceny the defendant's testimony and his theory accounting for the possession of the stolen goods have been submitted to the jury under instructions that if they raise a reasonable doubt as to his guilt he should be acquitted, it is not error to refuse to instruct the jury that possession of stolen goods is only presumptive evidence of guilt.—People v. Walters, 76 Mich. 195.

¶ 2094. An instruction that the possession of stolen property found with persons accused of burglary is not even prima facie evidence of that crime, but adding that if the jury found that whoever broke and entered a certain mill stole the flour therefrom, then in whosesoever possession the flour was found shortly after, it would be evidence of larceny, and the jury would be justified in finding such person guilty of burglary as well as of larceny, is proper.—People v. Wood, 99 Mich. 620.

¶ 2095. Where the burglary can only be inferred from a larceny, and but a small portion of the goods stolen is found in respondent's possession, the jury should be charged not to convict unless clearly satisfied of the larceny.—People v. Bielfus, 59 Mich. 576.

¶ 2096. In a prosecution for larceny, an instruction calling attention to the testimony of a witness identifying the defendant as one who was seen in possession of the property and stating that if this testimony is true it raised a strong presumption of guilt, is not error where the truth of the

testimony is left to the jury.—People v. Carey, 125 Mich. 535.

§ 432. ——On failure or refusal to testify or produce proofs.

Sufficiency of charge as a whole, see ante § 416.

¶ 2097. No inference is to be drawn from the fact that the defendant in a criminal action was not sworn as a witness, and the jury have no right to take into consideration or to pass upon the matter; and the court was not in error in so instructing the jury.—People v. Murphy, 145 Mich. 524.

¶ 2098. Inasmuch as a person accused of crime is protected in his right under the statute not to testify, the jury upon his request should be informed of that right to prevent the creation of the presumption of guilt by reason of his silence, and it is prejudicial error for the court to refuse to give an instruction that no presumption of guilt can be indulged in by the jury because of his failure to testify.—People v. Provost, 144 Mich. 17.

¶ 2099. Where a witness testifies fully on his direct examination, and refuses to answer a fair question on cross-examination not in any way directed against his character, or put for the purpose of impeachment, or to affect his credibility because of any wrong or criminal act on his part, on the ground that such answer may criminate him, it is not error for the court to refuse to instruct the jury that such refusal must not be considered as in any way discrediting his testimony, or to charge that the testimony could not be given such credit as the jury thinks it deserves.—People v. Gallagher, 75 Mich. 512.

¶ 2100. A request that no inference can be drawn against an accused because he does not take the stand in his own behalf should be given as a matter of law, and it is reversible error to refuse it even though the attention of the jury had not been called to the fact that he had not testified.—People v. Messer, 148 Mich. 168.

¶ 2101. Under Comp. L. 1897, § 10211, providing that the failure of a defendant in a criminal case to testify in his own behalf shall raise no presumption against him, an instruction of the court that such failure shall not be given unfair consideration constitutes reversible error as implying that the jury may give to such fact some consideration so long as it is fair.—People v. Mitchell, 164 Mich. 583.

¶ 2102. In a criminal case it is improper for a court in his charge to state to the jury what a defendant might have proved had he taken the stand in his own behalf.—People v. Peterson, 166 Mich. 10.

§ 433. Charging on dence or cr

On weighing and evidence and w 441.

Charges on confessi post § 444.

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§ 435. ——Uncon ceded fa

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the complaining witness as established simply because she has testified to them and has not been contradicted.—People v. De Fore, 64 Mich. 693.

¶ 2110. It is not error for the court in a criminal case to recite the conceded facts in his charge to the jury, and to refuse an instruction that the ultimate determination of such questions rests with them, and that they are not absolutely bound by the opinion of the court thereon.—People v. Hawkins, 106 Mich. 479.

¶ 2111. An instruction is correct which states that facts sworn to by the complaining witness which are not contradicted are undisputed, but which leaves the determination of the disputed points in the testimony to the jury.—People v. Bryan, 170 Mich. 683.

¶ 2112. Where the complaining witness' testimony as to the amount of money in his possession at the time of the robbery, and that he was in the neighborhood of the alleged crime on that night, and that he was robbed by a colored woman, is not contradicted, it is not error for the court to instruct the jury that these facts are undisputed.—People v. Bryan, 170 Mich. 683.

¶ 2113. The jury in a criminal case may decline to accept as true the testimony of any witness if, after considering all the testimony and surrounding circumstances, they do not believe his testimony; and a charge that it is their duty, as a matter of law, to accept undisputed testimony as true, unless in itself of such a conflicting nature as to discredit it, is erroneous.—People v. Mindeman, 157 Mich. 120.

§ 436. ——On expert and opinion evidence.

¶ 2114. Where all the experts in a murder case testified that death on the hypothesis presented resulted from arsenical poisoning, and the claim of defendant accused of poisoning her husband is that she was unable to hire experts, it is error to charge that the way to contradict expert testimony is by the testimony of other experts and that the jury has no right to disregard testimony of credible witnesses without proof.—People v. Vanderhoof, 71 Mich. 158, per Morse, J., and Sherwood, C. J., two others concurring in the result.

¶ 2115. An instruction that the testimony of expert witnesses is exposed to a reasonable degree of suspicion, and that, by giving too much weight thereto, juries have been induced to render unwarrantable verdicts, is error, where respondent relied upon such testimony to support his theory that death resulted from natural causes.—People v. Seaman, 107 Mich. 348.

¶ 2116. It is not proper for the court to refer to the testimony of expert witnesses as "boughten testimony."—People v. Jennings, 132 Mich. 662.

§ 437. ——Interest, bias or knowledge affecting credibility.

On bias of policemen and detectives, see post § 438.
On bias and interest of accomplices, see post § 439.
On interest of accused, see post § 440.
Singling out or omitting particular witnesses and charging on credibility, see post § 443.
Sufficiency of instructions as a whole, see ante §§ 415, 416.

¶ 2117. Upon a prosecution for the larceny of one's own property from a person who had a lien upon it, the trial judge might properly comment to the jury upon respondent's omission to take proper legal proceedings.—People v. Long, 50 Mich. 249.

¶ 2118. A charge may caution the jury to consider the relations the prosecuting witness and the defendant bore to the case in determining what weight to give their testimony.—People v. Herrick, 59 Mich. 563.

¶ 2119. Where the trial judge in his charge did not allude to the fact that a quarrel had occurred between respondent and his alleged victim prior to her making the complaint, it was held that respondent's rights were sufficiently guarded by the general charge that the jury should carefully consider the testimony of the complaining witness, her appearance and manner of testifying, her age, and all other things bearing upon her testimony and credibility, and from her evidence and that of respondent, and all of the evidence in the case, endeavor to arrive at a true and just verdict.—People v. Harris, 103 Mich. 473.

¶ 2120. An instruction in a robbery case stating that the credibility of the witnesses was for the jury and that the interest of each and his manner of testifying should be considered, and also the opportunities each had for observing what was going on, because some had excellent opportunities for so observing and some had very little, was not subject to the objection that it cautioned the jury against the testimony of the defendants.—People v. Blanchard, 136 Mich. 146.

§ 438. ——Testimony of policemen and detectives.

Singling out officers for commendation, see also post ¶ 2161.
Argumentative instructions respecting detectives, see ante ¶ 1953.

¶ 2121. Where the fact of employment to testify as detectives is established, it is error to refuse a request to charge that, in determining the credit that should be given to the testimony of such witnesses, the jury should consider the fact that they are "hired witnesses."—People v. Rice, 103 Mich. 350.

¶ 2122. Where, upon a prosecution for a violation of the local option law, it appears

that the complaining witness purchased liquor from respondent for the purpose of obtaining evidence against him, an instruction that such fact should be considered by the jury, in determining the credit to be given to his testimony, is sufficiently favorable to respondent, and it is not error to refuse instructions in that connection referring to such witness as a "spy" and a "hired witness," and reciting that "he was willing to and did ask respondent to violate the law for the sole and express purpose of making a case and instituting a criminal prosecution against him."—People v. Bennett, 107 Mich. 430.

¶ 2123. The fact that detectives to whom an unlawful sale of liquor was made purchased on a promise of reward for respondent's conviction is important only as it bears upon their credibility, and the court is therefore justified in refusing an instruction which simply denounces their conduct as scandalous and reprehensible.—People v. Everts, 112 Mich. 194.

¶ 2124. While in a criminal case it may be the duty of the court to direct attention to the testimony of a police agent employed, not to secure evidence of a crime already committed, but of one to be committed by the procurement and connivance of the agent, it is not the right of respondent to have the jury advised to regard such testimony either favorably or unfavorably.—People v. Plummer, 189 Mich. 415.

¶ 2125. Instructions to the jury that "The police department is an important part of the machinery of our government, and it is well enough to bear in mind that your homes, your lives, and your property would not be safe but for the police department and officers. It does not follow that because an officer testifies in the court room that his testimony is to be discarded, or any suspicion cast upon it, unless there is something about it which calls your attention to it," are not objectionable where the attorneys for defendant made a severe attack upon the police officers.—People v. Shoemaker, 131 Mich. 107.

§ 439. ——Accomplice's testimony.

Necessity of request for instruction on credibility, see ante § 402.

¶ 2126. The credibility of one who has turned state's evidence against an accomplice is for the jury to determine; and the court should not do more than call their attention to the nature of such testimony and the motives and temptations that may affect such witnesses.—People v. Jenness, 5 Mich. 305; People v. Wallin, 55 Mich. 497; People v. Hare, 57 Mich. 505.

¶ 2127. The jury cannot be instructed that they are bound to accept and credit testimony of an accomplice, either standing alone or more or less corroborated. It is their province to determine whether he is to be credited at all, and if so to what extent.—Hamilton v. People, 29 Mich. 173.

¶ 2128. One of the prosecution's witnesses under arrest for the same charge as that for which respondent was on trial testified that she was present when the larceny was committed, that she protested against its commission and had nothing to do with it, but received a part of the money. Held, that it was not improper for the court to charge that it was for her interest to show that somebody was the guilty party, and that if they found from the evidence that she and respondent together stole the money respondent would not be relieved thereby, but both would be guilty.—People v. Harrison, 93 Mich. 594.

¶ 2129. It is error to charge the jury in a criminal case that the testimony of an accomplice, if corroborated, is to be taken as true.—People v. Shaver, 107 Mich. 562.

§ 440. ——Testimony of accused.

Charging on credit to be given to specific portion of testimony, see post ¶ 2154.

¶ 2130. The jury in a criminal case may be instructed to take into consideration, in weighing the testimony given by the accused in his own behalf, the interest he necessarily has in the result.—People v. Calvin, 60 Mich. 113.

¶ 2131. It is not error to instruct the jury in a criminal case that, in weighing respondent's testimony they may "consider his relation to the offense" charged.—People v. Resh, 107 Mich. 251.

¶ 2132. It is erroneous to instruct the jury that where the defendant's statement conflicts with the testimony of an unimpeached witness they must believe the latter in preference.—Durant v. People, 13 Mich. 351.

¶ 2133. A conviction of larceny was reversed for language in the instructions to the jury that might have led them to believe that they could reject defendant's statement merely because it was not supported by other testimony.—People v. Arnold, 40 Mich. 710.

¶ 2134. An instruction to the jury that in estimating the weight to be given to the prisoner's statement they "should consider whether it is consistent with the other facts proven to their satisfaction, and whether it is corroborated or not by the other proofs, facts or circumstances of the case," is not objectionable as laying down an arbitrary or artificial rule on the subject.—People v. Jones, 24 Mich. 215.

¶ 2135. In a prosecution for murder an instruction that if respondent's statements were found to be inconsistent with his con-

duct before and after the killing, the jury should take his statements with such weight as they might appear to have under such inconsistent circumstances, was held not seriously objectionable.—People v. Harper, 83 Mich. 273.

¶ 2136. A request in a prosecution for larceny to charge the jury that the testimony of the defendant is to be tested the same as other witnesses and that if natural, rational and consistent it may outweigh the testimony of all other witnesses, should be given if it is not covered by the general charge.—People v. Hammond, 177 Mich. 416.

¶ 2137. An instruction in a criminal case that the jury has the right to believe a man accused of crime, when he testifies, as against other sworn testimony, if they think that his testimony deserves such respect, is not erroneous when given in connection with other instructions setting forth the correct rule.—People v. Parker, 166 Mich. 587.

¶ 2138. In a criminal prosecution where the accused was the only witness on his own behalf an instruction that if the jury did not believe the testimony of the accused then they should not return a verdict in accordance with his testimony and that they were to return a verdict according as to whether or not they believed or disbelieved the witness, held erroneous, as, even though the jury did not believe the testimony of defendant, still if they were not convinced by the people's case that defendant was guilty it would be their duty to return a verdict of not guilty.—People v. White, 194 Mich. 172.

§ 441. ——Impeached or falsified testimony.

On contradiction of accused by unimpeached witnesses, see ante ¶ 2132.
Correctness or propriety of charge taken with other parts of instructions, see ante § 415, ¶ 1959.

¶ 2139. Where a conviction for seduction depended almost entirely upon the testimony of the prosecutrix, who admitted that she had sworn falsely in some respects, it was proper to instruct the jury to consider her contradictory statements and her admission.—People v. Hubbard, 92 Mich. 322.

¶ 2140. In the examination preliminary to prosecution for seduction the prosecutrix testified that defendant had offered her no inducement and made no promise, but on the trial she testified he had protested his love and talked to her of marriage. Held, that it was reasonable to caution the jury, which had an opportunity to observe her, to consider her embarrassment on the examination, and her youth and degree of intelligence, and determine whether she would have volunteered to tell all that defendant had said to her about love and marriage, and whether she would consider it as a promise, unless her attention was called to it, and to charge them that if they were satisfied that she had told the truth on the trial and that defendant had induced her to consent they should find him guilty.—People v. Thompson, 37 Mich. 518.

¶ 2141. A requested instruction that if the jury find that any witness has wilfully sworn falsely to any material fact they may disregard his entire testimony is properly refused.—People v. Breen, 192 Mich. 39.

¶ 2142. Where a witness for the purpose of proving an alibi testified that accused was present in a certain place on the day in question and there gave a note which witness paid to accused at a certain city on a certain day later, and the note bore an indorsement of that day, but another witness testified that on the last-named day accused was elsewhere, such testimony being received as rebuttal, the jury was properly instructed that the latter testimony might be considered as bearing on the credibility of the former witness to the alibi.—People v. DeFrance, 104 Mich. 563.

¶ 2143. An instruction that respondent's testimony is to be scanned and tested the same as that of "other witnesses," and, if rational, natural, and consistent, it may outweigh the testimony of "other witnesses," is not open to the criticism that the court should have used the language "any other witness or witnesses," instead of "other witnesses," the language used being applicable to any other witness and to all other witnesses.—People v. Willett, 105 Mich. 110.

¶ 2144. It is not error in the court to refuse to charge that if a witness has wilfully testified falsely in one particular he must be wholly discredited. A charge that any such testimony should seriously affect all that the witness has sworn to, and that no credit should be given to any fact depending upon his statement alone, but that when corroborated by other proof or circumstances it might receive such credit as it appeared to the jury to deserve, is unobjectionable.—Knowles v. People, 15 Mich. 408.

¶ 2145. An instruction which leads the jury to suppose that it may convict on the testimony of a witness who has been conclusively shown by impeaching evidence to be unworthy of belief is erroneous.—People v. Lyons, 51 Mich. 215.

§ 442. Emphasizing or singling out parts of evidence.

Charging on testimony of particular witnesses, see post § 443.
Use of emphatic words or forms of speech, see also ante § 412.

¶ 2146. It is better to avoid directing the jury's attention to specific bits of evidence or to particular witnesses unless necessary.—People v. Finley, 38 Mich. 482.

¶ 2147. The omission to give requests for instructions which tend to distract the jury by calling special attention to metaphysical subtleties or particular testimony is not error.—People v. Finley, 38 Mich. 482.

¶ 2148. Where the charge in a criminal case, taken in its entirety, carefully conserves the rights of the defendant, prejudicial error cannot be based upon the fact that particular portions thereof give undue prominence to testimony of certain witnesses and that other parts are argumentative in character.—People v. Eagle, 189 Mich. 404.

¶ 2149. It is error for the court to point out particular testimony and instruct the jury that, if they believe it, it is "pretty strong evidence" in favor of the guilt of the accused, without cautioning them not to be influenced by such opinion, and instructing them that they are the exclusive judges of the weight of the testimony, and of what facts it tends to establish.—People v. Gastro, 75 Mich. 127.

¶ 2150. In a prosecution for burglary it is error so to dwell upon the question of the defendant's intoxication as to imply that it is the only inquiry open, where there are other questions of fact in dispute and where the breaking is not shown.—People v. McCord, 76 Mich. 200.

¶ 2151. Where there is evidence in a murder trial based on the theory of killing to obtain life insurance, the fact that four years before, when the deceased was sick, and carrying a large amount of insurance payable to respondent, the latter properly administered medicine to him, although an overdose would have caused his death, does not warrant a specific charge that such fact should be considered as evidence of a lack of intent at the time of the murder declared on. A request to so charge was therefore properly refused as singling out for emphasis one item of evidence.—People v. Pope, 108 Mich. 361.

¶ 2152. In a poisoning case it is error to give undue prominence in the charge to the testimony and the theories of experts that death was due to arsenical poisoning, ignoring facts ascertained by an autopsy which indicated organic weaknesses accountable for death.—People v. Vanderhoof, 71 Mich. 158, per Morse, J., and Sherwood, C. J., two others concurring in the result.

¶ 2153. Where in a prosecution for illegal and immoral advertising, a letter sent by defendant to advertising distributors is admitted in evidence, a charge to the jury adverting to such fact is proper.—People v. Kennedy, 176 Mich. 384.

¶ 2154. Where in a manslaughter trial, only a portion of defendant's testimony is contradicted, it is not error for the court to refer to said portion in charging the jury that in judging the credibility of defendant's testimony they are to consider that he is under inducement to tell that story which will most redound to his credit.—People v. Burkhart, 165 Mich. 240.

¶ 2155. The quotation by the court in its charge to the jury in a prosecution for breaking and entering a store, of the testimony of a witness in relation to the location of the premises, held not injurious where there was no dispute, under the testimony, as to the store's not being adjoining to or occupied with a dwelling-house.—People v. Roat, 117 Mich. 578.

§ 443. ——Charging on testimony of particular witnesses.

See also ante ¶ 2149.

Charges on credit to be given to particular classes of witnesses, see ante §§ 436-440.

¶ 2156. Where several witnesses testify to the same facts the court cannot single out a particular witness and instruct the jury what conclusion to come to if they do not believe him.—People v. Simpson, 48 Mich. 474.

¶ 2157. Instructions respecting the credibility of a witness are not matter of right if they involve no question of law. And it is not necessarily an abuse of discretion to direct attention, in the case of one witness, to facts that would detract from his credibility, and not to do so in the case of another.—People v. Wallin, 55 Mich. 497.

¶ 2158. It is not error in a criminal case to refuse specific instructions based upon the testimony of certain witnesses, unless such testimony forms the sole basis upon which conviction can be had. Where, however, t result depends upon the testimony of single witness, it is proper for the cour instruct the jury that, if they disbelieve testimony, or if it does not convince th respondent's guilt beyond a reasonable they should acquit.—People v. Pop Mich. 361.

¶ 2159. A charge which brings salient points of the people's testi ferring by name to the witnesse giving equal consideration to r testimony, is objectionable. If th trasts testimony it must clear do it without prejudice.—Peop 105 Mich. 169.

¶ 2160. Where in a crimin in his instructions refers t defendants, as witnesses, in trial, but fails to comment of an accomplice used as state other than to dire the jury to the anteced nesses, the charge is ploiting one of the a disadvantage of the mas, 161 Mich. 45.

¶ 2161. In a prosecution for highway robbery, it was held reversible error for the trial judge to commend the police officers who made the arrest and who were witnesses in the case.—People v. Leonzo, 181 Mich. 41.

§ 444. Charges on confessions and admissions.

Instructions as to determining voluntariness of confession, see also ante ¶ 1256.

Misnaming statement as a "confession" or "admission," see ante § 428.

¶ 2162. An instruction that the jury cannot consider respondent's admissions unless found beyond a reasonable doubt to have been made freely, without hope of favor or fear of consequence, and that the burden is on the people to show them to have been voluntary, is sufficiently favorable to respondent.—People v. Swetland, 77 Mich. 53.

¶ 2163. Where respondent's testimony tends to show that a statement in the nature of a confession was secured through undue influence exercised over him by the prosecuting attorney, or by inducements held out by the latter, it is error for the court not to instruct the jury, as requested, that a confession so obtained is involuntary.—People v. Clarke, 105 Mich. 169.

¶ 2164. In a criminal action where the basis of conviction is an alleged confession which confession is alleged to have been made under the influence of promises and threats, the jury must be instructed that it is their duty to first determine whether the confession was made voluntarily or under threats and promises, and an instruction which rests the right to convict upon proof of the making of the confession regardless of whether voluntary or under threats or promises is erroneous.—People v. Maxfield, 146 Mich. 103.

¶ 2165. A sentence in a charge on confessions—it is generally agreed that deliberate confessions of guilt are among the most effectual proofs in the law—is not error where embodied in a full and explicit charge on the various factors to be considered in weighing and valuing confessions.—People v. Borgetto, 99 Mich. 336.

¶ 2166. An instruction as to statements made by the accused at the time of his arrest, requiring caution in considering them, is improperly refused in a prosecution for manslaughter, as the jury should fully understand the importance of such statements, and the reasons for them.—People v. McArron, 121 Mich. 1.

¶ 2167. In a prosecution for assault with intent to rob, an instruction that the so-called confession and statement of the accused before a police officer must be most carefully scrutinized and weighed, and that the burden of proof was upon the people to show that the statement was made voluntarily without any influence being exerted by the officer, either by threats or promises of any kind, held improperly refused.—People v. Brockett, 195 Mich. 169.

§ 445. Charges on character and effect of character evidence.

¶ 2168. A defendant in a criminal case is entitled to have a proper requested instruction given to the jury as to the effect to be given by them to testimony tending to show his good character.—People v. Parker, 166 Mich. 587.

¶ 2169. The jury may be charged that it can consider respondent's character as bearing upon his guilt or innocence, and also whether a person with a good character would be less liable to be guilty of crime than a person of bad habits and character.—People v. Harrison, 93 Mich. 594.

¶ 2170. Where a respondent introduces evidence of his good character, which the prosecution does not attempt to rebut, it is prejudicial error for the court to instruct the jury that, while the law permits him to make such proof, the people are prohibited from showing his bad character.—People v. Marks, 90 Mich. 555.

¶ 2171. An instruction limiting the effect of proof of good character to cases where there is an even, or nearly an even, conflict of evidence, as to respondent's guilt, is erroneous.—People v. Van Dam, 107 Mich. 425.

¶ 2172. It is error to instruct the jury in a criminal case that a man's good character is a valuable thing under all circumstances; that it is proper evidence to be considered by the jury in doubtful cases to determine whether or not a man having that good character would commit the offense charged; that it often avails, and should avail, to acquit a man under such circumstances; but that, when there is positive proof of the commission of an offense, good character cannot avail to overthrow that proof.—People v. Jassino, 100 Mich. 536.

¶ 2173. Where, in a prosecution for burglary, the sole disputed question of fact is as to respondent's presence at the scene of the burglary, and there is positive evidence on both sides of the question, it is error to instruct the jury that, if they find that there is positive evidence that respondent did commit the offense, they are to pay no attention to the evidence which he has introduced tending to show his previous good character, such evidence being entitled to consideration in determining the disputed question.—People v. Laird, 102 Mich. 135.

¶ 2174. In a criminal case an instruction that a man's character is a valuable asset under all circumstances, that it is proper evidence to be considered in doubtful cases to determine whether or not a man having that good character would commit such an of-

fense, that it often avails and should avail to acquit a man under such circumstances, that when there is positive proof of the commission of an offense good character cannot avail to overthrow that proof, held to be erroneous.—People v. Humphrey, 194 Mich. 10.

¶ 2175. A qualification of an instruction in a manslaughter case as to the good character of the accused, to the effect that such character may be sufficient to raise a reasonable doubt, and that it must always be considered with the other testimony, held not erroneous, as the original instruction practically directed an acquittal by stating that evidence of good character should be considered sufficient in all cases to raise a doubt of guilt even against positive testimony.—People v. McArron, 121 Mich. 1.

§ 446. Cautions and admonitions to jury.

Particular cautions and admonitions, see post §§ 447-451.
As to agreement and unanimity, see post § 447.
As to personal feelings and judgment unbased on evidence, see post § 448.
Against improper use or consideration of evidence, see post §§ 449, 450.
Against improper argument or remarks by counsel, judge or others, see post § 451.
Against inference from failure to testify, see ante § 432.
Against religious prejudice, see also post ¶ 2225.
Instructions as to weighing and crediting classes of testimony and as to factors affecting credibility, see ante § 433 et seq.
Cautionary and corrective instructions to cure errors in evidence, argument and conduct of trial, see post §§ 562-565.
In civil cases, see Instructions, VI.

¶ 2176. On a criminal prosecution, a charge telling the jury that it was their sworn duty to arrive at a verdict, held prejudicial to the defendant and reversible error.—People v. De Meaux, 194 Mich. 18.

¶ 2177. A charge that the verdict of the jury should be one that would satisfy their consciences that they had done justice to the people and that such a verdict would satisfy the people is not to be regarded as impressing the jury with the idea that they must render a verdict to satisfy the people.—People v. Harper, 83 Mich. 273.

¶ 2178. An instruction on a criminal trial that the questions for the jury to determine "are cold, plain questions of fact," is not erroneous as leading the jury to think that respondent accused of keeping a house of illfame is bad, and should be found guilty on general principles.—People v. Wells, 112 Mich. 648.

¶ 2179. An instruction to a jury to answer the special questions put to them, keeping in mind that the answers should be consistent with their general verdict, though carelessly expressed is not necessarily open to the criticism that it requires the jury to conform the findings to the verdict; it may simply mean that the verdict should be in accord with the facts as found.—People v. Murray, 52 Mich. 288.

¶ 2180. The court was justified in instructing the jury, in a criminal proceeding, that they were bound to follow the instructions given them by the court as to the law, and that if they were to render a verdict in violation of the law or in disregard of the evidence they would be liable to prosecution for perjury, where, counsel for defendants, had stated in their argument, that the jury would be justified if they saw fit in rendering a verdict in defiance of the evidence and the law.—People v. Smith, 145 Mich. 530.

¶ 2181. Where defendants in a criminal case are charged as joint wrongdoers, the jury must be cautioned that the conviction of one is not to be considered in dealing with the other.—People v. Sligh, 48 Mich. 54.

§ 447. ——As to agreement and unanimity.

See also ante ¶ 2176.
Requests for special findings on interrogatories, see post § 470.

¶ 2182. A request for an instruction that each juror must hold his own judgment, uninfluenced or persuaded by others, is properly refused; the law permits jurors to deliberate and to discuss the evidence, and does not contemplate that, upon retiring, the judgment of each juror shall be irrevocabl made up.—People v. Wood, 99 Mich. 620.

¶ 2183. Defendant is entitled to an instr tion that to warrant a verdict of guilty jurors must unanimously find that he mitted the act testified to.—People v. ols, 159 Mich. 355.

¶ 2184. It is not error to refuse to the jury in a criminal case that if deliberations one or more of the jur consulting with the rest, retains a r doubt as to respondent's guilt, the j not find respondent guilty.—Peopl 97 Mich. 489.

¶ 2185. A charge which state the jurors has an individual equal to each and every otl that the testimony must be possible with the innocence because under the law the that he is innocent is r Swift, 172 Mich. 473.

§ 448. ——As to person ment of jurors.

Argumentativeness of jurors' personal fe

¶ 2186. An instruc to act as if the ma'

the jurors themselves or their families is improper, since it requires the jury to judge the case as if they or their families were either accusers or accused.—Carver v. People, 39 Mich. 786.

§ 449. ——Against misuse of evidence for improper purpose.

See also ante ¶ 716.
As to using rebuttal evidence for impeachment also, see ante ¶ 2142.
Admissibility for limited or restricted purpose, see ante § 159.
Offer and reception for restricted and proper purposes, see ante § 347.

¶ 2187. In a criminal case, where a witness had testified to statements made in respondent's absence to his wife, it was error to fail to tell the jury that the testimony was competent, not as affirmative evidence against respondent, but as impeaching evidence affecting the credibility of such wife, who had denied making the statements.—People v. Row, 135 Mich. 505.

¶ 2188. Where in a criminal prosecution evidence of the previous relations between the complaining witness and the accused is admitted for the purpose of determining the credibility of such witness, the jury should be properly cautioned and instructed as to the only purpose for which such testimony can be considered by them.—People v. Durham, 170 Mich. 598.

¶ 2189. If, in a prosecution for aiding and abetting the commission of the crime of rape, the court distinctly states that evidence of a former rape by the same party in respondent's home was admitted to show the relations between the parties, no error is committed.—People v. Neely, 171 Mich. 249.

¶ 2190. In a prosecution under Act No. 198, Public Acts 1903, providing that male persons who commit any act of gross indecency with another male person shall be deemed guilty of a felony, an instruction correctly states the manner in which evidence of previous offenses should be considered which charges that the defendant cannot be found guilty unless it is found beyond a reasonable doubt that he committed the specific offense relied on and that the other acts can only be considered as bearing on the relationship between the parties so far as the relationship throws light on the specific offense.—People v. Swift, 172 Mich. 473.

§ 450. ——Against consideration of evidence ruled out or conditionally admitted.

¶ 2191. Where evidence is received which is only to be made pertinent by further evidence, and such further evidence is not given, it is not error to instruct the jury to disregard it.—People v. Pitcher, 15 Mich. 397.

¶ 2192. Respondent was tried for assault with intent to do great bodily harm less than murder. As a defense he set up that he was rendered temporarily insane by learning that the victim of the assault had had improper relations with his wife. In rebuttal, the state was permitted to show that the wife had been on other occasions guilty of like improper conduct, upon the assurance that it would prove defendant's knowledge thereof, which knowledge it failed, though acting in good faith, to establish. The court announced in the presence of the jury that the evidence should be stricken out, but did not call the jury's attention to the point in his charge. Held, no reversible error was committed.—People v. Sharp, 163 Mich. 79.

§ 451. ——Against improper argument or remarks.

¶ 2193. On an appeal from a conviction of burglary a new trial was granted because after the prosecuting attorney had in the course of his argument told the jury that the defendant was entitled to the reasonableness of every doubt, "but gentlemen of the jury, if I had any belief or any doubt that was reasonable in the face of this testimony, as your prosecutor, I would tell you so," the trial court refused a requested instruction that the jury must not consider the belief of the prosecuting attorney, or his impression of the testimony, such refusal consisting in his entirely ignoring the request in his charge.—People v. McGuire, 89 Mich. 64.

§ 452. Additional or repeated instructions after retirement.

¶ 2194. If convinced for any reason that the instructions given to the jury should be amended, corrected or enlarged, the trial judge ought to give additional instructions.—People v. Hoffmann, 142 Mich. 531.

¶ 2195. Where in a prosecution for keeping a saloon open after hours the evidence of guilt is undisputed, it is proper to recall the jury from their deliberation and instruct them to bring in a verdict of guilty.—People v. Worges, 176 Mich. 685.

¶ 2196. Where the court has instructed a jury fully as to the various phases of a homicide case and the jury asks for further instructions upon the matter of provocation and as to the distinction between murder and manslaughter, such instructions may be given without giving instructions as to matters for which no request was made, such as reasonable doubt and self-defense.—People v. Sauerbier, 173 Mich. 521.

§ 453. ——Further charge as to reaching agreement.

Urging or coercing agreement, see post § 466.

¶ 2197. An instruction in a criminal case that the jurors should try to be persuaded, its substance having a tendency to make the jurors feel that they should give way to honest convictions upon the merits and agree with the majority though they had a reasonable doubt of the guilt of an accused,

held erroneous, especially where such a jury had been unable to agree for some time and where the evidence was in direct conflict.—People v. Engle, 118 Mich. 287.

¶ 2198. In a prosecution for violation of the liquor law, where the report of sales did not comply with the law, but where the issue was whether the illegal sales were in fact made, and where respondent introduced no testimony, it was error to direct the jury to find a verdict of guilty after they had reported that they could not agree.—People v. Remus, 135 Mich. 629.

¶ 2199. Where the jury came in after being out for a time, instructions by the court that it might be a proper thing for a minority to consider with seriousness whether it might be wrong, and a majority right; that it was probable sometimes a minority is right, and a majority wrong; that no juror should yield his well-grounded conviction or violate his oath; that if, on further consideration, a juror cannot conscientiously yield, he ought not to do so,—are not open to the objection that they call for a majority verdict.—People v. Coulon, 151 Mich. 200.

§ 454. ——Presence of accused or counsel.

Rereading charge in absence of accused as harmless error, see post § 550.

¶ 2200. Where the jury in a criminal case returned into court, and no new instruction was given, and only a simple paragraph of the charge—which was in respondent's favor—was read over, when the jury again retired and returned a verdict of guilty, held, that these proceedings, though in the absence of respondent and his counsel, did not prejudice him.—People v. La Munion, 64 Mich. 709.

¶ 2201. Respondent is entitled to his counsel's presence when the jury is further instructed; but where it is impossible to secure counsel's attendance when the jury needs further direction, there can be no reversal unless such instructions, being taken down by the reporter, contain manifest error.—People v. Robinson, 86 Mich. 415.

§ 455. Instructions on particular offenses.

[Note. For convenience the precedents of instructions on the substantive law of particular crimes are arranged in the following alphabetical sequence. A like arrangement of the substantive law of crimes occurs in Crimes, II, which also may be consulted. Where the decision turned on some principle of the law of instructions susceptible of application to all crimes or to a general class of crimes the case has been compiled in one of the sections which precede, to wit, §§ 402-454.]

Instructions required in absence of any request, see ante § 404 et seq.

On intoxication preventing specific intent, see ante § 409.

On aiding and abetting or participating, see ante § 410.

Sufficiency of the charge taken as a whole, see ante §§ 415, 416.

Instructions in assault and battery cases, see Assault § 11.

In prosecutions under liquor laws, see Intoxicating Liquors, VI, B.

§ 455a. Abandonment.

¶ 2202. Defendant was prosecuted for wife abandonment under Act No. 144, Pub Acts 1907. Held, respondent was entitled to have the jury instructed, in accordance with his request, that "abandonment or desertion under the statute, means to separate from wrongfully, without intention of again resuming marital relations."—People v. Stickle, 156 Mich. 557.

§ 455a. Abduction and enticement.

¶ 2203. Charge in case of abduction given at length and sustained.—People v. Bristol, 23 Mich. 118.

§ 455a. Adultery.

¶ 2204. Upon a prosecution for adultery, an instruction that sexual intercourse must be proved is sufficient, without going into particulars regarding penetration and emission.—People v. Payment, 109 Mich. 553.

§ 455a. Arson and burnings.

¶ 2205. A., indicted for burning a barn, had offered B. certain property if he would burn C.'s barn, and B. said he would do it if D. would consent. A. did not withdraw his offer. Held, sufficient for a charge that to constitute a completed contract, or a "hiring" to burn another's property, it was not necessary that B. should have informed A. of D.'s assent before doing the act.—People v. Taylor, 2 Mich. 250.

§ 455b. Bribery and corruption.

¶ 2206. Though the main charge in a prosecution for attempting to corrupt a prosecuting attorney contrary to Comp. L. 1897, § 11311, presented the question of the corrupt intent, failure to state the necessary connection between the act of offering and the corrupt intent is reversible error where it seems likely that the jury were misled thereby.—People v. Bilitzke, 174 Mich. 329.

§ 455b. Burglary.

¶ 2207. An instruction defining certain acts as breaking is not erroneous as omitting the element of felonious intent, where such intent must be presumed to have been understood from the residue of the charge.—People v. Evans, 150 Mich. 443.

¶ 2208. Where a building which was the object of burglary is spoken of by witnesses as a "shop," and the evidence shows that it was a shop within the common and approved usage of the language, an instruction that the building was a shop within the meaning of the section defining burglary (§ 11547,

3 Comp. L. 1897) is correct.—People v. Wycoff, 150 Mich. 449.

§ 455d. Disorderly houses and persons.

¶ 2209. In a prosecution for keeping a house of ill-fame against a married woman there is no error in refusing to give an instruction that whatever the respondent did as to keeping the house was presumed to have been done under the coercion of her husband, for no such presumption exists.—People v. Wheeler, 142 Mich. 212.

§ 455e. Embezzlement.

¶ 2210. It is error to instruct the jury in a prosecution for embezzlement that the mere retention of money, or its expenditure for the purposes of the firm for which respondent was selling cigars, with authority to make collections, in excess of the amount agreed upon for his expenses, if accompanied by a bare failure to report or accurately account for the money, is sufficient to convict, as it leaves out the important question of criminal intent,—the design to wrong, cheat, or defraud the owner,—which is a necessary element of the crime of embezzlement.—People v. Bauman, 105 Mich. 543.

¶ 2211. Since an act of appropriation or diversion from the uses of the state might be done by the treasurer without at any time being personally present where the money happened to be, it was held not error for the court to charge the jury that it was not necessary that the money should have been in the county where the treasurer's office is required to be kept to warrant their finding that he embezzled it in that county.—People v. McKinney, 10 Mich. 54.

¶ 2212. Where, on an indictment for embezzlement, it appeared the defendant was paid the money he was charged with embezzling on a certain date prior to the date charged in the indictment, and there was evidence that after such payment and before such date he falsely wrote the party to whom the money belonged that the debtor desired further time for payment, and within six months after the date charged in the indictment he forwarded by mail to the party "interest" on the money, a charge that the jury might find a completed embezzlement within six months after the date charged in the indictment was supported by the evidence, and so within How. St. § 9421, allowing proof of embezzlement within such six months.—People v. Gould, 118 Mich. 75.

¶ 2213. In a prosecution for embezzlement of a promissory note framed under Comp. L. 1897, § 11570, an instruction is correct which states that the respondent "fraudulently" intended to convert the note, and it is not necessary to instruct that respondent "feloniously" intended to do so.—People v. Gregg, 170 Mich. 168.

¶ 2214. In a prosecution for embezzlement, a charge that the gist of the crime of embezzlement is the breach of trust, is not erroneous where it is coupled with the instruction that respondent was not guilty unless he converted the funds of his employer to his own use with felonious intent.—People v. Wolff, 157 Mich. 242.

§ 455f. False pretenses and cheats.

¶ 2215. In a prosecution against a member of a township board for obtaining money by presenting false or invalid orders, it was not error to charge that even if the other members of the board made some examination for themselves and did not move in reliance upon what respondent did, still if the real cause was the fraud of respondent, then it was the moving cause, and the false pretenses as to the issuance of the orders had been established.—People v. Luttermoser, 122 Mich. 562.

¶ 2216. A charge (too long to be set out here) held to have sufficiently instructed the jury, in a prosecution for false pretenses by presenting to the state auditor a false claim for fees, that accused's knowledge of the falsity of the fact untruly stated must be found beyond a reasonable doubt.—People v. Hoffmann, 142 Mich. 531.

¶ 2217. Where an information for obtaining money on false pretenses charges several distinct and separate pretenses or representations, instructions to the jury that if they find that any of the pretenses charged were made, and were false and fraudulent, and were part of the moving cause which induced complainant to part with his money, and that he would not have parted with it but for such false pretenses, they might find the defendant guilty, are to be construed as assuming that each distinct pretense set up was a valid ground of charge on which a conviction might rest, if found false and fraudulent and operative in any degree to cause the complainant to part with his money.—People v. Jacobs, 35 Mich. 36.

§ 455f. Forgery, counterfeiting and uttering.

¶ 2218. Upon a charge of uttering a forged instrument, requests for instructions as to who should be deemed the forger are immaterial.—People v. Marion, 29 Mich. 31.

¶ 2219. Under a statute punishing the offense of uttering and publishing forged instruments knowing them to be forged, it is error to charge that the accused should be convicted if it was found that he uttered the instrument having reasonable cause to believe it was forged.—Carver v. People, 39 Mich. 786.

¶ 2220. A woman gave six hundred dollars to defendant to loan for her. Defendant kept the money, signed the name of some person to a note, and retained the note. In a trial for forgery, the court instructed on the question of intent that if defendant kept the note to show to the woman for the pur-

pose of deceiving her and working a fraud on her, he was guilty. Held, the charge was correct.—People v. Campbell, 160 Mich. 108.

¶ 2221. In a forgery case, defendant requested the court to charge on the question of intent that to find defendant guilty it was not enough that there was the purpose to deceive; that there must be the purpose to prejudice the rights of some person. Held, the instruction was properly refused.—People v. Campbell, 160 Mich. 108.

§ 455h. Health law violations.

Instructions in prosecutions for violations of health regulations, see Health § 3.

§ 455h. Homicide and homicidal assaults.

Instructions on substantive law and elements of murder, manslaughter and assaults with intent to kill and with intent to do great bodily harm less than murder, see Homicide §§ 72-81.

Instructions in homicide cases not peculiar to homicide but turning on general law of criminal instructions, see ante §§ 402-454.

§ 455i. Indecency and obscenity.

¶ 2222. In a prosecution for exhibiting representations of deformed human bodies or parts in violation of Act 103, Pub. Acts 1903, sec. 2, How. 2nd Ed., § 5293, a charge is proper which states that there are three elements which go to constitute the offense: first, the exhibition of the representations; second, that they were representations which would be indecent in the case of living persons if exposed as claimed; and third, that they were not so exhibited or used before members of the medical profession or medical classes.—People v. Kennedy, 176 Mich. 15.

§ 455l. Larceny.

General law of instructions not peculiar to larceny, see ante §§ 402-454.

Instructions on substantive law of larceny and matters peculiar to that crime, see Larceny, II.

§ 455m. Medicine, unlawful practice or acts.

¶ 2223. In a prosecution against a practitioner of medicine under Act 164 of 1907 for causing an immoral advertisement to be inserted in a newspaper, a charge to the effect that defendant was guilty if she was the procuring cause of having the advertisement published, and that it was not necessary to convict to find that she personally had it published, held not erroneous.—People v. Kowalski, 179 Mich. 368.

§ 455m. Mutilating or maiming animals.

¶ 2224. In a prosecution under Comp. L. 1897, § 11581, for fastening a strap about the tongue of a horse belonging to another and pulling on it with such force as to maim the animal in an attempt to induce it to work, the court's instruction to the ju express malice toward the owner of th was unnecessary, the only malice r being that which the law might imp the circumstances of the injury, was —People v. Tessmer, 171 Mich. 522.

§ 455o. Obstructing justice; resisting

¶ 2225. On a trial for resisting a who tried to arrest accused for distu Salvation Army meeting, in view of prejudice against such denomination, proper to charge that all religious wo are protected alike, the humblest as those who worship in costly temples. v. Rounds, 67 Mich. 482.

§ 455p. Perjury, subornation and fal ing.

¶ 2226. Where, in a prosecution jury alleged to have been committe trial of a criminal cause, the fact testimony was given as charged, an was false, is undisputed, an instructi jury that the only question for the mination is whether respondent testi estly, in the belief of the truth of t ment, as by him contended, and th jury has a reasonable doubt that he testified to a falsehood, it should sufficiently favorable to the resp People v. German, 110 Mich. 244.

¶ 2227. In a prosecution for p which it was claimed that a witn criminal prosecution for the illega intoxicating liquor made a stateme time of the examination before th which was contradictory to his made at the time of his examinatio purpose of issuance of the warra quested instruction that in consid guilt or innocence of defendant the fore it could convict, must find tha ple had proved beyond a reasona that the matters sworn to were fal and that the defendant knew at th made these statements under oath were false, held improperly refuse v. McClintic, 193 Mich. 589.

¶ 2228. In a criminal prosecutio jury an instruction that the jury find defendant guilty of testifying the testimony of only one witness was necessary that strong corrobo cumstances of such a character fairly turn the scale and overcom of the party charged should be pr improperly refused.—People v. Mc Mich. 589.

§ 455r. Rape and assaults and attem

General law of instructions in crin see ante §§ 402-454.

Instructions on substantive law o on matters peculiar to that Rape.

§ 455s. Seduction.

General law of instructions in criminal cases, see ante §§ 402-454.

Instructions on substantive law of seduction and on matters peculiar to that crime, see Seduction, II.

§ 455t. Threats and blackmail.

¶ 2229. A charge leaving it to the jury whether one accused of threat to accuse of crime had made a threat of "criminal action, or not," is not objectionable as having permitted the jury to convict on proof of a threat to make only a public nonjudicial accusation, where no such question was mooted at the trial and there was no specific request to charge thereon.—People v. Frey, 112 Mich. 251.

¶ 2230. A charge in a prosecution for threats to accuse a crime of perjury—"It would not be necessary that the precise words should be used that he (the respondent) would complaint of him (the complaining witness), or charge him with the commission of perjury. If he used language which clearly imported that intention * * * it would be sufficient"—is proper in connection with a further charge setting out the threat as understood to have been to send complaining witness "to the penitentiary for life," and leaving it to the jury to determine whether or not it was a threat to send him to prison for perjury.—People v. Whittemore, 102 Mich. 519.

§ 455w. Weapons, possession or misuse.

¶ 2231. An instruction that the respondent could not be convicted of a violation of § 11510, Comp. L. 1897, How. Ann. St., 2nd Ed., § 14559, relating to the careless use of firearms, unless the jury were satisfied of his guilt beyond a reasonable doubt, gave him all protection which the law requires.—People v. Kreidler, 180 Mich. 654.

¶ 2232. In a prosecution under Pub. Acts 1911, No. 274, § 1, How. 2nd Ed., § 14760, for carrying a revolver concealed on the person without a permit, an instruction that the law prohibits any person carrying any dangerous weapon concealed on the person without a permit, and that it was immaterial whether or not the revolver was loaded, was correct.—People v. Williamson, 200 Mich. 342.

F. CUSTODY OF JURY, CONDUCT AND DELIBERATIONS.

§ 456. In general; privacy and seclusion.

Custody and conduct during taking of view, see post § 457.

Bailiffs or sheriff in custody of jury, see post § 458.

Intruding on or communicating with jury, see post § 459.

Books, exhibits and substances or articles in jury room, see post §§ 460, 461.

Communications with court after retirement, see post § 462.

Return of jury into court, see post § 463.

Additional instructions or rereading testimony, see post §§ 464, 465.

Urging or coercing verdict, see post § 466.

Discharging jury, see post § 467.

Conduct of jury in rendering directed verdict, see ante § 400.

Allowing jury to disperse and reassemble to admit of continuance, see also ante ¶ 610.

Arrest of trial to investigate qualifications of juror, see ante § 332, ¶ 1533.

Necessity of objection below to save question of impropriety for review, see post § 522.

Inadmissibility of juror's affidavits in support of motion for new trial, see post § 482.

Practice in civil cases, see Trial, VIII.

Right to jury trial, qualifications and selection of jurors, swearing and impaneling jury and challenges, see Jury.

Induction of new juror after jury is sworn as error vitiating verdict reached, see also Crimes ¶ 107.

¶ 2233. New trial need not be granted on the ground that the jury were not kept in a private place until they rendered their verdict, if in fact they agreed upon it before leaving their room.—People v. Francis, 52 Mich. 575.

¶ 2234. It is within the discretion of the court to direct that the jury in a criminal case remain in the custody of an officer during the trial.—People v. Considine, 105 Mich. 149.

¶ 2235. A conviction will not be reversed because the jury were permitted to see one of respondent's witnesses confined in jail, in the absence of a showing of prejudice.—People v. Beverly, 108 Mich. 509.

¶ 2236. There is no constitutional or common-law right of an accused person to have jurors kept together until a verdict is returned into court except in capital cases.—People v. Duffek, 163 Mich. 196.

¶ 2237. Comp. L. 1897, §§ 11960-11962, requiring jurors to remain together until their verdict is rendered into court, applies only to murder cases.—People v. Duffek, 163 Mich. 196.

§ 457. Custody and conduct during taking of view.

¶ 2238. In a prosecution for murder it is not error to permit or direct a view by the jury of the premises where the crime was committed, but it must be properly guarded from separation or outside communications.—People v. Hull, 86 Mich. 449.

¶ 2239. A jury while going to and returning from the premises where the alleged offense was committed should be kept under an officer's supervision so that no person can communicate with them, or express any opin-

ion, or give any direction in their hearing.—People v. Hull, 86 Mich. 449.

¶ 2240. Permitting jury to separate while viewing premises, in respondent's absence, held error.—People v. Hull, 86 Mich. 449.

¶ 2241. Where a juror, while viewing the premises where the alleged offense was committed, drank liquor procured at a bar on such premises owned by the principal witness for prosecution, such misconduct was held, in connection with other errors, to require a new trial.—People v. Hull, 86 Mich. 449.

§ 458. Competency and disqualification of bailiff or sheriff.

Unsworn officer as assistant, see also post ¶ 2245.

Provisions as to custody of juries and for oath of officer in charge, see Comp. L. 1915, § 15833.

¶ 2242. A sheriff entered the complaint upon which respondent was tried for manslaughter, and he testified in behalf of the people; he also had the jury in charge during their deliberations. Held, that there was no impropriety in these facts.—People v. Coughlin, 65 Mich. 704.

¶ 2243. The fact that the custodian was a witness for the people will not work a reversal.—People v. Beverly, 108 Mich. 509.

§ 459. Intruding on or communicating with jury.

Precautions during view, see ante § 457.

Discharge for tampering with jury, see post § 467.

Drinking intoxicants while on view, see also ante ¶ 2241.

¶ 2244. A verdict in a criminal case may be set aside and a new trial granted if the officer who attended the jury remained in the jury room during their deliberations.—People v. Knapp, 42 Mich. 267.

¶ 2245. A new trial will not be granted in a criminal case on the ground that the officer in charge of the jury was assisted by another officer, who was not sworn, and who said nothing more than "Good morning" to them, where it does not appear that respondent was prejudiced, and where any presumption of injury is overcome by affidavits.—People v. Beverly, 108 Mich. 509.

¶ 2246. A new trial should be granted where the prosecuting attorney has furnished liquor and cigars during the trial to members of the jury, and where there have been conversations by different persons in the presence of the jury tending to influence the latter.—People v. Montague, 71 Mich. 447.

§ 460. Books, papers and exhibits in jury room.

Tasting or sampling of liquor in evidence, see post § 461.

Reading from documents in argume see ante § 389.

Provisions for receipt of letters papers during trial after ins same by judge, see Comp. § 15834.

¶ 2247. The question of permitti and documents in a case to be ta jury room for consideration of t one of discretion with the trial c ple v. La Londe, 197 Mich. 76.

¶ 2248. Upon a trial for rape it allow the evidence taken at the p examination and reduced to writin original written complaint of the ing witness, to be sent to the jury r testimony in criminal cases must b open court, and in the presence cused.—People v. Dowdigan, 67 Mi

¶ 2249. It is not error for the c the jury have retired to consult of dict, to permit them to have th defining the offense in their room, the same is objected to by defend sel.—Findley v. People, 1 Mich. 23

¶ 2250. Where defendant is on keeping a house resorted to for p prostitution, it is not reversible e low an exhibit, consisting of a li phone numbers with the given women who visited the house, to to the jury room, though such prac commended.—People v. Tibbetts, 628.

§ 461. Tasting or testing substanc dence.

Drinking intoxicants while on vie ing deliberations, see also an 2246.

¶ 2251. In a prosecution for local option law by selling ferme where a bottle of the cider sold dence and a witness who put the c bottle gave evidence tending to sh was in about the same conditio sold by the respondent, it was no the court to tell the jury that taste the cider if they wanted to, not showing that they did so, an tasting of it by the jury would no error.—People v. Kinney, 124 Mic

§ 462. Communications with court ment.

Showing of improprieties in sup tion for new trial, see post §

¶ 2252. Where the court in a c receives a communication from th it has retired, and makes no st to the nature of the communicati not answer it, it is within the co tion to withhold the contents t counsel.—People v. Sauerbier, 17

§ 463. Return of jury into court.

Return into court with verdict and rendition of verdict, see post IX, G.

Additional instructions after retirement, see ante §§ 452-454.

Form, matter and substance of instructions additional to original charge, see ante §§ 452, 453.

¶ 2253. The jury in a criminal case has a right to be brought before the court at any time it desires.—People v. La Munion, 64 Mich. 709.

§ 464. ——Rereading testimony.

Objection for first time on review to rereading testimony, see post ¶ 2455.

¶ 2254. The compliance with the request of the jury after it retired in a prosecution for illegal sale of liquor, for information as to certain testimony which had been produced before them, was a matter of discretion.—People v. Shuler, 136 Mich. 161.

§ 465. ——Presence of accused or counsel.

Necessity of presence of accused at giving of additional instructions, see ante § 454.

¶ 2255. In a manslaughter case the jury retired and some hours later were brought in because of word sent by the foreman to the judge, and a colloquy occurred between the judge, the foreman, and the jurors. The respondent was not present, but his counsel was, and gave no intimation to the court until the jury were sent back that his client was not present. Held, nothing in the situation called for a reversal of a verdict for manslaughter.—People v. Burkhart, 165 Mich. 240.

¶ 2256. In a criminal prosecution for larceny upon the jury's return to the box and their request, the testimony of a witness may be read to them in the absence of the defendant where his counsel is present and consents to its being so read.—People v. Carey, 125 Mich. 535.

§ 466. Urging or coercing verdict.

Charges on agreeing and additional charges after failure to agree, see ante §§ 447, 453.

Instructions as to unanimity and reconciliation of individual views, see ante § 447.

Urging and coercing jury in trial before justice, see post § 655.

¶ 2257. A trial court has no power to compel a verdict of guilty in a felony case, when some of the jurors are not willing to render such a verdict.—People v. Warren, 122 Mich. 504.

§ 467. Discharging jury.

Reviewableness of discretion as to discharging jury, see post § 631.

Discharge as former jeopardy, see Crimes § 25.

¶ 2258. Under Const. art. VI, § 29, a jury impaneled, accepted, and sworn cannot be discharged except for inability to agree, or for some other overruling necessity, which courts hold to constitute a mistrial.—People v. Parker, 145 Mich. 488.

¶ 2259. The court cannot arbitrarily discharge a jury upon rumors of improper conduct, or of attempts to corrupt one or more of them.—People v. Parker, 145 Mich. 488.

¶ 2260. The court may discharge a jury without prejudice to a new trial, when it appears, upon an examination, that a juror was disqualified when sworn and accepted, or by subsequent conduct has become disqualified; and such conduct on the part of a juror is overruling necessity essential to constitute a mistrial.—People v. Parker, 145 Mich. 488.

¶ 2261. It is the duty of the court in a criminal action, after the case has been submitted, not to discharge the jury so long as there is any reasonable probability that they can agree; though the court is justified in accepting their statement that they cannot agree as proper evidence in determining the question.—People v. Parker, 145 Mich. 488.

¶ 2262. It is justice to a juror that he have a hearing before a jury is summarily discharged because of misconduct charged against him.—People v. Parker, 145 Mich. 488.

¶ 2262a. In a trial for an assault with intent to do great bodily harm less than murder, the trial judge learned that a juror, after the state's and a part of the defendant's evidence was in, stated in a saloon that when he had his "mind made up, it will take more than they have got now to change it." Held, the court properly dismissed the jury and continued the case until the next term.—People v. Sharp, 163 Mich. 79.

G. VERDICT AND RENDITION AND RECEPTION.

§ 468. In general.

Announcement of verdict and polling of the jury, see post § 469.

Contents and findings of the verdict, see post §§ 470-472.

Responsiveness and conformity to several counts, see post § 472.

Construction and effect, see post § 473.

Amendment and correction, see post § 474.

Duty to follow instructions in reaching verdict, see ante § 396.

Instructions as to verdict to be reached and agreement on same, see ante § 446 et seq.

Urging or coercing verdict, see ante § 466.

Grounds for directing verdict, see ante § 399.

Mode of rendition and entry when verdict is directed, see ante § 400.

Rendition in absence of accused out on bail, see ante § 328.

The sentence and judgment on the verdict, see post XI.
Verdicts in homicide cases, see Homicide § 82.
General verdict on merits as essential part of constitutional jury trial, see Constitutional Law § 209.
Verdicts in trials with jury before justice, see post § 655.
General law of verdicts in civil cases, see Verdicts.

¶ 2263. The verdict of a jury in a criminal case should be and must be each individual juror's own verdict and the result of his own conviction.—People v. De Meaux, 194 Mich. 18.

¶ 2264. Opinions and conclusions of individual jurors cannot be inquired into.—People v. Knapp, 42 Mich. 267.

§ 469. Announcement and polling of jury.

Amendment of sealed verdict on polling jury, see also post ¶ 2289.

¶ 2265. It is error to refuse to permit the jury to be polled.—People v. Remus, 135 Mich. 629.

¶ 2266. The fact that a prisoner on trial has consented to a sealed verdict does not deprive him of the right to poll the jury on their bringing in such verdict.—Stewart v. People, 23 Mich. 63.

¶ 2267. The response of three jurors, on the jury being polled and asked if "this is your verdict," "it is now," does not show that it was not their voluntary verdict; though it appears that after deliberating the jury was called into court and asked if it was a question of fact on which they were differing, that on replying that it was they were sent back with further instructions to decide on the evidence alone and to be honest and fair with each other and endeavor to reconcile their views under the law and the evidence, weighing each side carefully, and with a further definition of a term or phrase in the case, that thereafter they were again recalled and one additional request proffered by accused was given and one refused, that thereafter a third request from accused for additional instructions was filed but not given, that later on their own request they were called into court and the instructions repeated and others given, and that again they were recalled at their own request and furnished with some papers in evidence and other evidence read to them and were instructed on a question asked by one of them, and that shortly afterward they returned the verdict.—People v. Hoffman, 142 Mich. 531.

¶ 2268. Whether or not a jury has separated before returning a verdict in court, it is the right of any juror to assent publicly to the verdict which is announced.—People v. Duffek, 163 Mich. 196.

§ 470. Specifications and findings.

Sufficiency of specification, see also post ¶ 2287.
Recommendations to mercy, see post § 471.
Specification of degree of homicide, see Homicide § 82.
Findings and specifications in civil cases, see Verdicts, II, III.
Provision for specifying finding of insanity when acquittal is on that ground, see Comp. L. 1915, § 15826.

¶ 2269. Under the constitution the jury in a criminal case has the right to render a general verdict.—People v. Marion, 29 Mich. 31; Underwood v. People, 32 Mich. 1.

¶ 2270. The statute providing for putting special questions to the jury does not apply to trials in criminal cases.—People v. Marion, 29 Mich. 31.

¶ 2271. Comp. L. 1897, § 10237, authorizing answers to special questions to control a general verdict, does not apply to criminal cases.—People v. Tessmer, 171 Mich. 522.

¶ 2272. A general verdict of guilty in a prosecution under Comp. L. 1897, § 11581, should not be reversed on special findings by the jury in answer to questions, that the injury was not inflicted because of malice toward the owner of the horse involved and that it was inflicted in anger on the refusal of the horse to do its work.—People v. Tessmer, 171 Mich. 522.

¶ 2273. A jury in a murder case may pass specially, if it choose, upon the sanity of the accused, but cannot be compelled to do more than render a general verdict on the merits, that is, "guilty," or "not guilty."—Underwood v. People, 32 Mich. 1.

¶ 2274. A man was prosecuted for neglect to support his wife, and a general verdict of guilty was rendered. His counsel submitted a request for a special finding as to whether the prisoner was then, and for about four months last past had been, well and sufficiently supporting his wife according to his means, and each juror answered, "Yes." Held, that under the special finding there should have been no judgment on the general verdict, and that the respondent should be discharged.—People v. Piper, 50 Mich. 390.

¶ 2275. As any limitation upon the jury's right in a criminal case to find a general verdict is against the policy of the law, it is not error for the court to refuse respondent's request that a special question be submitted to the jury.—People v. Roat, 117 Mich. 578.

¶ 2276. The court can add nothing to a special finding or infer any facts which the jury have not inferred and set forth. The court can only draw the legal conclusions from the facts found.—People v. Wells, 8 Mich. 104.

§ 471. Recommendations to mercy.

As indication of impropriety in reaching verdict, see post ¶ 2316.

¶ 2277. A verdict of guilty with recommendation to mercy does not violate public policy or entitle respondent to a new trial.—People v. Long, 44 Mich. 296.

§ 472. Several counts and included offenses.

Instructions cautioning jury as to joint and several verdicts, see ante ¶ 2181.

General verdict on indictment with one good and some bad counts, see ante § 55.

Construction to sustain verdict as one for lesser crime, see post § 473.

Proofs of greater or lesser crimes as variance from allegations, see ante §§ 80, 81.

Conviction for lesser offense when greater would have been sustainable, as favorable error, see post § 536.

Verdict for lesser offense as cure of errors pertaining only to greater offense, see post § 567.

¶ 2278. A jury may acquit of the principal charge and find the prisoner guilty of an offense of lesser grade if contained within it.—People v. McDonald, 9 Mich. 150.

¶ 2279. In this state, on an indictment for an offense which includes a lesser, the defendant, though acquitted of the higher, may be convicted of the lesser, and this though the one is a felony and the other is a misdemeanor.—Hanna v. People, 19 Mich. 316.

¶ 2280. It is no objection to a conviction for the lesser offense that the information was based upon a preliminary examination by a justice for the higher.—Hanna v. People, 19 Mich. 316.

¶ 2281. Where the complaint and warrant upon which a preliminary examination is had, and the information filed, fail to charge an offense sufficiently, but contain a full description of a lesser one of the same nature, they will sustain a conviction of the lesser offense.—People v. Calvin, 60 Mich. 113.

¶ 2282. How. St. § 9546, which provides that an indictment (information) for larceny may contain a count for obtaining property by false pretenses, or for embezzlement, or for receiving, having in possession, or aiding in concealing the same property, knowing it to have been stolen, and that the jury may convict of either offense, clearly requires the verdict to point out the crime of which the defendants are found guilty, and will not bear the construction that a conviction can be had on all the charges at once by a general verdict.—In re Franklin, 77 Mich. 615.

¶ 2283. A general verdict of guilty of an indictment for forging and uttering a mortgage, its acknowledgment, and the bond carries conviction of the forgery as well as the uttering, they being parts of one transaction.—Van Sickle v. People, 29 Mich. 61.

¶ 2284. A general verdict is bad if it may have been based on either of two inconsistent distinct counts, one of which was bad because not covered by the complaint and was therefore improperly contained in the information.—People v. Aikin, 66 Mich. 460.

¶ 2285. Where an information contained two counts, one setting forth an assault with intent to kill and murder, and the second with intent to do great bodily harm, a verdict finding the defendant guilty under the second count was proper, where the jury concluded that there was no intent to kill, but there was intent to do great bodily harm, and such a verdict will not be set aside, where the evidence was conflicting, the defendant himself admitting the use of the pitchfork, but denying the threat to kill. The jury was not compelled to accept either account of the affray in all its details.—People v. Cahoon, 88 Mich. 458, distinguishing People v. Partridge, 86 Mich. 243, where the respondent was charged with an offense from the commission of which the intent is presumed, and in a second count with a lesser offense, without an intention to commit the crime charged in the first count.

§ 473. Construction and effect of verdict.

See also ante ¶ 2276.

General verdict on charge in two or more counts of which one is bad, see ante § 472.

Cure of errors by verdict, see post § 567.

Presumptions on review, in favor of verdict, see post § 624.

Conclusiveness of verdict as finding of fact on the reviewing court, see post § 633.

Effect of verdict for offense within inferior jurisdiction, see ante ¶ 495.

Exclusion of affidavits of jurors to impeach verdict on motion for new trial, see post § 482.

Conformity of sentence to verdict, see post § 490.

Variance of proofs from allegations, see ante § 77 et seq.

Construction of verdict as part of the record on error or other review, see post § 612 et seq.

Conviction or acquittal of one as bar to other degree, see Crimes § 21.

¶ 2286. Where the information in a prosecution for assault and battery is insufficient in that it does not charge a battery a verdict finding the defendant guilty of the offense of assault and battery should be sustained as a conviction for an assault.—People v. Andre, 194 Mich. 524.

¶ 2287. The signed verdict of a jury read: "Assault with intent to do great bodily harm less than the crime of murder." Held, the language sufficiently expressed a verdict of guilty.—People v. Duffek, 163 Mich. 196.

¶ 2288. A respondent charged in the first count of an information with the offense of carnally knowing and abusing a female child under fourteen years of age, and in the second count with having committed an indecent assault upon her without committing or intending to commit the crime of rape, was convicted upon the second count. Held, that he was thereby acquitted of the first charge, and that, as the evidence showed the offense, if any, to have been what was charged in the first count, the conviction was erroneous.—People v. Partridge, 86 Mich. 243.

§ 474. Amendment and correction of verdict.

Propriety of exceptions before sentence to review conviction, see post ¶ 2695.
In civil cases, see Verdicts, V.

¶ 2289. In a prosecution for assault with intent to do great bodily harm less than the crime of murder, the court instructed the jury that if they reached a verdict during the night they might sign and seal the same, give it to the bailiff in charge of them, and separate for the night, returning into court in the morning. At 3 a. m. March 10th the jury signed and sealed the following verdict: "Assault with intent to do great bodily harm less than the crime of murder." At the opening of court one juror was ill and only eleven appeared. At the opening of court the next morning, March 11th, all the jurors appeared. The foreman stated that they had made an error in the form of the verdict. The sealed verdict was given back to them and they inserted the words: "We, the undersigned jurors, find the respondent, Andrew Duffek, guilty of." They returned this verdict into court and the jury was polled. Held no right of defendant was violated.—People v. Duffek, 163 Mich. 196.

X. NEW TRIAL AND MOTION IN ARREST.

§ 475. New trial in general.

Grounds and discretion of court to allow or deny, see post §§ 476-479.
Time for motion, see post § 480.
Motion and showing, see post §§ 481, 482.
Amendment and correction of sentence and judgment in trial court, see post § 498.
Motion for new trial as mode of saving questions for review, see post § 530.
Reversal and remand for new trial, see post § 636 et seq.
Retrial after review and remand, see post XVII.
Discharge and grant of new trial as jeopardy barring further prosecution, see Crimes §§ 25, 26.
New trials in civil cases, see New Trial.
Provisions for granting of new trials by trial court, see Comp. L. 1915, § 15836 et seq.

§ 476. Grounds and propriety of new trial.

Improper custody of jury as ground, see also ante ¶ 2233.
Misconduct in taking view, see also ante ¶ 2241.
Interference with jury during deliberations, see also ante § 459.
Conviction for felony on proof making out lower grade only, see also ante ¶ 1993.
Affidavits and showing of the grounds and objections, see post § 482.
Introduction of additional grounds into motion by amendment, see post § 481.
Propriety of remand on error for new trial, see post § 636 et seq.
Statutory grounds for new trial, see Comp. L. 1915, § 15836.

¶ 2290. As at common law new trial in cases of felony was not granted, and as the statutes allow it to be had in two ways only, (1) on exceptions sustained by the supreme court, and (2) by the trial court at the term at which trial was had or at the next term, leave to apply for a new trial on the ground of newly-discovered evidence cannot be granted where a new trial has been refused on exceptions and after such next term has elapsed.—People v. Marble, 38 Mich. 309.

¶ 2291. New trials are purely statutory, and courts have no right to annul the statute. At the common-law there was no new trial.—Frazer v. Judge of Recorder's Court, 112 Mich. 469.

¶ 2292. Where one has been convicted of selling liquors without paying tax, there is no abuse of judicial discretion in denying a new trial urged on the ground that the local option law had been adopted before the trial but after the commission of the alleged offense.—People v. Wade, 101 Mich. 89.

¶ 2293. A new trial will not be granted in a criminal case for the disqualification of a juror who did not disclose on his examination that on the day following a murd he called on an errand of his own at t house where occurred an assault by the ceased on the respondent preceding the ing, where the fact of the killing was cussed, but not the details, without the knowing that the respondent had be cused thereof, and without his expres opinion as to the former's guilt or in —People v. Ponsford, 181 Mich. 65

¶ 2294. In a criminal prosecutior ing, storing and possessing i liquor in other than his own res that a motion for a new trial or of the absence of witnesses wh the testimony of a witness fo tion that such absent witness ing beer in the residence mother was properly denie the trial, no request was m no effort was put forth to tendance, and it was not were not in the county c at the time, and it did no or all of these witnesse oath, deny the testimo the prosecution.—Peo Mich. 475.

§ 477. ——Verdict against evidence or unsupported by evidence.

Sufficiency of evidence on review, see post § 685.

¶ 2295. A motion for a new trial was properly denied where the case was to be determined on disputed facts, and there was evidence to support the verdict rendered.—People v. Mulvaney, 171 Mich. 272.

§ 478. ——Newly discovered evidence.

For absence of witnesses who would rebut or contradict state's witnesses, see ante ¶ 2294.

Time for application, see post § 480, ante ¶ 2290.

Showing on motion for new trial, see post § 482.

¶ 2296. Where a father has been convicted of murdering his two-year-old child by a succession of whippings, the main convicting testimony being that of a woman hired to care for the child, and who, according to such testimony, had herself never whipped it, it is error to refuse to grant a motion for a new trial based on newly-discovered evidence that she had in fact beaten the child several times in respondent's absence, and, on one occasion, two days before its death.—People v. Hamilton, 76 Mich. 212.

¶ 2297. In a prosecution for murder upon the defense of insanity, it is not error to refuse to grant a motion for a new trial upon the ground that the only surviving sister of the respondent had become insane since the trial, where it was shown on trial that the respondent's brother and her father were insane.—People v. Quimby, 134 Mich. 625.

¶ 2298. A denial of a motion for new trial on the ground of newly discovered evidence, after conviction for murder, will not be reversed on appeal where the newly discovered evidence consists solely of an affidavit of an accomplice, upon whose testimony the conviction was based, that his testimony at the trial was false and giving a different version of the affair.—People v. Nunn, 120 Mich. 530.

¶ 2299. The refusal of a motion for a new trial of a murder case, based on the ground of newly-discovered evidence, is not an abuse of discretion, when based on affidavits made more than two months after the killing, which cast doubt on the identity of the respondent as the person who did the killing, where he was positively identified at the trial, and doubt was cast upon some of the affidavits supporting the motion.—People v. Cona, 180 Mich. 641.

§ 479. ——Discretion to allow or deny.

See also ante ¶ 2299.

Reviewableness of discretion in passing on motion, see post § 632.

¶ 2300. A new trial is not a matter of discretion merely in a criminal case where one of the jurors was an alien and the prisoner was not aware of that fact until after verdict.—Hill v. People, 16 Mich. 351.

§ 480. Time for motion and action thereon.

See also ante ¶ 2290.

Time for grant of new trial by trial court, see Comp. L. 1915, § 15836.

¶ 2301. The provisions of Comp. L. 1897, § 11963, How. St., 2nd Ed., § 15134, that a motion for a new trial in a criminal case may be granted at the same or the next terms after conviction, is mandatory, and a motion made thereafter comes too late.—Nichols v. Houghton Circuit Judge, 185 Mich. 654.

¶ 2302. Circuit Court Rule 32, allowing two days after verdict within which to move in arrest of judgment, does not apply to criminal cases.—Cole v. People, 37 Mich. 544.

¶ 2303. The limitation by How St. § 9576, empowering the trial court to grant a new trial in a criminal cause at the same term at which the trial is held, or at the next term thereafter, cannot be avoided by the entry of orders extending the time in which the motion for new trial may be made. So held, at least, where the orders did not show that the prosecuting attorney consented to the proposed extension, and where no reason appeared why the motion might not have been made and disposed of within the statutory period.—Frazer v. Judge of Recorder's Court, 112 Mich. 469.

¶ 2304. A motion for a new trial made on the first day of the second term following that at which a criminal trial was held is too late, although the application was made on a holiday and the term, although set to begin on such holiday, did not in fact begin until the following day.—People v. Ayres, 195 Mich. 274.

¶ 2305. A motion for a new trial may be denied where made more than a year after the case was tried, as How. St. § 9576 contemplates that applications for a new trial should be made speedily, especially where there is no abuse of discretion in refusing the new trial.—People v. Swartz, 118 Mich. 292.

¶ 2306. The representatives of the people cannot waive the want of jurisdiction of the court to entertain a motion for a new trial in a criminal case after the expiration of the term following conviction.—Nichols v. Houghton Circuit Judge, 185 Mich. 654.

§ 481. Motion and amendments.

Time for the motion and for decision thereon, see ante § 480.

Necessity of presence of accused at hearing of motion, see ante § 328, ¶ 1519.

Affidavits and showing on the motion, see post § 482.

Necessity of exceptions to denial of motion to save question for review, see post § 526.
Motion and order thereon as proper matter for bill of exceptions, see post § 592.
Order granting or denying new trial as question reviewable by certification, see post § 575.
Propriety of review of new trial motion on exceptions before sentence, see post § 603.
Necessity and sufficiency of record showing of new trial motion and order for review, see post § 597.

¶ 2307. A ground for a new trial in a criminal case not germane to those stated in the original motion cannot be introduced by amendment after the expiration of the time limited by Comp. L. 1897, § 11963, How. St., 2nd Ed., § 15134, for the granting of a new trial.—Nichols v. Houghton Circuit Judge, 185 Mich. 654.

§ 482. Affidavits and showing for new trial.

¶ 2308. Affidavits of jurors cannot be used to impeach their verdict. So held where several of the jurors made affidavits that a verdict of guilty was rendered in a criminal case for the sole purpose of saving the county the costs of the prosecution, the complainant not having given security for costs.—People v. Stimer, 82 Mich. 17.

¶ 2309. Affidavits of jurors in a criminal case cannot be received to impeach their verdict.—People v. Swift, 172 Mich. 473.

¶ 2310. In a prosecution for arson, two jurors made affidavits to the effect that the jury considered the failure of respondent to take the stand as a witness in her own behalf, and that they consented to the verdict of conviction largely for that reason. Held, the court properly refused to consider these affidavits in hearing a motion for a new trial.—People v. Stewart, 163 Mich. 1.

¶ 2311. Where the affidavits, offered to show that the jury was spied on through the keyhole and coerced by instructions evoked by what was overheard of their deliberations, cast no doubt on the verdict for the causes assigned, it is not error to refuse to hear them and to strike them out; even if under other conditions such affidavits might be used for that purpose.—People v. Hoffmann, 142 Mich. 531.

¶ 2312. Affidavits of jurors, that while they were deliberating the officer in charge looked through the keyhole of the door and spied on them and listened, and that additional instructions given by the court without their request were on the subject they were discussing when spied on, that the fact of the spying was commented on in the jury room by jurors, are not taken out of the rule that such affidavits will not be received in impeachment of their verdict and brought under the rule that affidavits may be received to show that there was interference with their deliberations; where counter affidavits of officers denied the spying and stated that the discussion in the jury room became so animated that they could be heard 30 feet or more beyond the room, and where on the court's being advised of it the officers were instructed to clear the outer room of all but the officers, and where no officer entered the room.—People v. Hoffmann, 142 Mich. 531.

¶ 2313. It was not error to deny a motion for a new trial on the ground that by his examination of the voir dire and by affidavits it appeared that a juror was partial and had not answered honestly the questions on the voir dire, where there were counter affidavits, making an issue for the trial court.—People v. Hoffmann, 142 Mich. 531.

¶ 2314. It is not error in a criminal case to refuse a new trial moved for upon counsel's affidavit that the jury, while considering their verdict, read a newspaper article relating to the trial, and that counsel had been informed by some of the jurors that the article influenced jurors in arriving at their verdict; it not appearing how counsel knew the jurors had the paper, and what he was told by jurors as to the effect reading it had upon the verdict being hearsay and incompetent.—People v. Martin, 116 Mich. 446.

¶ 2315. Affidavits held not to present grounds for granting a new trial in a criminal case, because of newly-discovered evidence.—People v. Frontera, 186 Mich. 343.

¶ 2316. A delay of seven hours in agreeing to a verdict is not uncommon, nor are recommendations to mercy, especially with youn offenders, and they do not indicate that th verdict was obtained by improper means. People v. Lang, 44 Mich. 296.

§ 483. Arrest of judgment.

Defect in information warranting arr judgment, see also ante ¶ 201.
Grammatical errors in indictment, s ante ¶ 323.
Time for motion, see also ante ¶ 23
Propriety of review of motion in exceptions before sentence, § 603, ¶ 2694.

¶ 2317. A motion in arrest has always been proper practice case.—People v. Rathbun, 10

¶ 2317a. The rule allowing verdict within which to mo judgment does not apply to Cole v. People, 37 Mich. 5

¶ 2318. Where, on the tion of a respondent of t his counsel entered a r arresting and staying ju for the reason that t jurisdiction to try the

fense charged, as appeared by the records and files in the cause, but without further specifying the grounds of the motion, which the counsel refused to do on the request of the court, the refusal of said order, and the immediate sentence of the respondent, cannot be assigned as error.—People v. Wright, 89 Mich. 70.

XI. SENTENCE AND JUDGMENT, AND EXECUTION THEREOF.

§ 484. In general; power to sentence and limitations.

Time and stage of trial for sentence, see post § 485.
Examination of accused and inquiries as to measure of punishment, see post §§ 486, 487.
Requisites and validity of sentence, see post §§ 489-493.
Cumulative, concurrent and successive sentences, see post § 495.
Construction and effect of fixed and indeterminate sentences, see post §§ 496, 497.
Suspension of sentence, see post § 494.
Correction, amendment and resentence, see post § 498.
Execution of sentence and stay, see post § 499.
Record of sentence and warrant of commitment, see post XII.
Costs and fees, see post XIII.
Amount and kind of punishment as limitation on justices' jurisdiction, see ante § 91.
The verdict and rendition of same into court, see ante IX, G.
Place for imprisonment and power of courts to sentence to particular prisons and houses of correction, see Crimes §§ 28, 29.
Measure and limits of imprisonment term, see Crimes § 30 et seq.
Augmented punishment for second and subsequent offenses, see Crimes § 31.
Statutory authority to judges to pass sentences, see Comp. L. 1915, § 15856.

¶ 2319. Whether another than the trial judge has power in any case to give sentence where sentence has been omitted, quære.—Weaver v. People, 33 Mich. 296.

¶ 2320. How. St. § 9603 vests a discretion in the court to fine or imprison a respondent under § 2275 (for an offense against the liquor law), and the court's refusal, on the ground of want of power, to exercise such discretion, is error.—People v. Minter, 59 Mich. 557.

¶ 2321. Under the Local Option Law, Comp. L. 1897, § 5427, as amended by Pub. Acts 1899, No. 183, and Pub. Acts 1909, No. 107, How. 2nd Ed., § 5031, providing that any person who shall violate such act shall be deemed guilty of a misdemeanor and, upon conviction, may be sentenced to pay a fine and to imprisonment in the county jail, in the discretion of the court, discretionary power is given to the court to impose punishment either by fine or imprisonment and it is not error not to exercise the same.—People v. Harrison, 194 Mich. 363.

¶ 2322. The circuit cannot cannot impose a heavier penalty for an offense found on the trial to be properly cognizable by a justice of the peace than a justice could.—Brown v. People, 39 Mich. 57; Nelson v. People, 38 Mich. 618.

¶ 2323. On a conviction in the circuit court of a crime triable by a justice no greater punishment can be inflicted than could be imposed by the justice.—People v. Harrington, 75 Mich. 112.

§ 485. Time and stage of trial for sentence.

Pendency of motion in arrest, see ante § 483.
Nunc pro tunc amendment, see post § 498.

¶ 2324. The circuit court has the right to pass sentence in criminal cases without waiting for the settlement of any exceptions which may have been taken.—People v. Becker, 48 Mich. 43.

¶ 2325. A prisoner on bail awaiting sentence is on the same footing, so far as imprisonment goes, as if he were in confinement without bail; and if his sentence is delayed from time to time without his request until the full period of imprisonment to which he could be sentenced has expired, the court then loses jurisdiction to pronounce it and he is entitled to his liberty.—People v. Kennedy, 58 Mich. 372.

¶ 2326. The right to pronounce sentence, if once lost, is not revived by the request of the convict's counsel for further delay to enable him to prepare a case for review.—People v. Kennedy, 58 Mich. 372.

¶ 2327. A prisoner was released under suspended sentence and on his own recognizance in a nominal sum without sureties. No further proceedings were ever taken until more than a year after the expiration of his recognizance, when the judge of another circuit, sitting temporarily, passed sentence upon him. Held, that the prosecution had been practically abandoned, and that the sentence was unauthorized.—Weaver v. People, 33 Mich. 296.

§ 486. Examination of accused before sentence.

Showing for mitigation of punishment, see post § 487.
Examination on plea of guilty to ascertain voluntariness, see also ante § 114.
Record of examination on plea of guilty, see post §§ 504, 505.
Unsworn statement by accused to jury on trial, see ante § 336.
Asking prisoner for reasons against sentence as a sufficient examination as to voluntariness of his plea of guilty, see ante ¶ 579.

¶ 2328. It is not essential that the examination of the accused on passing sentence after his plea of guilty be conducted away from the presence of other persons, if it sufficiently appears to the judge that the plea was voluntary.—People v. Lewis, 51 Mich. 172, correcting People v. Stickney, 50 Mich. 99, in so far as it asserts that others must be excluded.

¶ 2329. A prisoner who had pleaded guilty was asked by the judge if he understood that if the plea was entered he would not be entitled to trial but would be subject to sentence. He said he so understood and wished the plea to be entered. He was sentenced the same day, the judge asking him if he had any reason to urge why judgment should not be passed against him, to which he answered that he knew of none. The judge made no other examination as to whether the prisoner's plea was voluntary, and this was in the presence of the prosecuting attorney and other officers of the court, but he made return that he was satisfied at the time from the prisoner's statements that the plea was voluntary. Held sufficient.—People v. Lewis, 51 Mich. 172, overruling as an inadvertent dictum, that examination in the presence of the officers of the court and other persons is not sufficient, uttered in People v. Stickney, 50 Mich. 99.

§ 487. Sbowing to ascertain proper measure of punishment.

Averments in indictment as to previous convictions, see ante § 35.
Record of investigation and approval of sentence to reformatory or house of correction, see post § 501.
Examination of docket by justice on conviction for vagrancy to ascertain and fix punishment as for first or second offense, see post § 656.
Intoxication as mitigation, see Crimes § 16.

¶ 2330. The facts showing satisfaction to mitigate punishment and that it is respondent's first conviction should be made to appear to the trial court before sentence, and otherwise respondent cannot avail himself after sentence of their existence in order to obtain a reversal.—People v. Hubbard, 86 Mich. 440.

¶ 2331. Under How. St. § 9143, a receiver of stolen property, if he would avoid imprisonment in the state prison, must show in the trial court before sentence that it is his first offense, and that he has made satisfaction to the injured party.—People v. Smith, 94 Mich. 644.

§ 488. Motion for and judgment of discharge.

Discharge of jury for inability to agree, see ante § 467.
Discharge of accused on vacating judgment where further prosecution is barred, see ante ¶ 613.
Propriety of judgment that prisoner be discharged on affirming or reversing sentence, see post § 639.
Dismissal or nolle prosequi, see ante § 127.
Record of dismissal or nolle, see post § 505.
Hearing on behalf of juror charged with misconduct, see also ante ¶ 2262.
Discharge of jury, quashal or nolle as bar to further prosecution, see Crimes § 25.

¶ 2332. There being no hard and fast rule as to how a pardon should be brought to the attention of the court before the passing of sentence, a formal motion to discharge the defendant upon the ground of his having been pardoned, was sufficient to require the court to discharge him, where the pardon itself had been left with the court some days before the hearing of such motion.—Spafford v. Benzie Circuit Judge, 136 Mich. 25.

§ 489. Requisites and validity of sentence.

Conformity to indictment and verdict, see post § 490.
On pleas of guilty, see post § 491.
Sentence on one or more counts, see post § 492.
Indeterminate sentences, see post § 493.
Cumulative, concurrent and successive sentences, see post § 495.
Suspension of sentence, see post § 494.
Record of sentence and judgment, see post XII.
Taxation of costs as part of sentence, se post § 509.
Proper judgment on error or exceptions, s post § 636 et seq.
Too small sentence as error favorable to cused, see post § 536.
Finality and sufficiency of judgment to port review, see post § 574.
Reviewableness of discretion in fixing p ment, see post § 630.
Sentence on trial before justice of court, see post §§ 656-658.
Proper punishments and measure th Crimes, I, E.
Validity of laws under constituti visions as to fines and punish Constitutional Law §§ 202-20
Nature of imprisonment as matt lative change or control, see
Sentence and judgment in homic also Homicide § 83.
Necessity of finding of degree sustain sentence, see Hor
General provisions as to judg tences, see Comp. L. 19
Plea of guilt, confession, or tial basis for convicti 1915, § 15624.
Provisions as to punishme fine and imprisonmer Comp. L. 1915, §§ 15

¶ 2333. A sentence ir court under Laws 188 took effect October 3 committed on Septem —People v. Dane, 81

¶ 2334. A sentence lighter than it might have have been is not erroneous so long as it does not involve a kind of punishment different from that allowed by law.—People v. Rouse, 72 Mich. 59.

¶ 2335. A sentence to confinement in the county jail for thirty days and to pay a fine of $200 within that time, and in default of payment of the fine within the thirty days respondent to be confined in the county jail for one year, is bad.—Donnoly v. People, 38 Mich. 756.

¶ 2336. A judgment imposing a fine of $200 and $50 costs, and committing respondent until payment, not exceeding ninety days, cannot be attacked collaterally because of the costs where there is nothing to show they were more than were in fact incurred in the prosecution.—In re Johnson, 104 Mich. 343.

§ 490. ——Conformity to indictment and verdict.

Sufficiency of indictment to charge lesser offenses as included in crime, see ante § 80.
Amendment and correction of verdicts, see ante § 474.
Construction of sentence, see post § 496.
Sentence for second offense of larceny, see also post ¶ 2393.

¶ 2337. A sentence as for the crime of horse stealing to six years' confinement in the state prison, on conviction under an information for "grand larceny" which included other property besides the horse, is not authorized.—Boody v. People, 43 Mich. 34.

¶ 2338. An information for larceny, charging two former convictions and one former sentence, cannot sustain a sentence for more than five years, the maximum punishment for simple larceny. A longer sentence cannot be imposed under the second clause of How. St. § 9141, because the three convictions are not at the same term; nor under the first clause of that section, because this would necessitate rejecting an averment as to one of the convictions, and would thus make respondent liable for a greater penalty than that imposed by the section under which the information was drawn; nor under sec. 9424, as the information was expressed to be for a third offense; nor under sec. 9425, as the information averred only one former sentence.—People v. Ellsworth, 68 Mich. 496.

§ 491. ——On plea of guilty.

Record of examination, see post § 504.

¶ 2339. It is not necessary in a judgment on plea of guilty on information for receiving stolen goods to aver that prosecution is for first offense, or that the stealing was not simple larceny, or that respondent has not made restitution or satisfaction.—People v. Caulkins, 67 Mich. 488.

§ 492. ——Conviction under two or more counts.

Verdict on the several counts, see ante § 472.
Construction of sentence to apply it to count, see post § 496.
Validity of sentence based on one good count in indictment with bad counts, see also ante § 55.

¶ 2340. Where a respondent accused of stealing a horse has pleaded guilty to an information in two counts, one under the general statute for larceny and one under How. St. § 9180, punishing horse-stealing, a sentence as for the second offense of horse-stealing may be imposed.—People v. Morris, 80 Mich. 634.

§ 493. ——Indeterminate sentences.

Construction and effect of the sentence, see post § 497.
Amendment or correction as to terms, see post § 498.
Provisions of Indeterminate Sentence Law, see Comp. L. 1915, § 15859 et seq.

¶ 2341. A sentence "for the maximum and minimum period of five years" is not a compliance with Pub. Acts 1904, No. 136, § 1, requiring indeterminate sentences.—In re Cummins, 138 Mich. 39.

¶ 2342. The words "provided by law" contained in Pub. Acts 1903, No. 136, § 1, in the sentence "the term of imprisonment of any person so convicted and sentenced shall not exceed the maximum term provided by law for the crime for which the person was convicted and sentenced," mean fixed by sentence rather than provided by statute; and do not require the court to fix a maximum sentence for larceny where the statute expressly fixes the maximum sentence.—In re Campbell, 138 Mich. 597.

¶ 2343. A judgment under the indeterminate sentence act need not fix the maximum penalty, that being provided by statute, but the court must fix a minimum penalty. —In re Downs, 147 Mich. 477.

¶ 2344. A sentence of fifteen years upon a conviction of rape is a sentence for a maximum term beyond which the person could not be legally detained in prison, and such a sentence complies with Pub. Acts 1903, No. 136, § 1, providing that in all cases where the maximum sentence, in the discretion of the court, may be for life or any number of years, the court shall fix the maximum sentence, the punishment for rape being imprisonment for life or any number of years under Comp. L. 1897, § 11489.—In re Manaca, 146 Mich. 697.

¶ 2345. The words "cases where the maximum sentence in the discretion of the court may be for life or any number of years" in Pub. Acts 1903, No. 136, § 1, providing for indeterminate sentences do not require the

court to fix a maximum sentence for larceny as the maximum sentence is fixed at five years by Comp. L. 1897, § 11553.—In re Campbell, 138 Mich. 597.

¶ 2346. Under the Indeterminate Sentence Law (Pub. Acts 1905, Act No. 184, §§ 1, 2, 3), a prisoner convicted of an assault with intent to kill, the penalty for which may be imprisonment for life, is entitled to have a decision of the judge upon the maximum sentence, and a minimum fixed which shall not exceed half of it.—In re Richards, 150 Mich. 421.

¶ 2347. Under Pub. Acts 1905, Act No. 184, § 3, where the judge fixes a maximum penalty at seven years and a minimum penalty at six, the sentence is valid as a sentence only for a minimum term of three and one-half years and a maximum of seven.—In re Richards, 150 Mich. 421.

¶ 2348. Where a life sentence is imposed under the Indeterminate Sentence Law, it is not necessary to fix a minimum sentence.—People v. Dumas, 161 Mich. 45.

¶ 2349. Under the Indeterminate Sentence Law, Act No. 184, Pub. Acts 1905, the court in passing sentence must fix the maximum sentence for the period named in the statute for the offense charged, and where he names a shorter term, such portion of the term is a nullity and the term prescribed by statute stands as the maximum period, and it is immaterial that the short sentence has never been corrected and that the prisoner has treated it as valid and served out the period.—In re Evans, 173 Mich. 25.

¶ 2350. The Indeterminate Sentence Law (Pub. Acts 1905, No. 184), § 3 of which provides that in cases where the maximum sentence may be life or any number of years, the court shall fix both the minimum and maximum, does not conclude the court on a conviction of murder in the second degree under Comp. L. 1897, § 11471, fixing the punishment for murder of that degree as life or any term of years in the discretion of the court, from sentencing the person so convicted to life imprisonment without fixing a minimum sentence, but in such case the court may either sentence for life or a term of years, in which latter case only need it fix a maximum and minimum.—People v. Vitali, 156 Mich. 370.

§ 494. Suspension of sentence or parts thereof.

Stay of sentence, see post § 499.
Remission of forfeiture of bail, see Arrest § 52.
Uniform Probation Law, see Comp. L. 1915, chap. 65.

¶ 2351. A judge is not authorized to exercise the pardoning power by indefinitely suspending the sentence of a convicted criminal; and it is improper to present to him a petition for such suspension.—People v. Brown, 54 Mich. 15.

¶ 2352. Suspending sentence for a reasonable time is discretionary with the judge if good cause is shown for doing so; but an indefinite suspension lasting for about nine months is unreasonable though it is not necessarily ground for setting aside the conviction.—People v. Reilly, 53 Mich. 260.

¶ 2353. A trial judge can suspend sentence for a reasonable time for a proper purpose, such as to enable defendant to move for a new trial or take exceptions to the supreme court, or to enable the judge to inform himself as to what sentence he ought to inflict.—People v. Kennedy, 58 Mich. 372.

¶ 2354. A partial sentence cannot be imposed and the convict ordered to present himself at a future day to receive the remainder; the judgment or sentence when pronounced must embrace the whole measure of the punishment.—People v. Felker, 61 Mich. 110.

¶ 2355. Act No. 144, Pub. Acts 1907, provided that in the case of a person convicted of wife abandonment the court might suspend sentence where the defendant gives sufficient bond that he will support her. Held, the clause was not void as giving pardoning power to the courts.—People v. Stickle, 156 Mich. 557.

§ 495. Cumulative, concurrent and successive sentences.

¶ 2356. A prisoner was committed to prison for two terms of three months each for larceny. The form of the second sentence made it run from a date specified, unless the first sentence should sooner expire or the convict should otherwise be entitled to release, in which case it was to run for three months from that time. Held, that the sentence was too uncertain and indefinite as to the time of its commencement to be upheld in the absence of statute.—In re Bloom, 53 Mich. 597.

¶ 2357. Inasmuch as cumulative sentences are inoperative when it is uncertain at what time the prisoner's first sentence is to expire, where a prisoner convicted of an assault with intent to murder is sentenced to imprisonment for twelve years in the state prison (the authorities whereof are empowered to determine how much reduction upon sentence shall be allowed for good conduct), and at the same term of court is sentenced for larceny to a term of three years from and after the expiration of the first sentence; the second sentence is void.—In re Lamphere's Case, 61 Mich. 105.

¶ 2358. No crime is punishable by our law except by virtue of some statutory provision; and it seems that cumulative sentences, at least for felonies, are not authorized by law.—In re Lamphere's Case, 61 Mich. 105.

¶ 2359. Under Pub. Acts 1887, No. 132, § 3, a convict imprisoned in the state prison, convicted of a crime committed therein, may be sentenced to imprisonment to begin at the expiration of the term he was serving when such crime was committed, although the date of the expiration of such term is uncertain. —People v. Huntley, 112 Mich. 569.

§ 496. Construction and effect of sentence.

Requisites and validity of sentences, see ante §§ 489-493.

Alternative sentences, see also ante ¶¶ 2335, 2336.

Concurrence or succession of sentences, see also ante ¶ 2356.

Former conviction or acquittal as bar or as jeopardy, see Crimes, I, D.

Effect of invalidity of sentence to leave other good conviction standing as prior "conviction" and so sustaining augmented punishment on second conviction, see Crimes ¶ 156.

Effect of judgment on plea of guilty as conclusion of fact of guilt in civil action, see Former Adjudication ¶ 72.

Habeas corpus to discharge prisoner from illegal sentence and imprisonment, see Habeas Corpus.

¶ 2360. A sentence to imprisonment, whether to a designated prison or not, is supposed to be subject to and on the conditions imposed by statute at the time relating to the prisons and government of the inmates.—Rich v. Chamberlain, 104 Mich. 436.

¶ 2361. Error cannot be assigned upon the sentence of a respondent, upon conviction of murder in the first degree, to solitary confinement in the state prison for his natural life, the word "natural" being surplusage and not a restriction or limitation upon the word "life" affecting the meaning implied by the statute.—People v. Wright, 89 Mich. 70.

¶ 2362. A judgment upon a conviction for assault with intent to commit murder, for which the penalty is commitment for life or for a term of years, committing the convicted person to prison at hard labor for a period of not less than ten years, and recommending that the proper penalty would be for life may be sustained as providing for a maximum sentence of ten years, with a minimum sentence of five years under Act No. 184, Pub. Acts 1905, §§ 2, 3, How. St., 2nd Ed., §§ 15178, 15179.—In re Hamilton, 188 Mich. 499.

¶ 2363. A sentence to imprisonment for more than five years, upon a general verdict of guilty under an information for horse-stealing, contrary to How. St. § 9180, and for the larceny of the same horse under the general statute, and for receiving, and aiding in concealing, the stolen property, is void for the excess, since the finding of guilty under such an information, if valid, can only be made valid by confining it to the least offense charged.—In re Franklin, 77 Mich. 615.

¶ 2364. Where a justice orders respondent to pay a fine of fifty dollars and costs, the judgment impliedly calls for immediate payment.—People v. Parsons, 163 Mich. 329.

§ 497. ——Indeterminate terms and sentences.

See also ante ¶ 2362, post ¶ 2376.

Requisites of the sentence, see ante § 493.

¶ 2365. A sentence imposed for the maximum and minimum of five years under Comp. L. 1897, § 11556, imposed after, for a crime committed before, the Indeterminate Sentence Law (Pub. Acts 1903, No. 136), became operative, is valid, and will be considered as though such law had never been enacted; and the prisoner will not be deprived of his rights under Pub. Acts 1893, No. 118, and Pub. Acts 1895, No. 218, previously enacted. —In re Marion, 140 Mich. 219.

¶ 2366. The old statute requiring a determinate sentence was entirely repealed by the Indeterminate Sentence Law Pub. Acts 1903, No. 136, so as to make a sentence for larceny for a minimum of one year without any maximum sentence merely a minimum sentence with a maximum fixed by Comp. L. 1897, § 11553 relating to larceny.—In re Campbell, 138 Mich. 597.

¶ 2367. Under Pub. Acts 1903, No. 136, § 2, providing that upon sentence for a definite period instead of an indeterminate sentence it shall not be void but the prisoner shall be entitled to the benefits and subject to the liabilities of the act and that where no minimum is fixed it shall be one year, where not otherwise provided; one found guilty of larceny and sentenced for the "maximum and minimum period of five years" is to be treated as sentenced for a maximum of five years and a minimum of one year.—In re Cummins, 138 Mich. 39.

¶ 2368. A sentence under the Indeterminate Sentence Law of 1903 (Pub. Acts 1903, No. 136) is a mere nullity wherein it essays to fix a maximum term in addition to the minimum under a law which fixes the maximum (larceny); and accordingly the sentence is to be read as if only the minimum was fixed and the maximum left to the law.—In re Duff, 141 Mich. 623.

¶ 2369. Where the respondent was convicted on December 13, 1904, of forgery of a deed committed January 13, 1903, a sentence of "not less than eight nor more than ten years" under the Indeterminate Sentence Law of 1903 (Pub. Acts 1903, No. 136), is valid for the minimum term.—People v. Fisher, 144 Mich. 570.

¶ 2370. Under Pub. Acts 1903, No. 136, § 1, providing for indeterminate sentences, a sentence of not less than one year for larceny

without fixing a maximum sentence does not entitle the respondent to a discharge upon the expiration of the minimum term, as Comp. L. 1897, § 11553, fixes the maximum for larceny at five years without any discretion in the court.—In re Campbell, 138 Mich. 597.

¶ 2371. One sentenced under an indeterminate sentence of not less than one year on a conviction of attempted larceny is not entitled to his discharge at the expiration of a year, inasmuch as the maximum penalty fixed by Comp. L. 1897, § 11784 is three years, and applies to supply the court's failure to fix it.—In re Downs, 147 Mich. 477.

§ 498. Correction, amendment and resentence.

Propriety of rendition of proper judgment in supreme court on error without remand for new trial, see post § 636.

Propriety of correction of judgment without new trial, see post § 637.

Reversal of excessive sentence as to excess only, see post § 637.

Remand on error for resentence, see post § 638.

Time for motion for new trial, see ante § 480.

Amendment of judgment to state degree of murder, see Homicide § 83.

Amendment of civil judgments, see Judgments, V.

¶ 2372. The imposition by the circuit court of a void sentence does not exclude authority to impose a valid one, where nothing has been done by way of executing the first sentence.—People v. Dane, 81 Mich. 36.

¶ 2373. Where the trial court has imposed an illegal sentence, it has power to substitute for it a legal sentence, notwithstanding the illegal sentence has been partly executed.—In re Vitali, 153 Mich. 514.

¶ 2374. Where a prisoner has been remanded to jail under a sentence valid in part, and void in part, he cannot be discharged on habeas corpus for want of a valid written commitment, but an order nunc pro tunc may be entered, correcting the sentence, and a proper commitment may be issued.—In re Richards, 150 Mich. 421.

¶ 2375. The trial court cannot set aside a valid sentence, and impose a new and different one after defendant has been remanded to jail to await execution of the sentence.—In re Richards, 150 Mich. 421.

¶ 2376. Upon conviction of petitioner of an assault with intent to kill, he was sentenced by the Recorder's Court of Detroit "to the Detroit House of Correction for a term of not less than six years, and the court recommends that the maximum term be not more than seven years over and including this date," and at a later date during the same term of court, and before the issuance of a commitment, the order was set aside and a sentence imposed directing that petitioner "be committed to the Detroit House of Correction for a term of not less than six years, and the maximum sentence be not more than twelve years." Held, that although the first sentence did not conform to the law because the maximum recommended was less than double the minimum fixed, the recommendation should be treated as a fixing of the maximum period, and that it could not be treated as surplusage, and therefore a nullity, justifying another sentence.—In re Richards, 150 Mich. 421.

¶ 2377. A convict sentenced to a life term for murder in the second degree is not entitled to discharge because the sentence does not comply with the provisions of Pub. Acts 1905, Act No. 184, § 3, relating to indeterminate sentences, but a legal sentence may be substituted for the illegal sentence.—In re Vitali, 153 Mich. 514.

¶ 2378. Where the record discloses a valid conviction and an irregular sentence for violation of the Local Option Law and defendant has been released on bail pending proceedings and nothing has been done by way of executing the first offense, the irregular sentence may be set aside and a new sentence imposed.—People v. Harrison, 194 Mich. 363.

¶ 2379. A court cannot after sentencing a minor to the reform school, on the ground of mistake in the convict's age, treat the sentence as void and proceed to give a new one.—In re Mason, 8 Mich. 70.

¶ 2380. After pronouncing sentence remanding the prisoner to jail to await execution, the court cannot vacate the tence and impose a heavier one for temped escape.—People v. Meservey, 7 223; People v. Kelley, 79 Mich. 320.

§ 499. Execution of sentence and sta

Stay or supersedeas pending revie § 585.

Time for sentence and proper st see ante § 485.

Effect of writ of error or excep and procedure for stay o post § 585.

Time for payment of fine, ¶ 2364.

Alternative provision for c fine is paid, see also ant

Warrant or mittimus for post § 506.

Propriety of imprisonme of fine, see Crimes §

Provisions as to execut warrant for executi § 15849 et seq.

¶ 2381. The autho cution of a sentence,

is purely statutory, and its exercise must depend on compliance with the requirements of the statute.—People v. Fritch, 161 Mich. 111.

XII. RECORD OR MINUTES AND COMMITMENT.

§ 500. Requisites and sufficiency in general.

For sentences to reformatories and houses of correction, see post § 501.
For augmented punishment of habitual or second offenders, see post § 502.
For sentence after breach of parole, see post § 503.
As to showing on plea of guilty, see post § 504.
Of dismissal or nolle, see post § 505.
Warrant or mittimus, see post § 506.
Duplicates and copies of informations or indictments on file, see ante § 19.
Necessity of showing arraignment and pleas, see also ante ¶ 546.
Entry of plea nunc pro tunc, see ante ¶ 553.
Record for review on error or exceptions before sentence, see post XVI, C.
Matters proper for record and for bill of exceptions, see post § 592.
Matters presumable on the record, see post § 617 et seq.
Presumptions on the record as to presence of judge pursuant to adjournment, see ante ¶ 1524.
Record as documentary proof in other prosecution, see ante § 287.
Docketing case in misdemeanor trial before justice, see post § 650.
Sufficiency of indictment and record to show imprisonment for crime on prosecution for escape, see Crimes ¶ 309.
Record under Indeterminate Sentence Law, see Comp. L. 1915, § 15862.

¶ 2382. The failure of the record in a criminal case to locate the venue of a crime within the jurisdiction of the trial court is ground for reversal.—People v. Ayres, 162 Mich. 241.

¶ 2383. Where the record clearly shows the respondent's presence on the first day, and when the jury were impaneled and sworn and when the judgment was rendered it is sufficient to sustain a judgment of conviction. —People v. Fisher, 144 Mich. 570.

¶ 2384. A recital in a criminal record that the defendant upon arraignment stood mute clearly imports that he was requested to plead and declined to do so.—People v. Fisher, 144 Mich. 570.

¶ 2385. A journal entry of a certain day, reciting that the court "thereupon adjourned" with a subsequent addition of the words "until May 1st, 1902" and the signature of the judge, is conclusive of the facts, so it seems; although a clerk's certificate attached to the transcript states that on April 29th the entry was made of the added words without any intervening entry, and that they were added at the instance of another judge, called in, who requested the original judge to sign the record, if correct, and, if not correct, to correct and sign it.—People v. McGarry, 136 Mich. 316.

¶ 2386. A finding and commitment reciting a conviction of the common law crime of robbery describes no crime known to the law of Michigan inasmuch as the common law crime has been superseded by the statutory crime of robbery.—People v. Powler, 142 Mich. 225.

¶ 2387. Where, under an information for aiding a prisoner to escape from jail, laid under How. St. § 9245, the record of the sentence recited that respondent had been convicted of "jail-breaking," which How. St. § 9661, describes as the escape of any prisoner from jail, etc., the court on habeas corpus held that such "breaking" could be committed from the outside as well as from the inside, and sustained the sentence; and that it is not the duty of the courts to discharge prisoners, fairly and legally convicted, because of technical errors in the record of sentence or in the commitments.—In re Case of Parks, 81 Mich. 240.

¶ 2388. Misnomer of the offense in the entry of the order for judgment does not affect the conviction when the record shows what the offense really was.—Cole v. People, 37 Mich. 544.

¶ 2389. The mere misnomer of the place of confinement is no reason for invalidating the sentence and discharging a prisoner where there is no doubt about the place meant.—In re Burger, 39 Mich. 203.

§ 501. For sentences to houses of correction and reformatories.

¶ 2390. Under the statute which requires courts sentencing offenders to the reform school to certify to the keeper thereof the age of the person sentenced as nearly as can be ascertained by testimony, a court which has certified the age of a convict to be under sixteen years must be conclusively presumed, in all collateral inquiries, to have performed its duty correctly.—In re Mason, 8 Mich. 70.

¶ 2391. The age of a defendant sentenced to said house of correction should appear from the record of the case.—Edwards v. People, 39 Mich. 760.

¶ 2392. Comp. L. 1897, § 2197, requiring as a condition to commitment to the industrial school for boys, that the circuit judge review the proceedings and testimony, and that he indorse his approval or disapproval, was not complied with by an indorsement stating that the judge approved of the sentence as set forth in the warrant of commitment,

without stating that he examined the testimony and proceedings.—In re Collins, 135 Mich. 91.

§ 502. For augmented punishment of habitual or second offenders.

¶ 2393. An information for larceny, charging two former convictions and one former sentence, cannot sustain a sentence for more than five years, the maximum punishment for simple larceny. A longer sentence cannot be imposed under the second clause of How. St. § 9141, because the three convictions are not at the same term; nor under the first clause of that section, because this would necessitate rejecting an averment as to one of the convictions, and would thus make respondent liable for a greater penalty than that imposed by the section under which the information was drawn; nor under section 9424, as the information was expressed to be for a third offense; nor under section 9425, as the information averred only one former sentence.—People v. Ellsworth, 68 Mich. 496.

§ 503. For sentence after breach of parole.

¶ 2394. Petitioner was convicted, and paroled under the Probation Law, Act No. 91, Pub. Acts 1903, as amended by Act No. 32, Pub. Acts 1905. He left the state with the consent of one of the judges of the recorder's court in which he was tried, and went into Missouri. He was brought back and sentenced, the judgment entry reciting that he had violated his parole, but not stating that the violation alleged consisted in his leaving the state. Held, there was nothing in this course to render the sentence invalid.—In re Satt, 164 Mich. 472.

§ 504. Showing as to examination on plea of guilty.

Sufficiency of record showing of examination before accepting plea of guilty, see post § 595, ante ¶¶ 576, 580.

¶ 2395. The judgment cannot be sustained on a record showing a plea of guilty and a sentence on the same day without anything to support an inference that any examination as to voluntariness was had.—Clark v. People, 44 Mich. 308.

¶ 2396. The record should show that accused pleading guilty was examined to ascertain whether the plea was voluntary or not, or at least should show such an interval between plea and sentence as to warrant the presumption that examination was made.—Edwards v. People, 39 Mich. 760.

¶ 2397. The validity of a sentence pronounced upon a plea of guilty does not depend upon its appearing of record in what manner the judge may have proceeded to satisfy himself that the prisoner acted freely in pleading guilty.—People v. Ferguson, 48 Mich. 41.

¶ 2398. Where the record shows that respondent, before pleading guilty, had consultation with counsel chosen by himself, and that the circuit judge had a private examination of the accused before sentence, it must be presumed that in accordance with statute the court was satisfied that the plea was voluntary.—People v. Ellsworth, 68 Mich. 496.

§ 505. Record of dismissal or nolle.

¶ 2399. The journal entry of an order in a criminal proceeding that "the prosecuting attorney filing reasons therefor," "he have leave not to file an information," is conclusive that he has filed reasons, and that the prosecution is at an end. He does not need leave to file reasons.—Spalding v. Lowe, 56 Mich. 366.

§ 506. Warrant of commitment; mittimus.

Warrant for commitment by justice or minor court, see post § 659.
Recommitment of prisoner out on bail on affirmance and remand, see post § 644.
Proceedings to require security to keep the peace, see post § 660.
Commitment for trial on preliminary hearing, see Arrest, VII.
Commitment of criminal insane, see Insane Persons, II.
Remand on habeas corpus after correction of commitment, see Habeas Corpus, ¶ 59.
Due process in laws for commitment of persons found insane and acquitted on the ground of crime, see Constitutional La § 150.
Detention under invalid commitment false imprisonment, see False Impri ment § 16.

¶ 2400. A commitment in a crimina reciting that a certain person was co of having on a specified date at a city and county then and there ac disorderly manner on one of th streets of said city, contrary to th an ordinance of the city, entitl dinance relating to disorderly p against the peace and dignity o of the State, does not recite a any offense known to law, an void upon its face.—Larson Mich. 492.

XIII. COSTS ANI

§ 507. In general; who lial

Taxation and retaxation,
Fees and amounts allow
Giving of security by c in jurisdiction of ju
Time for payment of fi tion of sentence,
Costs in trials before
Fees and expenses Counties §§ 31-3
Fees of counsel a county charge

What county liable for costs in case tried on change of venue, see Counties ¶ 129.
Power of county of origin to audit claim of county of trial for expenses of case tried on change of venue, see Counties § 44.
Necessity of effort to collect costs before resorting to claim against county, see Counties ¶ 136.
Application of moneys from fines to library purposes, see Counties § 38.
Costs in action on bail bond, see Arrest § 57.
Liability of prosecuting complainant for costs, see Comp. L. 1915, § 15907.
Nonliability of acquitted prisoner at liberty on recognizance, see Comp. L. 1915, § 15827.
Provision as to payment of expense of trial of persons for malfeasance in state office, see Comp. L. 1915, § 15916.

¶ 2401. Comp. L. 1897, § 12014, providing for a summary disposition of costs in criminal cases does not make the complaining party liable for costs where no security has been given. While the statute says he shall be liable when he has given security it does not say he shall be liable without security.—Board of Supervisors of Missaukee County v. Van Liew, 148 Mich. 520.

¶ 2402. Where a person acting in good faith makes a true statement of all the facts to the prosecuting attorney, who advises and authorizes criminal prosecution he is not liable to the county for costs incurred in a criminal prosecution begun by him but which is later nolle prossed.—Board of Supervisors of Missaukee County v. Van Liew, 148 Mich. 520.

¶ 2403. Where the city of Detroit was the real party in interest to a prosecution brought in the name of the people, costs, upon quashing the conviction, were awarded against the city.—Horn v. People, 26 Mich. 221.

¶ 2404. Copy of testimony need not be furnished by respondent in a criminal case as a prerequisite to settlement of bill.—Pope v. Judge of Recorder's Court, 107 Mich. 25.

§ 508. Fees and amounts allowable.

Counsel fees for taking writ of error as county charge, see Counties § 34.
Compensation and fees allowable to sheriffs, see Sheriffs, III.
Provisions fixing and regulating fees and costs in criminal cases, see Comp. L. 1915, chap. 274.
Provisions as to fee to attorney appointed by court, see Comp. L. 1915, § 15912.

¶ 2405. Prosecutions under the prohibitory liquor law and under the law prohibiting the sale of adulterated liquors were criminal prosecutions such as to charge the county with the sheriff's fees for services therein.—People ex rel. Mixer v. Manistee County Sup'rs, 26 Mich. 422.

¶ 2406. Under the statute (Comp. L. 1871, § 2141) providing for a fee not exceeding ten dollars to the attorney prosecuting a violation of the liquor law, he had no absolute right to that sum but only to such sum or less as should be fixed by the proper authorities, to wit, the supervisors.—People ex rel. Videto v. Jackson County Sup'rs, 31 Mich. 116.

¶ 2407. The attorney fee provided for by the prohibitory liquor law (Comp. L. 1871, § 2141) to be paid by the county where the prosecution is had in any township except that in which the prosecuting attorney resides, not being fixed in amount by the statute otherwise than by prescribing a maximum, is left as a discretionary allowance against the county, and the supervisors have exclusive authority under Const. art. X. § 10, to fix the amount of the fee. The statute contemplates that it is somehow to be fixed in advance, as by resolution establishing a rule and fixing amounts.—People ex rel. Videto v. Jackson County Sup'rs., 31 Mich. 116.

¶ 2408. The jurors' per diem in a criminal case cannot be added to the fine and costs.—People v. Kennedy, 58 Mich. 372.

§ 509. Taxation and retaxation.

¶ 2409. Costs against respondents in criminal cases need not be taxed by the clerk, but are preferably and commonly determined summarily by the court and included in the sentence.—In re Johnson, 104 Mich. 343.

¶ 2410. Const. art. X, § 10, which vests in the boards of supervisors, or in Wayne County, in the board of auditors, the exclusive power not subject to appeal, to fix compensation for services for, and to adjust all claims against, their respective counties, requires that such board, not the court, shall determine the "enlarged compensation" to be recovered by an attorney who, having been appointed to defend one accused of crime follows the case into the supreme court: (Overruling Springer v. Wayne Auditors, 99 Mich. 513, which held that the supreme, not the trial, court, fixed such compensation).—People v. Hanifan, 99 Mich. 516.

¶ 2411. Pub. Acts 1893, No. 96 providing that an attorney appointed to conduct the defense in a criminal case shall be entitled to receive from the county treasurer, on the certificate of the presiding judge, such an amount as the judge shall, in his discretion, deem reasonable compensation for the services performed, not exceeding the sum of $50, is not repugnant to Const. art. X. § 10, which vests in the board of supervisors the exclusive power to prescribe and fix the compensation for all services rendered for and to adjust all claims against the county (distinguishing People v. Hanifan, 99 Mich. 516); and it is the duty of the

trial judge to fix the amount of such compensation, and to certify the same, in accordance with the statute.—Withey v. Osceola Circuit Judge, 108 Mich. 168.

XIV. SAVING QUESTIONS FOR REVIEW; EXCEPTIONS.

[Note. The practice in civil cases for saving questions for review is treated in a separate topic, Saving Questions for Review, which may afford instructive analogies and precedents, but because of the stricter procedure in criminal cases and certain differences in practice detailed cross-references to matters of similarity are omitted.]

§ 510. In general; necessity of objection or question below.

Necessity with respect to particular questions, see post §§ 511-522.
Sufficiency of objections, see post § 523.
Necessity and sufficiency of ruling on objection, see post § 524.
Necessity of renewing objections, see post § 525.
Necessity and office of exceptions and sufficiency of the exception, see post §§ 526-528.
Construction and meaning of exceptions, see post § 529.
Questions preservable by motion for new trial, see post § 530.
Waiver of errors and exceptions to rulings, see post §§ 531, 532.
Assigning the errors in the supreme court, see post §§ 586-588.
Declination to consider points not regularly saved and material to case, see post § 604 et seq.
Time for objections to form or preliminaries of indictments and informations, and waiver by delay, see ante §§ 59-61.
Sufficiency of record showing as to evidence received or excluded erroneously, see post § 595.
Necessity of showing by record the objections and exceptions taken, see post § 596.

¶ 2412. A question which the record in a criminal case shows was not raised below cannot be considered upon error.—People v. Graney, 91 Mich. 646; People v. Carter, 96 Mich. 583.

¶ 2413. The general rule that the supreme court will on review consider only such questions as were presented for the consideration of the trial court applies to criminal cases as well as civil cases.—People v. Prinz, 148 Mich. 307.

¶ 2414. The fact that a bill of exceptions in a criminal case may show that proof essential to a conviction was not offered will not be ground for disturbing a conviction upon writ of error, unless some question was made upon it in the court below.—Foley v. People, 22 Mich. 227.

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all the material elements constituting the crime of perjury, and specifically assigns perjury upon two paragraphs of the answer alleged to have been falsely sworn to, and then concludes with the allegation that "the answer was not true and that the defendant did not believe it to be true," an objection that the concluding allegation is too general, and is defective because it is not a specific averment, need not be passed upon by this court, for the reason that the information contains two specific assignments of perjury to which respondent raises no objection, and in such case an objection to an insufficient assignment should have been raised upon the trial, by an exception to evidence introduced under it.—Hoffman v. Allegan Circuit Judge, 150 Mich. 58.

¶ 2422. After conviction the examining magistrate's return cannot be objected to on the ground that it failed—in the absence of an express request—to specify which one of the offenses charged, viz., rape and assault with intent to rape, there was probable cause to believe defendant guilty of.—People v. Goulette, 82 Mich. 36.

¶ 2423. On exceptions to a conviction for resisting an officer arresting a person for breach of the peace, the prosecution cannot take the position for the first time in the supreme court that respondent was arrested without warrant for being intoxicated in a public street.—People v. Johnson, 86 Mich. 175.

¶ 2424. Unless defendant requires it he cannot object that the witness did not read over testimony before signing it on a preliminary hearing.—See People v. Gleason, 63 Mich. 626; People v. Dowdigan, 67 Mich. 95.

¶ 2425. An objection to the testimony of a witness on the ground that his name is not indorsed on the information cannot be made in the supreme court when not made below.—People v. De France, 104 Mich. 563.

§ 512. Disqualification of judge, counsel or assistant to prosecuting attorney.

¶ 2426. After a conviction in the recorder's court of Detroit when held by one of the Wayne circuit judges has been affirmed on exceptions before sentence without raising the question of such judge's right to hold that court, his right to pass sentence cannot be questioned on error.—People v. Dane, 81 Mich. 36.

¶ 2427. Where counsel has been assigned to a person on trial, and has acted without objection from his client, the latter's conviction cannot be set aside on the ground that counsel was not of respondent's choice.—People v. Murray, 52 Mich. 288.

¶ 2428. An objection that the prosecuting attorney had assistance on the trial is not meritorious where no objection was made until motion for a new trial, when the assisting attorney made affidavit that he had no private interest in the prosecution.—People v. Wood, 99 Mich. 620.

§ 513. Time of trial or denial of continuance.

Necessity of motion for postponement to procure witnesses as basis for motion for new trial for absence of them, see ante ¶ 2294.

¶ 2429. Where the trial of a murder case began 17 days after the assault, a claim that the accused was "railroaded" into prison and that the court erred in refusing to delay the case, is not tenable where no application for a continuance was made.—People v. Ecarius, 124 Mich. 616.

§ 514. Admission or exclusion of evidence.

Objection to volunteered answers, see post § 515.

Necessity of renewal of objection by motion to strike, see post § 525.

Necessity of exception to ruling, see post § 526.

Offers of evidence, requisites and sufficiency of offer, see ante § 341.

Taking and making objections to evidence, see ante §§ 353, 354.

Presumptions on the record as to error in admission or exclusion of evidence, see post § 619.

¶ 2430. An objection to evidence not made at the trial cannot be urged on error.—People v. Wolf, 95 Mich. 625.

¶ 2431. A motion to strike is necessary to save the question of allowing a faulty answer to stand over a bare objection that it was irresponsive.—People v. Lyle, 124 Mich. 184.

¶ 2432. An objection that the unsworn testimony of a child over ten years of age was improperly received cannot be made for the first time on appeal.—People v. Kemmis, 153 Mich. 117.

§ 515. Volunteered answers.

¶ 2433. In the absence of a motion to strike it out, an irrelevant statement volunteered by a witness in his answer to a question was held to be harmless error.—People v. Howard, 73 Mich. 10.

§ 516. Defects in proof.

Defect shown in bill of exceptions without objection, see ante ¶ 2414.

¶ 2434. The question, in a prosecution for murder, whether there was any evidence tending to establish malice, will not be considered on error in the absence of any ruling or exception raising the point.—Burden v. People, 26 Mich. 162.

¶ 2435. Where, upon the trial of a prosecution for selling liquors without having

paid tax, no proof was offered to establish the adoption of local option in the county, and no point made that it had been adopted, the question cannot be raised for the first time on error.—People v. Wade, 101 Mich. 89.

¶ 2436. An objection that the evidence was insufficient to warrant respondent's conviction of the offense charged, and that the court should have directed a verdict of not guilty, cannot be urged for the first time on error.—People v. Smith, 106 Mich. 431.

¶ 2437. On a criminal prosecution for operating a theater without a license, contrary to the provision of a resolution of the township board, the contentions of respondent that such resolution had no application to him, and that the fee was unreasonable, cannot be considered if they were not raised in the lower court, especially where the terms of the resolution are not before this court.—People v. Richards, 150 Mich. 434.

§ 517. Errors in examination of witnesses.

¶ 2438. If no objections are made to questions asked in cross-examinations and no exceptions noted to the rulings of the court, no error can be assigned on appeal as to the admission of the testimony.—People v. Mulvaney, 171 Mich. 272.

¶ 2439. While an admonition to a quibbling witness in a criminal prosecution of what he might expect if it appeared that he was refusing to tell all that he knew, is a dangerous thing by reason of its implication, there should be an objection and an exception to present it for review.—People v. Case, 105 Mich. 92.

¶ 2440. In a prosecution for assault with intent to kill and murder, where defendant is convicted only of assault and battery, it is not reversible error to permit defendant to be cross-examined as to previous occasions upon which he had, under a claim of self-defense, drawn and threatened to use weapons, no objection being made or exception taken at the trial.—People v. Klise, 166 Mich. 1.

§ 518. Errors in order of proof or reception of evidence.

¶ 2441. Objection to the order of introduction of evidence cannot be first made on appeal.—People v. Kemmis, 153 Mich. 117.

§ 519. Failure to call state's witnesses.

¶ 2442. In a prosecution for murder, the failure of the prosecution to call as a witness one of the physicians who performed the autopsy on the victim and who removed from the body the bullet which was introduced in evidence cannot be taken advantage of for the first time on request for acquittal, if counsel did not regard this testimony of sufficient importance and benefit to the respondent to request the witness to be produced on the trial.—People v. Higgins, 127 Mich. 291.

§ 520. Erroneous argument or conduct of counsel.

Necessity for ruling on objection, see post § 524.

¶ 2443. Improper remarks made by the prosecuting officer in his address to the jury concerning the respondent cannot be assigned as error without some complaint made at the time.—People v. Haley, 48 Mich. 495.

¶ 2444. Objections to the argument of counsel to the jury will not be considered by the supreme court unless the trial court's attention was called to the matter, a ruling made and exceptions taken.—People v. Mulvaney, 171 Mich. 272.

¶ 2445. Exceptions to the argument of the prosecuting attorney need not be considered where no rulings were requested or made thereon.—People v. Singer, 174 Mich. 361.

¶ 2446. Unless the argument of the prosecuting attorney is so flagrant as to be clearly prejudicial to the respondent, a conviction will not be set aside where the attention of the trial court was not called to his argument, a ruling obtained, and an exception taken.—People v. Frontera, 186 Mich. 343.

¶ 2447. An improper argument by the prosecuting attorney contrasting foreigners with American citizens, held not so flagrant and prejudicial to the respondent as to justify the setting aside of a conviction, where the attention of the trial court was no called to the argument, a ruling obtaine and an exception taken.—People v. Fronte 186 Mich. 343.

¶ 2448. Where no objection is mad language used by the state's attorney ' the jury, as being prejudicial to defe and the court's attention is not dire it, defendant cannot complain in the court.—People v. Giddings, 159 Mic

§ 521. Failure to charge or error ir

Manner, time and sufficiency of r instructions, see ante §§ 417

¶ 2449. The sufficiency of a touched on points in the ca reviewed where the accused n for fuller instructions and no on them, the question being plemental brief that a ver stand if the record sho judge did not fully expl questions necessary to r the case.—People v. Car

¶ 2450. Where the cution for assault charge the jury on

able doubt and presumption of innocence, and the defendant makes no exception or request for such instructions, the supreme court will not reverse for this omission.—People v. Yund, 163 Mich. 504.

¶ 2451. Where an information contained two counts, one for assault with intent to murder, and the other for assault with intent to do great bodily harm, the court charged that if neither of these intents was found the respondent must be acquitted. Held, that an objection, made for the first time on error, that the court should have charged that if there was no intent respondent might be found guilty of assault and battery, came too late and could not be considered.—People v. Raher, 92 Mich. 165.

¶ 2452. That the court in a prosecution for forgery failed to explain to the jury the meaning of the words "false" and "forged," and to caution the jury that the respondent's not testifying in his own behalf was not evidence of guilt, cannot be held error where the attention of the trial court was not called to such points by respondent's counsel.—People v. Warner, 104 Mich. 337.

¶ 2453. The defense that respondent was so intoxicated as to be incapable of the intent charged (to do great bodily harm less than murder) should be called to the attention of the trial court by a request to charge, and cannot be raised for the first time on error.—People v. Carter, 117 Mich. 576.

¶ 2454. The claim that there was no charge in the information or testimony to warrant an instruction was waived by the failure of counsel to call the attention of the court to the objection.—People v. Hinshaw, 135 Mich. 378.

§ 522. Questions on custody and conduct of jury.

¶ 2455. The action of the court in a criminal prosecution for rape in permitting the jury, after retiring, to return to the court and have the stenographer read all the testimony of the prosecutrix without having submitted to it the testimony of the defendant, does not constitute error where such testimony is ordered read by the court after a request by the jury, and no request is made by the defendant that his testimony be read to the jury, and no objection is made nor exception taken to the action of the court.—People v. Smith, 192 Mich. 355.

§ 523. Sufficiency of objections; specificness.

Specification and particularity in objections to informations and indictments, see ante § 62.
Objections on trial and sufficiency thereof, see ante §§ 353-355.
Specification necessary in objections to evidence, see also ante ¶ 354.
Particularity and specification in assignments of error, see post § 586 et seq.
Objections to competency of witnesses, see Witnesses, II.
Efficacy of motion for new trial to save question, see post § 530.

¶ 2456. An exception in a criminal case, based on an objection to testimony, for which objection no reasons are given, and the ground of which is not reasonably apparent, cannot be considered on a review.—People v. Moore, 86 Mich. 134.

¶ 2457. On an appeal from a conviction of rape where, when testimony was offered, the opposing attorney simply said "Objected to," without giving any ground, and the ground of his objection not being reasonably apparent, an allegation of error based thereon cannot be considered.—People v. Moore, 86 Mich. 134.

¶ 2458. An objection to the conduct of counsel in attempting to introduce incompetent evidence must be specific in order to constitute a basis for the assignment of error.—People v. Page, 198 Mich. 524.

¶ 2459. The mere noting of an exception to objectionable arguments in a criminal case without calling it to the attention of the trial court does not save the question for review.—People v. Maczulski, 194 Mich. 193.

¶ 2460. To lay the foundation for exceptions on the ground that a hypothetical question to an expert witness embraces facts not in evidence, the attention of the trial judge should be called to the specific objection that he may determine whether there is sufficient evidence tending to prove the assumed facts.—People v. Foglesong, 116 Mich. 556.

¶ 2461. Where the objection below to allowing the stenographer to read into the evidence the testimony of a deceased witness went to the competency only of the testimony regardless of the authentication, the objection that the prosecution failed to make preliminary proof of the accuracy of the minutes cannot be raised for the first time on appeal.—People v. Peck, 147 Mich. 84.

¶ 2461a. In a prosecution under the Local Option Law against two respondents, a revenue receipt was offered in evidence and objected to as being immaterial. On appeal error was claimed in said admission on the ground that while said receipt was admissible against one of the respondents, it was not against the other. Held, under the ground of objection made at the trial, said latter ground of objection could not be raised on appeal.—People v. Adler, 169 Mich. 322.

¶ 2462. In a prosecution for burglary, testimony of a street car conductor who "spotted" respondent with two others on his car, that he did not "size them up" as railroad

men, was not assignable as error on the ground that such conductor was not shown to know how railroad men looked or dressed, as no objection was made upon any such ground.—People v. Wilson, 133 Mich. 517.

¶ 2463. An objection that an answer was not responsive does not raise the question that it volunteered incompetent matter in replying to the question.—People v. Lyle, 124 Mich. 184.

¶ 2464. On the court's declining to permit further cross-examination of a witness, the proper practice is to make known some reason why further cross-examination was desired and the subject thereof, cross-examination already having been extensive, and if then denied to except; otherwise the question is not saved.—People v. Kindra, 102 Mich. 147.

§ 524. Necessity and sufficiency of ruling on question.

On improper argument, see also ante § 520.
Necessity for renewal of objection where decision is reserved, see post § 525.
Necessity of exception to ruling, see post § 526.

¶ 2465. It cannot be urged that no ruling was made upon improper remarks of the prosecuting attorney where the record shows that respondent's counsel promptly objected and the court declined to rule and told such counsel to take an exception.—People v. Huff, 173 Mich. 620.

¶ 2466. Where counsel for defendant on a murder charge contents himself with taking exception to particular portions of the argument of the prosecuting attorney, without asking for or obtaining a ruling thereon by the court, such exception cannot be considered on appeal.—People v. Sartori, 168 Mich. 308.

¶ 2467. Where the attention of the trial court is called to an objection to the argument of the prosecuting attorney to the jury, a ruling requested, and no ruling is made, the effect of the refusal or failure to rule should be held to be the same as an adverse ruling.—People v. Sartori, 168 Mich. 308.

§ 525. Necessity of renewing objection.

¶ 2468. In a prosecution for murder a witness was called by the state, who acted as interpreter for defendant while the latter was being questioned at the county jail by the state, and was permitted without objections to testify as to what defendant said, and was cross-examined by defendant. After he had left the stand and another witness had been called, defendant moved to strike out his evidence on the ground that defendant was being compelled to testify against himself. The court reserved the decision. Defendant did not renew his motion and the court took no further action upon it. Held, the admission of the testimony did not constitute reversible error.—People v. Sartori, 168 Mich. 308.

¶ 2469. Defendant in a criminal prosecution cannot predicate error on the fact that certain testimony given by witness for the People on direct examination stated a conclusion, was hearsay and was not the best evidence where such fact was developed only on cross-examination, and, although the testimony was originally given under objection and exception, no motion to strike was made after the cross-examination.—People v. May, 199 Mich. 574.

§ 526. Necessity and office of exceptions.

To raise constitutional or jurisdictional questions, see ante §§ 510, 511.
To improper argument of counsel, see also ante ¶ 2444.
Where error works manifest injustice or denies fair trial, see post § 527.
Motion for new trial to save objections, see post § 530.
Sufficiency of exceptions, see post § 528.
Sufficiency of marking of requests to admit of review without exceptions, see ante § 421.
Power to sentence before settlement of exceptions, see ante § 485.
Suspension of sentence to permit preparation of exceptions for review, see ante § 494.
Necessity and office of the bill of exceptions, see post §§ 590 et seq., 604.
Exceptions before sentence as mode of review, see post §§ 569, 581.
Statutory dispensation with exceptions charge, see Comp. L. 1915, § 14576.

¶ 2470. Assignments of error canno considered if unsupported by excepti People v. Mills, 94 Mich. 630.

¶ 2471. Errors in a criminal case considered on appeal, must be excep People v. Van Driesche, 154 Mich.

¶ 2472. Where an information slaughter caused by abortion (Co § 7542, How. St. § 9107) was n its face as applied to ordinary assault, but was bad as app slaughter by abortion because averred, it was held that the sufficiency did not arise dir record but on the bill of ex fect not being apparent u came in; the error lay in viction on it.—People v. C 431.

¶ 2473. Admission of is not ground for setti if no exception was t cott, 51 Mich. 612.

¶ 2474. A ruling c to cannot be revie Summers, 115 Mich

¶ 2475. Admission of testimony over objection must be excepted to, or it cannot be reviewed.—People v. Summers, 115 Mich. 537.

¶ 2476. The sustaining of an objection to a question cannot be complained of in the absence of an exception.—People v. Hilliard, 119 Mich. 24.

¶ 2477. Not only must objection be made to the admissibility of evidence but an exception must be taken to the ruling of the court.—People v. Thorne, 148 Mich. 203.

¶ 2478. Assignments of error relating to the exclusion of testimony will not be considered on appeal where no exceptions were taken to the rulings of the court.—People v. Muste, 137 Mich. 216.

¶ 2479. Where the defendant made a motion to strike out certain testimony given on cross-examination, which was granted by the court, and neither party excepted to the ruling, there is no ground for the defendant to assign error on appeal.—People v. Mulvaney, 171 Mich. 272.

¶ 2480. Failure to except to the admission of evidence prevents a review of the question on error though a motion is made for new trial on that ground.—People v. Auerbach, 176 Mich. 23.

¶ 2481. An objection to the admission of testimony cannot be considered on error in a criminal case where no exception is taken.—People v. Breen, 192 Mich. 39.

¶ 2482. The court's neglect in criminal cases properly to charge the jury upon a material point may be taken advantage of on error without having been excepted to at the trial.—People v. Murray, 72 Mich. 10; People v. Macard, 73 Mich. 50; People v. McGuire, 89 Mich. 64.

¶ 2483. Where improper remarks by the prosecuting attorney had been excepted to, the court's neglect to grant a request made for the purpose of curing prejudicial effect of such remarks was held reviewable though no exception thereto was taken at the trial.—People v. McGuire, 89 Mich. 64.

¶ 2484. Failure to explain the elements to be proved in a statutory crime will not be reviewed, if not excepted to.—People v. Thorne, 148 Mich. 203.

¶ 2485. Additional instructions given after retirement may be reviewed like those first given.—People v. Hoffman, 142 Mich. 531.

¶ 2486. Though Comp. L. 1897, § 10247, permits, without exceptions, the review of errors in charging or refusing to charge the jury, the court has no authority to review a ruling ordering a juror to be sworn though he was not a taxpayer and such fact was brought to the attention of the court and counsel, where no exception was taken to such ruling.—People v. Albers, 137 Mich. 678.

¶ 2487. Where in a murder case no exceptions are claimed or filed to the reasons for the order or the order itself denying the motions for a new trial, the supreme court cannot consider said motions.—People v. Sartori, 168 Mich. 308.

§ 527. ——Errors affecting fairness of trial; manifest injustice.

Flagrantly improper argument, see also ante ¶¶ 2446, 2447.
Self-induced lack of fair trial by failure to object, see also post ¶ 2492.

¶ 2488. If the supreme court in a criminal case sees, upon a review of all the proceedings which have resulted in a respondent's conviction, that a fair trial has not been had, it is its duty, under the general superintending power and control over inferior courts conferred by its appellate jurisdiction, to set aside such proceedings and order a new trial, even though the proper objections and exceptions have not been taken.—People v. Murray, 72 Mich. 10.

¶ 2489. Where error is assigned on the court's charge, no instructions having been asked or exceptions taken, objections to the charge will not be considered unless they are substantial and calculated to do justice.—People v. Jensen, 66 Mich. 711.

¶ 2490. Where no request to charge has been made, and no exception for failure to charge the jury on a material point in a criminal case has been taken, the supreme court will not reverse unless a manifest injustice has been done.—People v. Brott, 163 Mich. 150.

§ 528. Sufficiency of exception.

Meaning, application and effect of exception, see post § 529.
Exception to argument as saving refusal to give cautionary charge to jury, see also ante ¶ 2483.
Reduction of exceptions to writing and settlement of bill, see post § 593.
Sufficiency of the bill of exceptions, see post § 592 et seq.
Necessity of showing error affirmatively by record or bill of exceptions, see post § 595.
Presumptions on the record, see post § 617 et seq.

¶ 2491. When the record shows that a prisoner on trial demanded, and, after refusal, insisted upon, the right to poll the jury, and protested against the record of the verdict without it, the absence of specific exception in any other form does not preclude the raising of this question.—Stewart v. People, 23 Mich. 63.

¶ 2492. One who makes no objection or exception to admission or exclusion of evidence cannot assign the rulings of the court thereon as error consisting in the lack of an impartial and fair trial; since if it was lacking the lack was due to the failure to object.—People v. O'Brien, 92 Mich. 17.

§ 529. Construction and meaning of exceptions.

Construction of the record and presumptions thereon, see post § 611 et seq.

¶ 2493. Where the witness refused to answer a question, and the court ruled that it need not be answered before an exception could be taken to the question, it cannot be insisted on appeal that the exception which was entered was meant to be to the language of the court, where such a claim is not warranted by the exception; and the language of the court is not objectionable.—People v. Mulvaney, 171 Mich. 272.

§ 530. Questions preservable by new trial motion.

See also ante ¶ 2480.

¶ 2494. It is a doubtful practice to save questions by specifying matters occurring at the trial as ground for new trial and then assigning each several ground as error entering into the denial of a new trial. Such practice raises the particular questions only by indirection, since the granting of a new trial is largely discretionary; but where the assignments were so made and treated as good, the court considered them.—People v. Frey, 112 Mich. 251.

§ 531. Waiver of errors.

Waiver and cure of objections to information or indictment, see ante § 65.
Waiver of objections by plea or trial to merits, see ante §§ 117, 118.
Waiver of exceptions or objections after making, see post § 532.
Errors in information or indictment waived by want of objection below, see also ante § 511.
Cure of error by subsequent action of objector himself, see post §§ 554, 555.

¶ 2495. Where, after the charge in a criminal case, the court inquires of the defendant's counsel whether the charge covers his points, and the latter replies that he is entirely satisfied, he waives his right to assign errors to the charge, even under the statute (Act No. 52, Pub. Acts 1901) which permits errors to be assigned, though not excepted to.—People v. Van Driesche, 154 Mich. 158.

¶ 2496. The refusal of the trial court subsequent to the passage of Pub. Acts 1881, No. 245, to allow respondent to make an unsworn statement, though objectionable was waived by his subsequently being sworn as a witness on his own behalf and testifying and being cross-examined.—People v. Reilly, 53 Mich. 260.

¶ 2497. Where an information was verified before the clerk of the court the objection that in signing the jurat he did not add his official title is waived if not taken before trial and conviction.—People v. Murphy, 56 Mich. 546.

¶ 2498. Objections to a complaint and warrant for maliciously trespassing upon improved lands for not describing the premises trespassed upon and the kind of grain intended to be destroyed are waived unless seasonably made below.—People v. O'Brien, 60 Mich. 8.

§ 532. Waiver and abandonment of objections or exceptions.

Waiver of the error or defect itself, see ante § 531.
Waiver of objection to mode of review, see post § 579.
Cure of error by subsequent action of accused, see post §§ 554, 555.
Waiver of objections to competency of witnesses, see Witnesses, II et seq.

¶ 2499. When a challenge to the array has never been presented to or passed upon by the court it will be considered as having been waived. For example, where during an argument upon the matter of such challenge it appeared it was not in writing, and the oral challenge was overruled, and counsel asked permission to file a written challenge later, and to have it treated as filed, and the court asked to see it when filed and it was filed three days later but had never been drawn to the attention of the court it was waived.—People v. Tubbs, 147 Mich. 1.

¶ 2499a. Where, in a prosecution for violation of the Local Option Act, the evidence is such as to require the court to submit to the jury the question of the respondent's intent to violate the act in furnishing liquor to a friend, respondent does not waive his right to have the question so submitted by insisting that he is entitled to a directed verdict.—People v. Slater, 164 Mich. 156.

XV. HARMLESS ERROR AND GROUND FOR REVERSAL.

§ 533. In general; technical or unsubstantial errors.

Wrong reasons for correct ruling as harmless error, see post § 535.
Errors favoring accused, see post § 536.
Self-committed or invited errors, see post § 537.
Particular errors and classes of errors in course of trial, see post §§ 538-550.
Curing errors by other incidents and rulings or by verdict, see post §§ 551-567.
Aggravation or mitigation of the error by condition of the case or of proofs, see post § 534.

Substantial nature of right to have names of witnesses indorsed on information, see ante §§ 20, 21.
Declination of points not material or necessary to proper decision of the case, see post § 607 et seq.
Necessity of showing in the record as to the effect of the error, see post § 595.
Presumptions on review as to harmfulness or harmlessness of error, see post § 627.
[Note. The harmless error doctrine as applied in civil cases is fully treated in the topic Harmless Error.]
Statutory rule against reversal except for error resulting in miscarriage of justice, see Pub. Acts 1915, No. 89.

¶ 2500. The court on appeal ought not to reverse a judgment for error in the admission or exclusion of evidence, where such error was without prejudice.—People v. Ryder, 151 Mich. 187.

§ 534. Aggravation or mitigation of error by other matters or strength of case.

¶ 2501. A conviction should be set aside that is based on directly conflicting testimony concerning a vital point, if rigid cross-examination has not been allowed.—People v. Long, 50 Mich. 249.

¶ 2502. Where, in a criminal action, defendant produced a witness who testified that the reputation for truth and veracity of a witness for the people was bad, error in refusing to allow him to answer the further question whether he would believe the latter under oath, will not reverse, where the evidence so clearly establishes guilt that the jury could not have been prejudiced.—People v. Ryder, 151 Mich. 187.

¶ 2503. Language of a prosecutor in a criminal case, although subject to criticism in some particulars, will not reverse where the court is of the view that had the jury not found the defendant guilty, it would have been a miscarriage of justice.—People v. Dowdall, 124 Mich. 166.

¶ 2504. The disregard of the rule as to the impeachment of witnesses by first interrogating as to the time, place and conversation had with a witness, is error warranting the reversal of a conviction for robbery committed about ten o'clock in the evening, where the defense is an alibi, and where the sister of the accused testifies that she left her home after supper, when the accused also left and returned about nine o'clock, going to bed at eleven o'clock, during all of which two hours the accused was present playing cards, and where no questions were asked such sister as to a conversation with another person who took the stand and swore that the sister stated to him that the accused was home all evening. The sister's evidence was very material, although the impeachment was as to an immaterial matter, and the jury were not instructed to disregard the testimony of the third person.—People v. Riede, 121 Mich. 700.

¶ 2505. In a prosecution for having carnal knowledge of a girl less than fourteen years old, a witness for the prosecution, after testifying that about a year before the commission of the offense, while the girl was at her house, she noticed respondent taking hold of her arm and pulling her around, added that her husband spoke of it at the time. In his closing argument the prosecuting attorney referred to the testimony as showing that respondent made improper overtures to the girl, and used it as a basis of a claim that the parties were guilty of undue intimacy. Held, that denial of respondent's motion to strike out the testimony respecting the husband's remark was made more harmful by the argument.—People v. Duncan, 104 Mich. 460.

§ 535. Wrong reasons for correct decision or ruling.

¶ 2506. The giving of a wrong reason for admitting testimony is not prejudicial error if the testimony was for any reason admissible, and the jury is properly instructed concerning the use to be made of the testimony.—People v. Collins, 144 Mich. 121.

¶ 2507. Where the trial court has directed a verdict of guilty, and the jury has followed such direction, and the facts are admitted or undisputed, so that the only question is one of law, applied to such facts, a new trial will not be granted if the supreme court is satisfied that the law was rightly applied.—People v. Neumann, 85 Mich. 98.

¶ 2508. A correct exclusion of offered impeachment on a bad objection that no foundation was laid and without objection to the form of the question, which was in bad form, is not reversible error.—People v. Considine, 105 Mich. 149, per Long, J., Grant, J., concurring, and Hooker, J., concurring in the result.

§ 536. Errors favoring accused.

Admission of improper evidence favoring accused, see post § 541.
Continuance by justice at request of accused for more than legal time, see post ¶ 2973.
Less than legal punishment as harmless error, see ante § 489.

¶ 2509. Sentencing to imprisonment in the state prison for a term less than the minimum fixed by the statute for the offense cannot be assigned as error being an irregularity beneficial to respondent.—People v. Burridge, 99 Mich. 343.

¶ 2510. One informed against for larceny of goods above the value of $25 cannot complain of a conviction upon a finding that the goods are worth less than that sum.—People v. Jacks, 76 Mich. 218.

§ 537. Self-committed or invited error.

Invited improprieties in argument, see ante § 391.

¶ 2511. One accused of perjury who had made application for a mandamus to compel the prosecuting attorney to indorse the names of two persons confined in the state prison, and to produce them as witnesses on behalf of the people at his trial, which application was denied, and who thereupon procured the depositions of the two convicts to be taken, cannot complain of the admission of the depositions in evidence where his attorney read them to the jury; he being under no compulsion to read them.—People v. Fay, 89 Mich. 119.

¶ 2512. The fact that erroneous language in an instruction is taken from a request prepared by defendant's counsel, does not cure the error.—People v. Cismadija, 167 Mich. 210.

¶ 2513. One who has brought out in his cross-examination damaging evidence is not in a position to complain of its introduction, where the court had permitted him full inquiry into details over the objection of the prosecuting attorney.—People v. Thorne, 148 Mich. 203.

§ 538. Particular errors and defects in procedure.

Immateriality of defects in indictments, see ante § 49 et seq.

Immaterial misnomer or misdescription in indictment, see ante § 51.

Impossible dates in indictment, see ante § 53.

Sufficiency of indictment with one good count, see ante § 55.

Waiver of objection to irregular indorsement of names of witnesses, see also ante ¶ 91.

Improper evidence before grand jury, see also ante ¶ 354.

Effect of absence of formal plea where trial was had on merits, see also ante § 105.

Improper custody of jury after agreement on verdict, see also ante ¶ 2233.

Wrong reason for correct ruling, see ante § 535.

Cure of errors by other incidents and rulings in trial, see post § 551 et seq.

Presumption as to harmfulness, see post § 627.

[Note. The section lines which follow describe the successive stages and incidents of trial in which the errors were committed. Consult them.]

Provision that judgment shall not be wholly but only partly reversed for excessiveness in punishment, see Comp. L. 1915, § 15857.

¶ 2514. A respondent is not prejudiced by the action of the prosecuting attorney in indorsing the names of several witnesses upon the information after it had been filed, where the only one of such witnesses sworn on the trial is one because of whose absence respondent moved for a continuance.—People v. Burwell, 106 Mich. 27.

¶ 2515. A conviction will not be reversed because of the failure of the prosecution to produce a witness whose name was indorsed upon the information, where it appears that such witness was beyond the jurisdiction of the court, and that all evidence of the transaction in regard to which he was to testify was stricken out by the trial judge.—People v. Berry, 107 Mich. 256.

¶ 2516. The surrender of a codefendant by the bondsmen and the taking of new bail in the presence of the jury held not prejudicial error in a prosecution for murder.—People v. MacGregor, 178 Mich. 436.

¶ 2517. The denial by the trial court of a motion for a change of venue for local prejudice will not be reversed on error where no difficulty was experienced in drawing an impartial jury, respondent having used no peremptory challenges.—People v. Burke, 157 Mich. 108.

§ 539. ——In formation of jury and rulings on challenges.

Swearing jury before order for separate trial of coindictees, see also Jury, V.

¶ 2518. Overruling a challenge for cause is harmless where the right to dismiss the objectionable juror by peremptory challenge is still open and is not used.—People v. Barker, 60 Mich. 277; People v. Aplin, 86 Mich. 393.

¶ 2519. An improperly sustained challenge for cause in a criminal case prejudices a respondent in no substantial right where it does not appear that the regular panel of jurors was exhausted, or that the people had exhausted their peremptory challenges, or that any objection was made by respondent to the competency or impartiality of the jury which was obtained.—People v. Fowler, 104 Mich. 449.

¶ 2520. A complaining witness and several jurors were the same in defendant's trial for larceny as in a preceding case against another person charged with an offense in no way connected with that of defendant. The trial court refused to permit a juror on his voir dire examination to state whether he had an opinion as to the credibility of the complaining witness, and overruled defendant's challenge for cause directed against the juror. Defendant did not exhaust his peremptory challenges. Held, no error was committed in permitting the juror to sit in defendant's case.—People v. Wright, 170 Mich. 154.

¶ 2521. It is reversible error to refuse to permit a juror upon his voir dire to answer the question "suppose that you ascertain that the testimony is evenly balanced in your

mind (that is, as much upon one side as upon the other, and entitled to the same weight and credence), which way would you be inclined to lean—for or against the defendant?" and the fact that council has not or does not use peremptory challenges does not affect the question.—People v. Peck, 139 Mich. 680.

¶ 2522. Respondent is not aggrieved by the refusal of the court to permit a juror who has sat in a prior case involving the same transaction, to answer the question whether the fact of his sitting in the prior case and having heard the testimony, would affect his judgment in the pending case, where the testimony of the only witness who had also testified in the prior case, was improperly admitted.—People v. Albers, 137 Mich. 678.

¶ 2523. A conviction for murder will not be reversed on the ground that defendant's counsel was not allowed to examine a juror upon the condition of his health and his physical ability to sit during a long trial, where it appears the trial was short and the juror sat through it without apparent injury to his health, and it does not appear that his health or physical condition affected his verdict.—People v. Oblaser, 168 Mich. 227.

§ 540. ——Admission of improper evidence or witnesses.

Calling incompetent witness as harmless error, see also ante ¶ 1566.
Improper evidence favoring accused, see post § 541.
Volunteered testimony, see post § 543.
Improper order of receiving proofs, see post § 546.
Cure by admission of other proofs, see post § 552.

¶ 2524. The court must exclude irrelevant testimony, but when that is admitted which cannot influence the jury to believe the defendant guilty, or prejudice them against him or his witnesses, and the court can see that harm could not result, the judgment will not be reversed.—Strang v. People, 24 Mich. 1.

¶ 2525. A conviction will not be reversed for admitting testimony without which it is perfectly evident that a verdict of guilty should have been rendered.—People v. Owen, 154 Mich. 571.

¶ 2526. In a prosecution for larceny of a watch from a man asleep, there was no fatal error in allowing a witness to testify as to what the sleeper said when he woke up, or what those present said, if the remarks had no tendency to implicate any one.—Hall v. People, 39 Mich. 717.

¶ 2527. In a prosecution for keeping a house of ill-fame, it was in proof that an officer was furnished money by the county to be used in an effort to ascertain the character of the house, and that he made use of a man accompanying him to entrap the defendant. The officer testified to certain conduct between his companion and an inmate of the house. But as there were other circumstances, entirely disconnected from the officer in question, tending to establish respondent's guilt, a conviction was sustained.—People v. Wright, 90 Mich. 362.

¶ 2528. The coroner's clerk, called as a witness on a prosecution of the coroner for obtaining money of the state by a false claim that a person was a "stranger" on whose body an inquest was held, may as a witness testify that he took the statements of two doctors that deceased was a stranger for the purpose of making a showing that the state was liable for the fees, though it does not appear that he had any direction from or understanding with accused to take them for that purpose, where it also appears that the statements went into the coroner's records and from those records the reason equally well appears to the jury.—People v. Hoffman, 142 Mich. 531.

¶ 2529. In a criminal prosecution the fact that a deputy sheriff testified to a statement made by defendant's wife indicating his guilt is not prejudicial error where no objection was made thereto, and it was largely a repetition of the testimony of the witness upon cross-examination, and was partly adduced by defendant's counsel in support of the theory of the defense, and it was later contradicted by the wife, but would have been proper on rebuttal even under objection.—People v. De Camp, 146 Mich. 533.

¶ 2530. In a prosecution for murder, it is not reversible error to admit testimony as to an arrangement made between the deceased and one of the defendants for the former to go to a certain place and get a bicycle previously loaned to deceased by said defendant, where said evidence appears to be in nowise prejudicial to defendants.—People v. Sartori, 168 Mich. 308.

¶ 2531. Testimony of the complaining witness in a prosecution for an assault with intent to commit rape on a female under the age of sixteen years, as to what her uncle did towards learning the identity of the assailant on being told by her of the occurrence immediately after the alleged assault, held improper but not prejudicial to the respondent where the uncle merely tried to learn his name.—People v. Harrington, 186 Mich. 482.

¶ 2532. In a prosecution for seduction testimony that prosecutrix's mother was insane and that her father did not care for her after she was 14 years of age, is not admissible; but its admission, where preliminary simply, will not require reversal.—People v. Payne, 131 Mich. 474.

¶ 2533. On an indictment for obtaining money for a coroner's inquest from the state by false pretenses, immaterial testimony as

to property possessed by the deceased is not prejudicial to accused.—People v. Hoffmann, 142 Mich. 531.

¶ 2534. It was harmless error to allow a physician to state on a hypothesis what would have been a proper fee for making a post mortem examination, where the issue was as to whether accused had defrauded the state by charging for a fee not paid for such service, and the testimony was that none was charged or paid, and where lay knowledge suffices to show that in one case no post mortem would have been necessary, while as to others the value of the service might vary.—People v. Hoffmann, 142 Mich. 531.

¶ 2535. In a prosecution under Pub. Acts 1911, Act No. 62, How. 2nd Ed., § 5299, prohibiting the advertisement of the treatment of "venereal diseases," "lost manhood," and "lost vigor," evidence of a physician as to what was meant in medicine by venereal diseases and that the other terms had no medical significance, is not prejudicial to the defendant.—People v. Kennedy, 176 Mich. 384.

¶ 2536. On a trial for larceny of a cow which a witness claimed to have bought from defendant, whom he had never seen before the sale, held that the action of the court in allowing the witness to show how and in what manner he subsequently identified the defendant, was harmless error.—People v. Eagle, 189 Mich. 404 (Bird, Moore, and Kuhn, JJ., dissenting).

¶ 2537. Where a respondent on trial for murder had been examined as a witness in his own behalf, to draw from him on cross-examination testimony that he had been divorced was not, even if improper, such error as to justify reversal.—People v. Parmelee, 112 Mich. 291.

¶ 2538. Where, in an action for larceny, counsel for the accused sought to obtain an admission from the prosecuting witness that he had tried to settle by obtaining from defendant certain sums of money, the admission on redirect examination of testimony of the witness as to offers of settlement from the defendant's wife and another, if error, is not prejudicial, it appearing that those persons had no authority to speak for defendant.—People v. Ryder, 151 Mich. 187.

¶ 2539. Certain letters and a photograph of defendant, in a prosecution for murder, admitted on his cross-examination to show his untruthfulness as a witness and the manner of man he was, held not relevant to the case and might well have been excluded, but its admission not reversible error.—People v. Winney, 196 Mich. 347.

¶ 2540. Upon a prosecution for taking improper liberties with the person of a female child six years of age, the admission of evidence that the complaining witness had stated that she had previously been subjected to similar treatment by another person, the accused having no connection therewith, is harmless error.—People v. Walker, 113 Mich. 367.

¶ 2541. In a prosecution for assault with intent to commit rape on a girl 13 years of age, the admission of testimony concerning a conversation between the girl, a detective and others immediately after the alleged assault in the absence of respondent is not prejudicial to him when none of the conversation is related.—People v. Dupree, 175 Mich. 632.

¶ 2542. It was not harmless to allow the wife to testify on a trial of the husband for murder of one of their children, where though he admitted the shooting it was not in such sense as to be equivalent to a plea of guilty on which the court might have determined the degree without submission to the jury of the evidence.—People v. Gordon, 100 Mich. 518.

§ 541. ——Improper evidence favorable to accused.

¶ 2543. One cannot complain because the opposing party offers in evidence a part only of a printed article or statement, where the admission of the rest could have had no other effect than to injure instead of benefiting the party objecting.—People v. Coughlin, 67 Mich. 466.

¶ 2544. The admission of the statement of an accomplice, explanatory of his condition shortly after a crime, is not prejudicial error, where they tended to exclude respondent's presence at the time to which they related.—People v. Cleveland, 107 Mich. 36

¶ 2545. The admission of incompetent mony in rebuttal by the people in a cution for murder held not prejudici where such testimony tended to sup plea of self-defense.—People v. C Mich. 6.

¶ 2546. The admission in a for wife desertion of evidence th had trouble with his father c wife, that he struck his father father swore out a warrant was not prejudicial error, w done was in defense of th against her.—People v. Sch 497.

¶ 2547. Where the fact in a prosecution for an to kill, clearly indicate mission of a written, defendant intended t saulted, and then to error, is not prejudi to prove the defens Owen, 154 Mich. 5 JJ., dissenting).

§ 542. ——Improper exclusion of evidence.

¶ 2548. Where in an indictment for embezzlement the good or bad faith of the defendant is, under the statute, immaterial, it is harmless error to exclude evidence on the part of the state of facts showing good faith.—People v. Glazier, 159 Mich. 528.

¶ 2549. On a trial for larceny of a cow, refusal to admit evidence by a stock buyer as to whether he thought that the skull produced in evidence belonged to any particular cow held not erroneous where the witness had already testified that he could not say.—People v. Eagle, 189 Mich. 404.

¶ 2550. Exclusion of testimony by a respondent as to his statement to his brother-in-law to whose house he went early in the morning after the alleged commission of the rape in question, and before leaving the state, that such brother-in-law had no authority to settle the case for him, was not injurious, where respondent had testified that he never authorized any one to settle the matter for him and that he wrote his brother-in-law not to settle.—People v. Rich, 133 Mich. 14.

¶ 2551. In a criminal prosecution against a father for manslaughter of his child, alleged to have been effected by a course of ill treatment by defendant and his second wife, and by malnutrition, where an expert medical witness for the People stated on cross-examination that the girl did not have pyemia, held that the exclusion of the answer to the further question as to how pyemia manifests itself, although improper, was not reversible error, under the circumstances of the case.—People v. Eaton, 196 Mich. 715.

¶ 2552. In a criminal prosecution against a father for manslaughter of his child, alleged to have been effected by a course of ill treatment and by malnutrition by defendant and his second wife, where the defendant's mother had testified that at the time she came to live as a member of the family the child was not strong and had a great deal of trouble with her stomach and vomited often, held that the exclusion of the answer to a further question as to what the child had eaten which made her sick was not prejudicial error, where it had occurred six or seven years before the child's death and the witness was allowed to testify fully as to her condition at that time.—People v. Eaton, 196 Mich. 715.

¶ 2553. The fact that a witness in a criminal action knows nothing of defendant's reputation in the community where he lives renders his testimony thereon valueless, and error in excluding a proper question put to him, is error without prejudice.—People v. Ryder, 151 Mich. 187.

¶ 2554. It was not reversible error to refuse to allow recall of a court stenographer to lay a foundation for impeachment by the testimony given on a former trial which the stenographer heard, where objection that no foundation was laid had been sustained but such objection was untenable, though one to the form of the impeaching question might have been made and was not made.—People v. Considine, 105 Mich. 149, per Long, J., Grant, J., concurring, and Hooker, J., concurring in the result without opinion on this point.

¶ 2555. Whether or not a communication from a sheriff to a detective employed to uncover crime is privileged as a matter of public policy, it was harmless to rule it out as privileged and also as immaterial, where the witness's testimony plainly showed that he had already answered as fully as he could about what his arrangement was with the sheriff and could not recollect what the sheriff said.—People v. Hilliard, 119 Mich. 24.

¶ 2556. It was not prejudicial error to strike out evidence of admission of guilt on the part of defendant, made after his arrest, on a prosecution for forgery, even though it is not clear that the ruling was correct; where it is not clear that the statements made by defendant implied guilt.—People v. Tollefson, 145 Mich. 444.

§ 543. ——Volunteered testimony.

Volunteered answer without motion to strike, see also ante ¶ 2433.
Cure of error by striking out answer, see post § 561.

¶ 2557. A witness cannot bring error into a case by volunteering inadmissible testimony that is immediately stricken out by the trial judge.—People v. Mead, 50 Mich. 228.

¶ 2558. On a prosecution for having burglar's tools in possession where a conversation was admitted to show the relations of accused to one B., and then that B. was a burglar, to show the intent with which the tools were possessed, an irresponsive answer, volunteered to a question about B.'s occupation, that B. was then in state's prison was improper, and should have been stricken out; but respondent not having moved to strike it out, was harmless error in view of respondent's own testimony.—People v. Howard, 73 Mich. 10.

¶ 2559. In a criminal prosecution for larceny of cattle, volunteered testimony concerning other thefts which is immediately stricken out by the court is not reversible error.—People v. Carey, 125 Mich. 535.

¶ 2560. The volunteered testimony of a witness that the name by which a respondent went was not his true name, was not error where the witness had not been asked about such matter and where upon being asked by the court whether he knew respondent's true name, he answered that he did not.—People v. Wilson, 133 Mich. 517.

§ 544. ——Improper examination and cross-examination or offers of proof.

¶ 2561. The error in allowing a witness to be asked questions which require him to state legal conclusions will not require a reversal if the conclusions are legally correct. —People v. Brown, 53 Mich. 531.

¶ 2562. The mere asking by the prosecution in a criminal case of incompetent questions which are ruled out by the court, and where the ruling is accepted without any statement of what is proposed to be proved, does not require reversal on the ground that they might have prejudiced the jury.—People v. Pyckett, 99 Mich. 613.

¶ 2563. The attempt of the state, in a criminal prosecution for murder, to introduce incompetent testimony does not constitute prejudicial error where the court promptly rules that it would not be competent and the jury is cautioned to pay no attention to it.—People v. Page, 198 Mich. 524.

¶ 2564. Accused on the stand admitted having been convicted of a prior assault upon the complaining witness, and was asked further questions regarding the details of such assault. Objections interposed to such questions were promptly sustained by the court, who also instructed the jury that the fact of such conviction was admissible solely as bearing upon the credibility of the witness. Held, that respondent was not prejudiced, even if it was error to ask such questions.—People v. Conley, 106 Mich. 424.

¶ 2565. Elicitation of answers from a defendant in a criminal prosecution on cross-examination by the prosecutor, concerning previous crimes committed by the defendant, in which the stating of details in such crimes was largely voluntary on the defendant's part, held not reversible error.—People v. Kimbrough, 193 Mich. 330.

¶ 2566. Compelling accused on the stand in his own behalf to place an iron bar in his pocket to show that it could thus have been carried in a concealed position preparatory to the murder, if self-criminatory, is harmless where the same demonstration might have been made by the prosecuting attorney taking the bar in the same manner.—People v. Ecarius, 124 Mich. 616.

¶ 2567. The fact that a witness was permitted to read from books in evidence is not error, where there is nothing to show that a false reading was made.—People v. Hoffmann, 142 Mich. 531.

§ 545. ——Omission of or defect in proofs.

¶ 2568. Respondent in a criminal action can hardly complain of the omission to give attainable evidence of res gestæ when enough to convict him has already been given without contradiction.—People v. Coffman, 59 Mich. 1.

¶ 2569. In a prosecution for malicious injury to a fence, where defendant claimed that the deeds to the land in question introduced in evidence failed to prove title as alleged, the point was unavailing where it also appeared that the ground had been occupied by the alleged owner for a longer period than that required by the statute of limitations.—People v. Ferguson, 119 Mich. 373.

§ 546. ——Improper order of proofs.

¶ 2570. Where the respondent has not been prejudiced, the admission of evidence out of its proper order does not constitute ground of reversal.—People v. Durfee, 62 Mich. 487.

¶ 2571. It is not necessarily reversible error to admit in rebuttal evidence for the prosecution that should have been offered in chief where such evidence could not have prejudiced respondent.—People v. Cox, 70 Mich. 247.

§ 547. ——Erroneous restrictions on argument.

¶ 2572. Respondent in a criminal case cannot complain of a limitation of time for argument, where his counsel did not use all the time assigned to him.—People v. Van Alstyne, 157 Mich. 366.

§ 548. ——Improper arguments, remarks and misconduct in trial.

Prejudicial nature and effect of improper arguments, see also ante § 374 et seq.

¶ 2573. A conviction in a criminal cas will not be reversed because of impassion arguments of the prosecuting attorney unl such arguments were unwarranted by evidence and probably contributed to the viction.—People v. Peck, 147 Mich. 84; P v. Sharp, 163 Mich. 79.

¶ 2574. A verdict will not be set a alleged improper remarks of the pro officer in his argument to the jury, clear case of abuse is shown, wh respondent's rights were prejudic v. Gosch, 82 Mich. 22.

¶ 2575. On assignments of er proper argument of counsel, resort will interfere by granti only where the attorney has the evidence and the line of ment, to the evident preju site party.—People v. Tubl

¶ 2576. A conviction w because of improper re cuting attorney which fluenced the jury.—Pe Mich. 371.

¶ 2577. A convicti because of alleged prosecuting attorn departed from the legitimate argume son would conclu

diced thereby.—People v. Conley, 106 Mich. 424.

¶ 2578. Where in arguing a murder case before a jury, the prosecuting attorney fails to make a clear distinction between facts sworn to by witnesses and his own inferences therefrom, the judgment will not be reversed on this account, where it appears that in view of all the testimony the jury could have honestly reached no other verdict than the one returned.—People v. Oblaser, 168 Mich. 227.

¶ 2579. Remarks of counsel to the jury which on their face and unexplained are not very intelligible and appear somewhat unseemly, and which are in the nature of retorts in answer to comments of opposing counsel, held not ground for reversal.—People v. Davis, 171 Mich. 241.

¶ 2580. Remarks of the trial court to counsel in regard to the order of proof and admission of evidence in a murder trial, held not to have prejudiced the defendant.—People v. Kimbrough, 193 Mich. 330.

§ 549. ——Instructions and refusals or omissions to instruct.

¶ 2581. A judgment will not be reversed for an error in the charge that could not have misled the jury.—People v. Scott, 6 Mich. 287.

¶ 2582. Reversal will not be granted for wrong instructions to the jury upon an abstract point not called for by the case and wholly ineffective.—People v. Marble, 38 Mich. 117.

¶ 2583. There is a miscarriage of justice necessitating the reversal of a case where the trial court affirmatively denies by means of instructions to an accused the benefit of an elementary rule favorable to him upon which, by the giving of testimony which invoked the application of the rule, he relied.—People v. Humphrey, 194 Mich. 10.

¶ 2584. Where there is a plain conflict of testimony, and one side or the other must be believed without qualification, there is no room for a "reasonable doubt," and an error in defining it to the jury is immaterial.—People v. Marble, 38 Mich. 117.

¶ 2585. An instruction defining reasonable doubt as a doubt arising out of the facts and circumstances of the case, in maintaining which the jury could give some good reason, was regarded by two justices as harmless, though not, perhaps, strictly accurate, the facts being susceptible of but one conclusion.—People v. Stubenvoll, 62 Mich. 329.

¶ 2586. An instruction that the presumption of innocence continues to surround the respondent until removed by evidence convincing the jury, beyond a reasonable doubt, of his guilt of the offense charged in the information, "or any other offense," is not error requiring reversal, where there is no evidence of the commission of any offense other than that set forth in the information.—People v. Resh, 107 Mich. 251.

¶ 2587. A judge's favorable comments upon the character of witnesses, though scarcely proper, are not clearly erroneous if borne out by undisputed evidence.—People v. Gibson, 58 Mich. 368.

¶ 2588. In a criminal trial improper hypothetical questions containing in substance the ordinary facts about the crime to be proved by the People, and upon which the jury were as competent to pass as were expert witnesses, were permitted to be answered by medical experts. The judge in his instructions commended medical witnesses in general. Held, such commendation in connection with such hypothetical questions constituted error prejudicial to defendant.—People v. Fritch, 170 Mich. 258.

¶ 2589. In a prosecution for hawking and peddling without a license, the court stated to the jury that in his opinion the defendant had violated the statute. He, however, gave the jury the privilege of retiring to their room, selecting a foreman, and returning a verdict, which privilege the jury exercised, and found the defendant guilty. Held, the record having disclosed that the opinion of the court was undoubtedly correct, the conviction should not be reversed.—People v. Stewart, 167 Mich. 417. Reversed in 232 U. S. 665, 58 L. ed. 786, 34 Sup. Ct. Rep. 476.

¶ 2590. An inadvertent misstatement of an item of testimony by the trial judge in his instructions to the jury is not ground for a reversal, where the remark passed unchallenged at the time, and was apparently not prejudicial.—People v. Caldwell, 107 Mich. 374.

¶ 2591. Where the attempt had been made to show that one who had confessed to a crime was insane at the time of confessing, and the record clearly implied that there was no evidence of that fact, though it disclosed some evidence on the one hand that he was insane a day and a half or two days after, and on the other that he was never insane at all, the rulings of the trial court on the question of such insanity, and the burden of proof and the nature of the evidence on that subject, were held immaterial and not to be assigned for error.—Sullivan v. People, 31 Mich 1.

¶ 2592. Defendant was convicted of breaking and entering in the nighttime a store not adjoining or occupied with a dwelling house, with intent to commit larceny. The court gave no charge that the jury, to convict, must find that the store was not adjoining nor occupied with a dwelling house. No request to so charge was made and no exception for

failing so to charge was taken. There was abundant evidence on the point. Held, the upper court would not reverse for failure so to charge, where it was evident the conviction was just.—People v. Brott, 163 Mich. 150.

¶ 2593. One convicted of keeping a house of ill-fame cannot complain that the jury was instructed that, "however bad she may be, or however guilty of other offenses, the question is whether she is guilty of the offense charged"; the instruction having been in her interest, to prevent undue weight being given to evidence which had appeared in the case affecting her character for chastity, and showing that she had previously been accused of selling liquor without a license.—People v. Wells, 112 Mich. 648.

¶ 2594. The objection of the defendant in a prosecution for keeping his saloon open on Sunday, to the charge of the court was properly overruled, where among other things, the court said: "If the saloon was open, and people went in and liquor was sold to them, then the saloon was open in the meaning of the law. It makes no difference whether the door was open or not. If they went into the restaurant and from there found any means of access to the saloon, then it was open for business. It makes no difference how many people were in there; the only question is, was the saloon open for business?" since such charge was too favorable for defendant.—People v. Cummerford, 58 Mich. 328.

¶ 2595. On a trial for selling liquor to a minor the minor testified that respondent's barkeeper sold him liquor in respondent's presence, so that respondent must have known of it. Upon this undisputed testimony the court charged that respondent would be liable whether he knew the liquor was sold or not. Held, that the charge, if erroneous, was harmless, because there was no question of ignorance.—People v. Riley, 71 Mich. 349.

¶ 2596. In a prosecution for keeping a saloon open on a legal holiday, an affirmative answer by the court to the abstract question by a juror as to whether it would be the duty of the jury to convict, even if the barkeeper of defendant went in simply to fasten the door and neither drank nor sold drinks, even if an incorrect answer, was not error in the absence of testimony that such barkeeper went in to fasten the door.—People v. Kriesel, 136 Mich. 80.

¶ 2597. On a prosecution for resisting an officer who was attempting to serve a warrant on the defendant, a statement by the court to the jury that it was admitted that the warrant was a good and sufficient one, held not prejudicial to the defendant since the question whether the warrant was good or bad was for the court to decide.—People v. De Meaux, 194 Mich. 18.

¶ 2598. Where the testimony of a respondent charged with carnally knowing a female child under the age of fourteen years showed the act was in October, it was harmless error for the court in its charge to refer to the date as October 16th.—People v. Ten Elshof, 92 Mich. 167.

§ 550. ——Erroneous practice in giving charge.

¶ 2599. Where the jury in a criminal case returned into court, and no new instruction was given, and only a simple paragraph of the charge—which was in respondent's favor—was read over, when the jury again retired and returned a verdict of guilty, held, that these proceedings, though in the absence of respondent and his counsel, did not prejudice him.—People v. La Munion, 64 Mich. 709.

§ 551. Curing errors.

[Note. In the sections following the particular classes of errors are arranged with descriptions of the cause or act by which they were cured.]

Error in admitting questions or evidence cured by other matters, see post §§ 552-557, 561, 562.

Error in excluding evidence cured by other matters, see post §§ 558-562.

Errors in respect to opening statements and arguments to jury cured by instructions or other matters, see post §§ 563-565.

Instructions or refusal to charge cured by other charge or by verdict, see post §§ 566, 567.

Cure of errors by verdict, see post § 567.

Waiver and cure of errors and defects in indictment or information, see ante § 65.

Cure of defects in count of indictment by election, see ante § 65.

Matters waived by pleading to or going to trial on merits, see ante §§ 117, 118.

Waiver of errors and of exceptions taken to rulings, see ante §§ 531, 532.

Sufficiency of defendant's evidence to sustain conviction notwithstanding objection made when People rested, see post ¶ 2833.

Matters aggravating error, see ante § 534.

Harmlessness of errors where peremptory challenges are not exhausted, see ante §§ 538, 539.

¶ 2600. The withdrawal of a former prosecuting attorney from a criminal prosecution after arguing a motion to quash the information and asking a few questions of a witness, even if shown to be in the employ of private persons interested in the prosecution, saves any question under an objection made to his taking part in such prosecution.—People v. Schick, 75 Mich. 592.

¶ 2601. The error in refusing counsel for accused leave to suggest a form of question on his examination was not cured by the defendant being afterwards allowed to go upon the stand and make a further statement, in which he said only, "I know nothing about the stealing, and had nothing to

do with it"; as the defendant evidently needed the aid which counsel proposed to give as much at this time as he had needed it before.—Annis v. People, 13 Mich. 511.

§ 552. ——Admission of improper evidence by other proofs.

Admission of secondary evidence followed by primary evidence, see post § 553.
Cure by adduction of like evidence by accused, see post § 554.
Cure by admissions or concessions, see post § 555.
Cure by striking out or by instructions, see post §§ 561, 562.
Harmless answer curing improper question, see post § 557.

¶ 2602. Error in admitting evidence will not reverse where the facts it tends to prove are established by other good evidence.—People v. Adams, 162 Mich. 371.

¶ 2603. Receiving a dying declaration, if error, was harmless as to circumstances wherein it was in accord with undisputed facts.—People v. Beverly, 108 Mich. 509.

¶ 2604. A reversal will not be granted in a prosecution for burglary because an officer was permitted to testify that the wife of defendant stated to him that the room in which the stolen goods were found was hers, where the point was so fully covered by other evidence that no doubt could have existed in the mind of the jury even if this testimony had been excluded.—People v. Gregory, 130 Mich. 522.

¶ 2605. In a criminal case the fact that evidence other than an alleged improper confession is sufficient to sustain a conviction does not make the admission of such confession improperly extorted harmless, as it cannot be said what weight the jury gave to the confession in reaching their verdict.—People v. Brockett, 195 Mich. 169.

¶ 2606. On trial for resisting an officer while he was arresting accused for disturbing a religious meeting, evidence that accused disturbed it earlier in the evening before the officer came, was not prejudicial; where accused was permitted to show that he was assisting to preserve order before the officer's arrival and where the jury were charged not to consider it as bearing against accused.—People v. Rounds, 67 Mich. 482.

¶ 2607. Testimony of a witness in a prosecution for rape, that he found snow which had a red color produced by blood, at the scene of the alleged offense, was not subject to complaint on the ground of the witness not being an expert, where respondent in his testimony himself accounted for the condition as having been caused by his hand bleeding.—People v. Rich, 133 Mich. 14.

¶ 2608. In a prosecution of a woman for keeping a house of ill fame it was not reversible error to admit evidence that the respondent under an assumed name kept a personal bank and store account, where she offered no evidence in her defense and the undisputed testimony showed that there was no evidence that she was married except an understanding in the community that a man who lived with her was her husband, and the evidence failed to connect him in any way with the keeping of the house, and there was an abundance of testimony that the house kept by her was a house of ill fame.—People v. Wheeler, 142 Mich. 212.

¶ 2609. Admission of evidence that witness talked to defendant about another larceny than the one charged and accused him of it also is not cured by further testimony that defendant denied witness's accusation.—People v. Hammond, 177 Mich. 416.

¶ 2610. The fact that in a criminal prosecution for taking indecent liberties with a young female child, wherein there was also a count charging assault with attempt to ravish, the court permitted the city marshal to narrate a conversation with the child wherein she had told him of the details of the crime constituting the second count if immaterial is not prejudicial; where everything he had testified to was already in the case without objection, and especially so where the second count had been withdrawn and the court instructed the jury that they could not consider his testimony except the fact that she had made complaint to him.—People v. Harris, 144 Mich. 12.

¶ 2611. Whatever error there was in allowing the prosecutrix in rape, after testifying that the respondent had inveigled her into the wine room of a saloon, and while there, under threat that if she cried out she would be arrested for being in a saloon, accomplished his purpose, to testify as to statements made by a third man in the absence of respondent, to the effect that he claimed to have authority to arrest her for being in a saloon, was cured later by its being shown that, after leaving her, respondent went into the saloon proper, that the inmates joked him about "his girl," that he ordered beer for the boys at the bar, that respondent and such third man were together in the saloon, that he left respondent and went into the wine room and was there when respondent returned; and that he eluded the officer who sought to subpoena him and could not be found afterwards.—People v. Murphy, 145 Mich. 524.

¶ 2612. The introduction of a hotel register containing the signature of the defendant for comparison on a prosecution for forgery, was harmless error, where the objection is made for the first time in the court of review; and where an expert witness was allowed to testify from a comparison between the signature upon the check and that upon the register; and particularly where

the evidence leaves no possible doubt of defendant's guilt.—People v. Tollefson, 145 Mich. 444.

¶ 2613. Where the prosecuting attorney in his opening statement and before any testimony had been presented told the jury that the only issue in the trial was the fact of a certain settlement alleged to have been made between the accused and the prosecuting witness, whether the accused had repaid the money he admitted having received, any error in admitting documentary proof tending to show the receipt of the money is harmless in view of the fact that there was an abundance of other testimony showing he had received the money.—People v. Peck, 147 Mich. 84.

§ 553. ——Admission of secondary evidence by reception of primary.

¶ 2614. Error in the admission of secondary evidence of the contents of an instrument is cured by the subsequent introduction of the original paper by the opposite party. People v. Pope, 108 Mich. 361.

¶ 2615. An assignment of error based upon the admission of testimony of the contents of certain letters, will not be considered where the letters themselves were afterward produced.—People v. Peck, 139 Mich. 680.

¶ 2616. The introduction of photographic copies of handwriting in a case of forgery is immaterial, whether right or wrong, if the originals are afterwards produced.—People v. Van Alstine, 57 Mich. 69.

¶ 2617. The admission in a prosecution for disorderly conduct of parol evidence of previous convictions is harmless error where respondent himself testifies that he has been confined in the house of correction several times for being drunk.—People v. Kelly, 99 Mich. 82.

§ 554. ——Adduction of similar proofs by respondent.

¶ 2618. Respondent in a criminal prosecution cannot complain of the admission for the prosecution of facts which the defense proved at a later stage of the case.—People v. Crawford, 48 Mich. 498.

¶ 2619. The admission, on the prosecution of an officer of a corporation for embezzlement of money of the corporation by receiving an excessive salary, of evidence given in bankruptcy proceedings on examination into the affairs of the bankrupt corporation, which is incompetent because of the immunity granted by 30 U. S. Stats. L. 548, is harmless error where the accused himself afterwards goes upon the witness stand and substantially reiterates all that was said before the referee.—People v. Lay, 193 Mich. 476.

¶ 2620. In a prosecution for rape it is immaterial whether the prosecutrix was intimidated by the state's attorney so as to give an answer in the affirmative to the question whether the defendant put his arms around her and kissed her on the night of the alleged rape where the defendant himself testified that as brother of the foster mother of the girl he had frequently kissed her.—People v. Smith, 192 Mich. 355.

§ 555. ——Admissions or concessions curing improper evidence.

¶ 2621. In a prosecution for assault and battery, error in permitting the jury to learn that a petition for defendant's discharge had been circulated by his fellow employees was harmless, where the defendant practically admitted his guilt.—People v. Green, 155 Mich. 524.

§ 556. ——Improper questioning of accused by suggestion of privilege.

¶ 2622. In the cross-examination of a prisoner on trial for crime, upon his statement to the jury, it is error to allow questions relating to matters outside of the statement, such as whether he had lived or been in certain places named, and whether he had not been arrested at one place on a charge of murder, and arrested also at other places, and put in jail at still other places. The error is not cured by instructing the prisoner that he may decline answering at his option, especially where the asking of the questions had been accompanied by the production, in sight of the jury, of several letters, in a manner calculated to convey an impression that they contained damaging disclosures which the prisoner must either admit or falsify the facts.—Gale v. People, 26 Mich. 157.

§ 557. ——Harmless answer to improper question.

¶ 2623. In a prosecution for manslaughter an accused cannot object to an answer to a question asked of a witness as to his arrest for the trouble where such answer was a mere denial which did not injure him.—People v. McArron, 121 Mich. 1.

§ 558. ——Improper rejection of proof; other proofs.

Exclusion cured by later reception
to receive, see post § 559.
Refusal to call witnesses cured by
ant's calling them, see post §
Waiver of right to make statement
stand to testify, see ante ¶

¶ 2624. Error in excluding
laration is cured by permitting
by whom it was proposed
to state afterwards what
in the interview with dec
the declaration was mad
25 Mich. 405.

¶ 2625. Whether a
tion was or was not
comes unimportant

the witness testified upon the trial to the facts covered thereby.—People v. Smith, 106 Mich. 431.

¶ 2626. Whether an objection to documentary evidence in a criminal case was well or ill founded became unimportant where the fact to which the documentary evidence related was otherwise proven.—People v. Schoonmaker, 119 Mich. 242.

¶ 2627. Where detectives had testified that they were to be paid a certain sum per day for their work in looking up violators of the liquor law, under an arrangement with county officers including the sheriff, the exclusion of testimony of one of the detectives as to what the sheriff said to him was harmless where the witness had already stated that he could not recollect what the sheriff said to him, and it was evident that the question had already been answered.—People v. Hilliard, 119 Mich. 24.

¶ 2628. Upon a trial for receiving stolen goods a witness for the prosecution, who had taken part in the removal of the goods, was asked whether he knew he was criminally liable for what he did the night the goods were stolen. This was excluded as immaterial, but as other testimony by the same witness fully covered the question of his knowledge of the responsibility for his acts, it was held that the exclusion, though erroneous, was not prejudicial.—People v. Considine, 105 Mich. 149.

¶ 2629. The exclusion of evidence of restitution, in a prosecution for larceny, is not reversible error where the substance thereof was gone into later in the trial so that respondent was not prejudiced by the exclusion of the evidence at the particular time complained of.—People v. Hutchings, 137 Mich. 527.

¶ 2630. Exclusion of testimony of respondent's good reputation for truth and veracity, in a prosecution for perjury, is not cured by the admission of testimony that his general reputation and his reputation for honesty and integrity was good, since this does not show that the exclusion of the other testimony was not injurious.—People v. Albers, 137 Mich. 678.

§ 559. ——Exclusion of evidence cured by reception or offer to receive later.

Exclusion cured by striking other evidence, see post § 561.

¶ 2631. Where evidence is ruled out as not proper on cross-examination, the correctness of the ruling will not be inquired into on error, where it appears that the witness is afterwards called by the party offering the evidence, and examined fully on the subject.—Dillin v. People, 8 Mich. 357.

¶ 2632. Where error was committed in excluding evidence on cross-examination of the witnesses for a criminal prosecution, it was cured by allowing the defense to examine the witnesses fully in his own behalf on similar questions.—Burden v. People, 26 Mich. 162.

¶ 2633. Refusal to permit a question is immaterial if a question of the same import is afterward allowed and counsel are permitted to pursue the subject as fully as they see fit.—People v. Pearsall, 50 Mich. 233.

¶ 2634. An error committed in sustaining an objection to the admission of expert evidence as to whether a wounded man's body would remain in an upright position, when he had hold of a rod to steady himself, is cured by afterwards permitting an answer to the question.—People v. Swartz, 118 Mich. 292.

¶ 2635. The exclusion of evidence as to whether a witness ever saw a person accused of manslaughter before the trial, cannot be objected to on appeal where such evidence is subsequently admitted in the course of the trial.—People v. McArron, 121 Mich. 1.

¶ 2636. Error in refusing to allow a witness to testify that he intended to return the goods he took is not prejudicial where the court later reversed his ruling, and permitted the testimony, and followed this by correctly instructing the jury on the question of the intent essential to prove the crime.—People v. Wycoff, 150 Mich. 449.

¶ 2637. In a prosecution for murder of a husband by his wife, where plea of self-defense was filed, and the accused had testified to certain previous assaults by her husband upon her, the exclusion of the testimony of certain witnesses as to her appearance following such assaults, held not prejudicial error where the witnesses subsequently described her appearance.—People v. Cutler, 197 Mich. 6.

¶ 2638. Where an objection to a question in cross-examination is sustained, and substantially the same question is asked and answered without objection, error cannot be assigned in the supreme court on the ground that the point covered in the first question was not allowed in cross-examination, for the point in substance was admitted without objection.—People v. Neely, 171 Mich. 249.

§ 560. ——Refusal to call witnesses by defendant's calling them.

¶ 2639. The refusal of the prosecution to produce a witness whose name was indorsed upon the information is not ground for a reversal, where respondent himself afterwards placed the witness upon the stand, and obtained the benefit of his testimony.—People v. Resh, 107 Mich. 251.

§ 561. ——Errors in evidence by striking out.

Cautionary instruction in addition to striking out, see post § 562.

¶ 2640. In a criminal case if testimony once received under objections has a serious tendency against respondent the error is not cured by striking out.—People v. Pinkerton, 79 Mich. 110; People v. Fowler, 104 Mich. 449.

¶ 2641. An error of the trial court in a murder case in excluding the evidence offered by defendant to show an entire conversation, parts of which the state put in evidence as a confession, is not cured by a ruling striking out the testimony of one of the state's witnesses with respect to the conversation, where the testimony of the other witnesses is allowed to stand.—People v. Bowen, 171 Mich. 129.

¶ 2642. The error in improperly admitting a statement as a dying declaration, made when the declarant was not in extremis, where his knowledge as to who shot him was based on hearsay, is not cured by striking out the incompetent portions of the declaration, which, if admissible at all, was admissible in its entirety.—People v. Christmas, 181 Mich. 634.

¶ 2643. The letting in of testimony improper because lacking certainty is not error where it is immediately struck out, and the jury is cautioned to disregard it.—People v. Droste, 160 Mich. 66.

¶ 2644. Where, in answer to a question as to whether he knew the respondent, a witness for the people stated that he was "unlucky enough to get acquainted with him,' which reply was promply stricken out by the court, the failure of the court expressly to rebuke the witness, and to instruct the jury to disregard the statement, was not ground for reversal.—People v. Smith, 106 Mich. 431

§ 562. ——Errors in evidence by corrective instruction.

Instruction making harmless evidence of possession of stolen goods, see also ante ¶ 823.

¶ 2645. Striking out testimony that has been improperly allowed in a criminal case and cautioning the jury not to be influenced by it, do not necessarily obviate its effects.—People v. Wolcott, 51 Mich. 612.

¶ 2646. Error in permitting the introduction of immaterial evidence which is afterwards stricken out by the court is not prejudicial where the court cautions the jury that they must not consider the immaterial testimony.—People v. Swartz, 118 Mich. 292.

¶ 2647. In a prosecution for arson, the trial court permitted witnesses to state as their opinion that a certain woman seen by them at night on a road near the scene of the crime was the respondent. Later, when it appeared that there was but slight ground of fact to rest their opinion upon, the court

§ 564. ——Improper remarks and arguments cured by charge.

Cure of improper comment on failure to testify, see post § 565.
Cure of argument by verdict, see post § 567.
Charge of caution against improper remarks or argument, see ante § 451.

¶ 2654. Judgment will not be reversed because counsel for one party, in the argument to the jury, is permitted to take an erroneous view of the law, if the judge in his charge corrects the error and truly states the law on the point.—People v. Jenness, 5 Mich. 305.

¶ 2655. Where the prosecuting attorney in his argument in a criminal prosecution for selling liquor in violation of the local option law, assumes facts not in evidence and predicates guilt thereon, the error is not reversible where the court immediately instructs the jury to disregard the remarks and also does the same in his charge.—People v. Bedell, 162 Mich. 230.

¶ 2656. A conviction will not be reversed merely because of improper language by the prosecutor, where the court immediately stated, in the presence of the jury, that the language should not have been used, and where it was not of a character to work prejudice to the jury, in view of the statement by the court.—People v. Grant, 111 Mich. 346.

¶ 2657. A verdict in a criminal prosecution for homicide should not be set aside because of an improper remark by the prosecuting attorney, where the court properly controls the trial, checks the attorney who goes too far, and instructs the jury to disregard the improper remark.—People v. Swartz, 118 Mich. 292.

¶ 2658. A remark by the prosecutor in a murder trial of a woman for killing her husband that the relations between respondent and the man who did the killing were filthy and improper is cured by an instruction that there is no testimony to show improper relations between the parties, and that the argument of the prosecutor upon that point must be rejected.—People v. Pope, 108 Mich. 361.

¶ 2659. The expression of an opinion by the prosecuting attorney as to respondent's guilt is harmless where the jury was expressly instructed to disregard such opinion, except as it was supported by evidence.—People v. Pope, 108 Mich. 361.

¶ 2660. Comments by the prosecutor as to the contents of a paper of which only the front part and the face of the respondent's photograph were in evidence, were not error where promptly checked by the court before any harm could have been done to the respondent.—People v. McDonald, 133 Mich. 366.

¶ 2661. In a prosecution for murder, the statement of the prosecuting attorney to the defendant who is a witness for himself, that "we ascertained that what you said to us was not true" at once condemned by the court is not prejudicial error.—People v. Higgins, 127 Mich. 291.

¶ 2662. Where on a trial for murder the prosecuting attorney in his address to the jury recited admissions made by defendant while testifying in his own behalf, to the effect that he had been arrested a number of times for assault and battery, had been convicted of a certain offense, etc.; an instruction by the court that these admissions were not to be considered as bearing upon the question of defendant's guilt, but only upon his credibility as a witness, cured any error that might have arisen from the prosecutor's language.—People v. Welch, 80 Mich. 616.

¶ 2663. Where the trial court, in a criminal prosecution, referred by name to certain witnesses in its charge, without commenting upon their testimony, except to indicate that they were witnesses for the People, and concluded the charge with the admonition that their verdict should be based entirely upon the evidence actually produced before them and not the statements of attorneys or the court as to the testimony, held that such admonition cured any undue impression from such references.—People v. Cutler, 197 Mich. 6.

¶ 2664. In a criminal prosecution in a recorder's court, the mention by the court of the fact that respondent had been convicted in the police court, is not reversible error, where mention of the trial in the police court had been made by respondent's counsel, especially where the court expressly charged that the jury had no right to consider anything which had occurred in another court as bearing upon respondent's guilt or innocence.—People v. Green, 155 Mich. 524.

¶ 2665. In a prosecution for assault and battery, in his argument to the jury the prosecuting attorney stated that if they found defendant guilty they would only be doing what another jury had done in the justice's court before the case was appealed. The court immediately instructed the jury to disregard this remark. Held, the remark, though improper, was not ground for reversal.—People v. Yund, 163 Mich. 504.

¶ 2666. Where in a criminal case the respondent on the witness stand volunteers the opinion that he is about to be acquitted, it is not reversible error for the prosecuting attorney to retaliate with the opinion that respondent is about to be convicted, where the court rules that said retort is improper.—People v. Hoek, 169 Mich. 87.

¶ 2667. In a prosecution for keeping a house of ill-fame, the intimations by the pros-

ecuting attorney in his argument that the women housed therein were prostitutes does not constitute reversible error when made in the heat of the trial in the midst of a series of objections, and when the trial court sustains said objections and states that the argument is improper.—People v. Hoek, 169 Mich. 87.

¶ 2668. In a prosecution for arson against a respondent for setting fire to her own buildings, there was evidence that the value of the buildings was considerably larger than the insurance thereon. The prosecuting attorney in his argument to the jury on the question of motive said, "It is common knowledge that people burn buildings for insurance." The court immediately directed the jury to "take nothing from that statement." Held, the remark did not constitute reversible error.—People v. Stewart, 163 Mich. 1.

§ 565. ——Improper comment on failure to testify or adduce proof by charge to disregard.

¶ 2669. It is error to permit the prosecuting attorney to comment to the jury upon the respondent's failure to call witnesses to testify as to his good character, and such error is not cured by instructing the jury not to consider the comment.—People v. Evans, 72 Mich. 367.

¶ 2670. The prosecuting attorney's error in commenting upon respondent's failure to testify in his own behalf was not considered ground for reversing a conviction where such comment was immediately retracted, and where the court, on the prosecutor's request, instructed the jury that such failure raised no presumption of guilt.—People v. Hess, 85 Mich. 128.

¶ 2671. It is improper to suggest the defendant's failure to testify in a criminal prosecution, but not prejudicial where immediately retracted and properly covered in the court's charge.—People v. Salsbury, 134 Mich. 537.

¶ 2672. A conviction will not be reversed because the prosecuting attorney, in his argument to the jury, commented upon respondent's failure to call the parents of his wife as witnesses to corroborate a material element of time in an alibi, where the court at once ruled that such comment was improper.—People v. Smith, 106 Mich. 431.

¶ 2673. Failure to charge when requested, that no inference should be drawn from the failure of accused to take the stand in his own behalf, is not cured by the response of the court to counsel in a colloquy, "I will say to the jury that no stress whatever is to be laid on the fact that defendant did not go on the stand," the colloquy itself having called the attention of the jury to such fact.—People v. Messer, 148 Mich. 168.

§ 566. ——Instructions or refusal to charge cured by withdrawal or other charge.

[Note. The so-called cure of error in a charge by other portions of the charge involves a misuse of the term "error," since taken as a whole the charge is or is not erroneous. If not erroneous there was no error to be cured. If erroneous as a whole it could not be cured by its own qualities. For these reasons the matter is treated as precedents on the "construction of the charge as a whole" and is classified ante §§ 415, 416.]

Instructions or refusal to instruct cured by verdict, see post § 567.

¶ 2674. Where the court, in a trial for polygamy, charged that there must be at least two witnesses besides the magistrate or minister present at a marriage ceremony, and that "it appears from the testimony that but one witness was present," the error is not cured by recalling the clause referring to the testimony and one witness, since it still left the charge as to what was necessary to constitute valid marriage.—People v. Goodrode, 132 Mich. 542.

§ 567. Cure of errors by verdict rendering them immaterial.

Verdict as curing erroneous amendment or addition of count, see also ante ¶¶ 373, 374.

¶ 2675. A ruling will not be reviewed o error when it has become immaterial by fa ure to convict on the point to which it lates.—People v. Knapp, 26 Mich. 112.

¶ 2676. A statement in argument th witness not called would have corrobo one who was called and testified as to bank books showed, though errone harmless, where the conviction of for embezzlement was based on an ite entered on the books but proved by timony of another witness.—People 148 Mich. 168.

¶ 2677. Where a prosecutor in case used evidence that had b stricken as a basis of argumen held that as the jury probably argument it did not furnish versal.—People v. Bollman, 1

¶ 2678. In a prosecution printed matter which was fact the court at first err to the jury the question instructed them it was t held of no consequence der any view of the convicted.—People v. T

¶ 2679. Where th charge the crime o murder, such error make are harmles

victed of the lesser crime of assault with intent to do great bodily harm less than murder.—People v. Sharp, 163 Mich. 79.

¶ 2680. Where a defendant is convicted of the lesser offense of assault with intent to do great bodily harm less than the crime of murder, the upper court will not review alleged errors in the rulings and charge bearing on the crime of assault with intent to murder.—People v. Lieska, 161 Mich. 630.

¶ 2681. In a prosecution for an assault with intent to kill and murder, it is not reversible error to show what the respondent an hour after the assault said what he would have done at the time of the assault if he had thought of it, or what he would do to the complaining witness if he ever came upon his premises again, where the jury convicts respondent only of the offense of assault and battery.—People v. Klise, 166 Mich. 1.

¶ 2682. Where a respondent is convicted of manslaughter only, errors in the court's charge as to the crime of murder are harmless.—People v. Collins, 166 Mich. 4.

¶ 2683. Where the court instructs the jury correctly as to the distinction between murder in the second degree and manslaughter, an erroneous additional statement that the practical difference was one of maximum penalty is not prejudicial where the accused is convicted of manslaughter.—People v. Sauerbier, 173 Mich. 521.

¶ 2684. Where in a charge of assault, error is committed in admitting evidence of a defendant's prior conviction to show his intent with reference to the act in question, the error is harmless where the jury has acquitted the defendant of intent to do bodily harm.—People v. Hoffman, 154 Mich. 145.

¶ 2685. Where the verdict of the jury is the only one possible under the evidence, and there was ground for the argument that the accused had committed forgery and subornation of perjury to defend himself upon the charge upon which he was being tried, and the prosecuting attorney believed the charges to be true he was justified in using strong language and his argument is not ground for reversal.—People v. Peck, 147 Mich. 84.

XVI. REVIEW.

A. MODE AND RIGHT OF REVIEW.

§ 568. In general.

Error or exceptions as proper procedure, see post § 569.
Error or mandamus or habeas corpus as proper mode of review, see post § 570.
Certiorari as proper or available mode of review, see post § 571.
Review by reservation and certification of questions, see post § 572.
Reviewable decisions and judgments, see post § 574.
Reservable or certifiable questions, see post § 575.
Who entitled to review, see post § 576.
Jurisdiction and power to review, see post § 577.
Waiver of objection to mode of review, see post § 579.
Bail and recognizance pending review, see post § 578.
Procedure for review and procedure in supreme court pending review and judgment, see post XVI, B.
Record and bill of exceptions for review, see post XVI, C.
Hearing and reviewing the case and judgment on review, see post XVI, D.
Mode of saving questions by objection and exception below, see ante XIV.
Appeals from convictions before justices and minor courts, see post § 662 et seq.
Propriety of writ of error after judgment on exceptions and sentence below in order to make final judgment for writ of error to United States Supreme Court, see post ¶ 2943.
Mode and right of review in civil cases, see Appeal; Certiorari.
Mode of review of convictions for violations of ordinances, see Municipal Corporations, XVI, B.
Provision for writs of error in criminal cases, see Comp. L. 1915, § 14587.
Provision for review by exceptions to supreme court, see Comp. L. 1915, § 15837 et seq.
Right to writ of error for errors of record notwithstanding resort to exceptions, see Comp. L. 1915, § 15841.

¶ 2686. There are two statutory methods of review of criminal proceedings. One is by exception before sentence; the other, by a writ of error.—People v. West, 143 Mich. 586.

¶ 2687. Review on exceptions to proceedings in criminal cases is purely statutory.—People v. West, 143 Mich. 586.

¶ 2688. Where a writ of error is the means of review sought to review a criminal proceeding it is upon the assumption that the writ has a function to perform and that a judgment has been entered.—People v. West, 143 Mich. 586.

¶ 2689. Where exceptions before sentence is the method of review sought in a criminal proceeding, a writ of error performs no function, there being no judgment.—People v. West, 143 Mich. 586.

¶ 2690. Comp. L. 1897, §§ 11964-11968, providing for exceptions before sentence in criminal proceedings were designed to secure the right of bail until a conviction is determined in the supreme court unless the circuit judge is clearly of the opinion that the exceptions alleged are frivolous, imma-

terial, or intended for delay.—People v. West, 143 Mich. 586.

¶ 2691. Error is the proper remedy to review the validity of a judgment and sentence in a common-law criminal proceeding.—In re Coffeen, 38 Mich. 311.

§ 569. Error or exceptions.

Scope of errors open to review on error and exceptions respectively, see post §§ 602, 603.

Writ of error rather than certification of question where case has gone to judgment, see post ¶ 2702.

Proper mode of making final judgment after review and remand so as to have writ of error to United States Supreme Court, see post ¶ 2943.

Proper judgment in supreme court on exceptions, see post § 640.

¶ 2692. No writ of error is needed in a criminal case where there has been no judgment; the case comes up on the exceptions.—Patten v. People, 18 Mich. 314; People v. Knapp, 26 Mich. 112.

¶ 2693. No writ of error is needed where there has been no judgment; the case comes up on the exceptions.—People v. Knapp, 26 Mich. 112.

¶ 2694. The denial of a motion in arrest of judgment is reviewable on exceptions before judgment notwithstanding the failure of the trial court to give the reasons for such denial.—People v. Rathbun, 105 Mich. 699.

¶ 2695. A conviction will not be reviewed on exceptions before sentence.—Village of Lake Odessa v. Randall, 158 Mich. 205.

§ 570. Error or mandamus or habeas corpus.

Nature and office of mandamus and grounds for mandamus, see Mandamus.

Mandamus as means of review, see also Mandamus, II.

Habeas corpus as means of review, see Habeas Corpus, I.

Habeas corpus as remedy for imprisonment on wholly void sentence, see Habeas Corpus § 1.

¶ 2696. Mandamus lies, and is a more suitable process than a writ of error, to review a decision quashing an indictment.—People ex rel. Robison v. Swift, 59 Mich. 529.

¶ 2697. The alleged want of a preliminary examination, and the illegal arrest in another state, and transportation into this state, of a respondent who has been convicted and sentenced to state prison, cannot be considered on habeas corpus; the remedy being by writ of error.—In re Ellis, 79 Mich. 322.

§ 571. Certiorari.

Necessity of final judgment to support certiorari, see post § 572.

Waiver of objection to propriety of certiorari, see post ¶ 2714.

Certiorari in aid of writ of error to bring up full record, see post § 601.

Procedure on certiorari to recall transferred case, see ante ¶ 542.

Nature, office and propriety of certiorari, see Certiorari.

¶ 2698. Where, upon a trial for murder, the court ordered the officers to exclude from the courtroom all but "respectable citizens," such error is properly reviewable on certiorari rather than by bill of exceptions.—People v. Murray, 89 Mich. 276.

¶ 2699. In a prosecution for rape where a disputed question arose as to whether the offense charged was committed within the jurisdiction of the court, the judge charged the jury upon this question of fact alone, and upon their finding that the offense was committed within the jurisdiction of the court they were instructed upon the whole case, and rendered a verdict of guilty. Respondent applies for certiorari to review the conviction. Held, that since all the errors relied upon appear upon the face of the record, respondent's remedy is by writ of error, not certiorari.—People v. James, 15 Mich. 548.

¶ 2700. Where the court denied an appli tion for certiorari, brought by the respond in a criminal case on the denial of a mo to dismiss the case because the examin of the complaining witness did not show the offense charged was committed, and on Act No. 310, Pub. Acts 1905, pro that decisions on motions to quash wri jurisdictional grounds may be review writ of certiorari, upon the ground offense could be shown later in the tion to be filed by the prosecuting it did not intend to decide that grievance would be reviewed und —People v. Chamblin, 149 Mich.

§ 572. ——Necessity for final ju

See also ante ¶ 2700.

Finality of judgment to suppo general, see Certiorari § 2

¶ 2701. Certiorari will n the action of the circuit cou quash an indictment found prior to the final disposit the lower court.—People Mich. 583.

§ 573. Reservation or ce

Reservable and certifia § 575.

Provisions for report judge to suprer see Comp. L. 19

¶ 2702. After ju in a criminal ca

raise in the supreme court the question of the constitutionality of a statute, on a certificate of the trial court, but must resort to a writ of error.—People v. Dickerson, 162 Mich. 400.

§ 574. Reviewable decisions and judgments.

Matters reviewable on exceptions, see also ante ¶¶ 2694, 2695.
Finality of judgment to support certiorari, see ante § 572.
Finality and completion of judgment for review in civil cases, see Appeal, III.
Review of habeas corpus judgment, see Habeas Corpus § 15.

¶ 2703. The discharge on habeas corpus of a prisoner convicted of a criminal offense is final, and the People cannot bring error to review it.—People v. Conant, 59 Mich. 565; People v. Fairman, 59 Mich. 568.

¶ 2704. An order by the circuit court judge ordering an appeal bond given by respondent in a criminal proceeding forfeited, because of his nonappearance is not a final order or determination.—People v. Stimer, 82 Mich. 17.

§ 575. Cases and questions reservable.

Certification as proper mode of review, see ante § 573.

¶ 2705. A motion for a new trial, on the ground that the verdict is against evidence, for the reason that the facts proved, or to prove which evidence was given, did not make out the crime, embraces both law and fact. A motion for a new trial on the ground that the verdict is against the weight of evidence presents a question of fact alone. And neither of these questions could be reserved for the opinion of the supreme court. —People v. Adwards, 5 Mich. 22.

¶ 2706. An assignment that "the court erred in that part of its charge where he charges the jury in relation to the crime of rape, because the same is contrary to law, and in this case misleading to the jury and contrary to the evidence," is too general to be considered.—People v. De Fore, 64 Mich. 693.

¶ 2707. An assignment "that the court erred in refusing to grant the request submitted by defendant's counsel, and in refusing to instruct the jury as stated in said several requests; that the refusal of each and every one of defendant's requests was error," is not too general.—People v. De Fore, 64 Mich. 693.

§ 576. Who entitled; review at public instance.

Constitutional right to review, see Constitutional Law § 206.
Right of People to writ of error to review quashals and certain other decisions less than acquittal or conviction, see Pub. Acts 1917, No. 159.

¶ 2708. At the common law, and under our constitution, no writ of error or other proceeding lies on behalf of the public to review a judgment of acquittal in a criminal case, as no one can twice be put in jeopardy. —People ex rel. Robison v. Swift, 59 Mich. 529.

¶ 2709. Though error does not lie in behalf of the public to review a judgment of acquittal, proceedings that have not gone to trial may be reviewed.—People ex rel. Robison v. Swift, 59 Mich. 529.

§ 577. Jurisdiction and power to review.

Jurisdiction of supreme court in general, see Courts § 52 et seq.
Appellate jurisdiction in civil cases, see Appeal, II.

¶ 2710. Circuit court commissioners cannot review the judicial action of any court in holding persons convicted of crime, or issue writs of habeas corpus upon grounds involving judicial action.—In re Buddington, 29 Mich. 472; In re Burger, 39 Mich. 203.

§ 578. Bail and recognizance pending review.

Object of exceptions before judgment, see also ante ¶ 2690.
Grounds for allowing stay and bail, see post § 585.
Enlargement on bail pending writ of error, see Comp. L. 1915, § 14590.
Provisions for recognizance by accused pending exceptions, see Comp. L. 1915, §§ 15840-15842.

¶ 2711. Mandamus denied to compel the admission to bail of a respondent who, after reversal of conviction of murder, had been admitted to bail and, pending his second trial, had been ordered into custody.—Hull v. Wayne Circuit Judge, 87 Mich. 497.

¶ 2712. Where exceptions in a criminal case are transmitted to the supreme court for review before sentence, that court has no power to admit the defendant to bail.—People v. McKinney, 9 Mich. 444.

¶ 2713. Where a criminal case is pending in the supreme court on exceptions before sentence, the circuit judge, not having found that such exceptions were frivolous, cannot have the respondent—who is under bail—arrested and sentenced and refuse bail, since under How. St. § 9578, the signing of the bill of exceptions stays all further proceedings unless the judge shall find that the exceptions are frivolous, immaterial or dilatory.—In re Montague, 70 Mich. 157.

§ 579. Waiver of objection to mode of review.

¶ 2714. Whether certiorari is the proper process to bring up for review the alleged wrongful action of a circuit judge in sentencing to state prison a receiver of stolen property who claims to have made statutory satisfaction to the injured party, quære; but

return having been made to the writ, the errors assigned upon such return were disposed of.—People v. Hubbard, 86 Mich. 440.

B. PROCEDURE FOR ERROR AND MATTERS PENDING REVIEW.

§ 580. In general; application, leave and issuance of writ.

For review on exceptions, see post § 581.
Authority and functions of attorneys on review, see post § 582.
Calendaring and setting cause for hearing, see post § 583.
Dismissal or abatement of cause, see post § 584.
Supersedeas and stay, a transfer of jurisdiction by taking review, and procedure for bail pending review, see post § 585.
Assigning and specifying the errors relied on, see post §§ 586-588.
Briefing and arguing the case, see post § 589.
Making up and contents of the record and bill of exceptions, see post XVI, C.
Proceedings after review, see post XVII.
Procedure in trial court to save question by objection and exception to ruling, see ante XIV.
Request for time to prepare for review as extending time for sentence, see ante § 485.
Suspension of sentence to permit preparation for review, see ante § 494.
Allowance and issuance of writ or error, see Comp. L. 1915, §§ 14587, 14588.
Notice of application for writ of error in capital cases, see Comp. L. 1915, § 14588.
Issuance of writ of error as of course in other than capital cases, see Comp. L. 1915, § 14589.

¶ 2715. The proper administration of the law demands of convicted persons diligence in determining the method proposed to be pursued to secure a review of the proceedings, and in advising the trial court thereof.—People v. West, 143 Mich. 586.

¶ 2716. Where a defendant seeks to have his cause reviewed by writ of error after sentence, the writ issues as a matter of course, and unless he desires an order staying execution of the sentence and enlargement on bail, no allowance of said writ or other order is necessary.—People v. Fritch, 161 Mich. 111.

§ 581. Procedure for review on exceptions.

Effect of exceptions to leave case pending in court below, see post § 585.
Needlessness of assignments of error, see post § 586.
Procedure on exceptions to supreme court, see Comp. L. 1915, § 15837 et seq.

¶ 2717. In order to obtain the review of a conviction of crime by exceptions before sentence, a compliance with the statute (Comp. Laws 1897, §§ 11964-11969, How. Ann. St., 2nd Ed., §§ 15135-15140) is essential.—People v. Macomber, 182 Mich. 59.

¶ 2718. The practice provide
Comp. L. 1897, § 11964, How.
§ 15135, relating to exceptions
cases to any opinion, direction o
of the court in any matter of la
and should be followed.—People
176 Mich. 381.

§ 582. Authority and functions of

Fixing compensation for taking
review, see ante § 509.
Duty of appointed attorney to fol
review and right to enhanc
services on review, see Com
§ 15913.

¶ 2719. Although it is a gener
the attorney-general represents t
the supreme court, that court m
prosecuting attorney on applicat
the quashing of an indictment
(Public L. 1887, Act No. 72).—Pe
Robison v. Swift, 59 Mich. 529.

¶ 2720. Where the attorney-g
pears for the people in a crimin
confesses error, the supreme cou
no attention to suggestions fron
respect to the case.—People v. Bu
199.

¶ 2721. The management of cri
in the supreme court remains un
trol of the attorney-general, an
ment by him for a continuance
upon the prosecuting attorney n
ing the duties laid upon the latt
Laws 1887, Act. No. 272.—People
80 Mich. 501.

¶ 2722. Laws 1887, Act. No. 7
§ 559a), which makes it the
prosecuting attorney to appear
preme court in criminal cases re
his county, is construed as re
to furnish a brief and make the
ment, but as leaving the manage
case under the actual control of t
general, under How. St. § 286
quires the attorney general to p
defend all actions in the supre
which the state is interested, o
People v. Bussey, 80 Mich. 501.

§ 583. Calendaring and setting f

Calendaring cases of civil natu
peal § 134.

¶ 2723. Criminal cases, when
be noticed for hearing for the fir
term, may, under Supreme Co
be noticed for any day during
weeks of the term, and when so
on motion, be put on the docket
The requirement of rule 28 th
given to the clerk six days bef
day of the term does not apply t
—People v. Nugent, 30 Mich. 50

§ 584. Dismissal or abatement of cause.

Dismissal for want of record showing of entered judgment, see also post ¶ 2747.

¶ 2724. A pardon granted after conviction but before sentence disposes of the case pending on bill of exceptions before the reviewing court.—People v. Marsh, 125 Mich. 410.

§ 585. Supersedeas and stay, transfer of jurisdiction, and bail pending review.

Power to admit to bail pending transfer of case or review, see also ante ¶¶ 2712, 2713.

Necessity of return of cause by certification of instructions given on exceptions to enable trial court to proceed further, see post § 641.

Stay of sentence, see ante § 499.

Effect of writ of error as staying proceedings, see Comp. L. 1915, § 14589.

Stay by filing exceptions to supreme court, see Comp. L. 1915, § 15838.

Effect of writ of error as stay, necessity of allowance by judge and order for stay, see Comp. L. 1915, §§ 14589, 14590.

¶ 2725. Notwithstanding exceptions taken the case still remains in the court below.—People v. McKinney, 9 Mich. 444.

¶ 2726. Where a criminal case is pending in the supreme court on exceptions before sentence, the circuit judge, not having found that such exceptions were frivolous, cannot have the respondent—who is under bail—arrested and sentenced, and refuse bail.—In re Montague, 70 Mich. 157.

¶ 2727. Except where the conviction is for treason or murder in the first degree, writs of error issue in criminal as well as in civil cases, as of course, and they do not stay or delay the execution of the judgment or sentence unless they are allowed by one of the justices of the supreme court or by a circuit judge "with an express order thereon for a stay of proceedings on the judgment or sentence" (Comp. L. 1897, § 10490).—People v. West, 143 Mich. 586.

¶ 2728. Where in a criminal case a writ of error without an order for stay of execution has been made and filed in the supreme court, and the case is shortly to be heard by said court, it will not grant an application for a stay of execution and admission to bail where there has been no petition for a writ of error containing an order for a stay.—People v. Fritch, 166 Mich. 576.

¶ 2729. Under the proceedings for the allowance of a writ of error, etc., a stay and admission to bail cannot be granted if it appears that the exceptions taken are frivolous, immaterial, or intended for delay only.—People v. Fritch, 161 Mich. 111.

¶ 2730. The supreme court will not grant a writ of error, stay sentence, and admit to bail a convicted defendant, where the trial court has refused such bail on the ground that the exceptions taken are frivolous and intended only for delay, and where the defendant presents neither a bill of exceptions nor the record, but only affidavits of their contents.—People v. Fritch, 161 Mich. 111.

¶ 2731. Where respondent has taken out a writ of error in a criminal case before sentence has been pronounced, and applied to this court to be admitted to bail and for an order staying proceedings until the determination of the writ by this court, no objection will be interposed by this court to the pronouncement of sentence, and the application will be denied without prejudice to its renewal after sentence in the court below.—People v. West, 143 Mich. 586.

§ 586. Assigning errors.

Specifications, grounds and reasons, see post § 587.

Reference or citation of page in record, see post § 588.

Pointing out errors in briefs and arguments, see post § 589.

Specification necessary to admit of certification of question for review, see ante ¶¶ 2706, 2707.

Briefing questions to preserve assignments, see post § 589.

Necessity for exceptions to support assignments, see also ante § 526.

Necessity of showing of error by the record, see post § 595 et seq.

Mode of assigning errors in charge or in refusal to charge, see Comp. L. 1915, § 14576.

Making and filing statement of errors relied upon on exceptions to supreme court, see Comp. L. 1915, § 15837.

¶ 2732. Errors relied upon by one who seeks reversal of a conviction should be assigned in advance.—People v. Wright, 90 Mich. 362; People v. Carter, 96 Mich. 583.

¶ 2733. An objection that an information for a third offense is defective in not averring prior convictions may be raised on error by assignments alleging error in the charge, authorizing a conviction as for a third offense, and in the sentence, imposing a punishment appropriate to such a conviction, and in excess of that which could be lawfully imposed for a first conviction; and this, notwithstanding respondent pleaded to the information before moving to quash for the reason stated.—People v. Buck, 109 Mich. 687.

¶ 2734. The supreme court will not consider whether a refusal to give a requested charge in a murder case was error, when the assignment sets out only a portion of the requested instruction.—People v. Sartori, 168 Mich. 308.

¶ 2735. The action of counsel in basing an assignment of error upon a partial extract

from the charge, taken out of its connection, and in confining the discussion in their briefs to such part, where the part omitted clearly shows that the point raised is without merit, is criticized.—People v. Pichette, 111 Mich. 461.

¶ 2736. An assignment of errors is unnecessary on exceptions before sentence.—Wattles v. People, 13 Mich. 446; Patten v. People, 18 Mich. 314.

§ 587. ——Specifications, grounds and reasons for points.

¶ 2737. An assignment of error that "the court erred in his whole charge, as there was not testimony in the case to support the charge as given," is too general to merit attention on appeal.—People v. Adler, 169 Mich. 322.

¶ 2738. On error to a conviction for statutory rape the exclusion of questions as to the ages of prosecutrix's brothers and sisters based on a paper not put in evidence cannot be considered where the materiality of the questions was not explained to the trial judge when he ruled them out on that ground, and where the bearing and importance of the questions is not pointed out on error.—People v. Colbath, 141 Mich. 189.

§ 588. ——Citation of error by page in record.

Citations of record page in briefs, see post § 589.

¶ 2739. The entire charge of the court in a criminal case will not be examined on appeal in order to determine which portion fits any particular assignment of error, where the objectionable portions or paragraphs of the charge, or the pages of the record containing them is not shown.—People v. Ponsford, 181 Mich. 659.

§ 589. Briefs and arguments.

Relative duties of attorney general and prosecuting attorney in conducting and arguing case, see ante § 582.
Declination to consider points not properly briefed and argued and insisted on, see post §§ 609, 610.
Assigning the errors relied on, see ante §§ 586-588.
Arguments to jury, see ante IX, C.
Practice in civil cases, see Appeal, XI, E.

¶ 2740. The brief should point out that page in the record where improper evidence was introduced, or else cite the testimony, and the page where the question was raised, and should also show how it was damaging to respondent.—People v. Parmelee, 112 Mich. 291.

¶ 2741. Reference, merely, in the brief of objecting counsel to errors assigned to the charge as given by the court, without argument, is not good practice, though probably indicative that such assignments of error are not waived.—People v. Murphy, 145 Mich. 524.

¶ 2742. Under Supreme Court Rule 40, requiring appellant's brief to state clearly the errors relied on, a general statement of certain points relied on, with an announcement that these and kindred subjects will be discussed in their order, is insufficient, as it does not notify the court what errors are abandoned.—People v. Van Alstyne, 157 Mich. 306.

¶ 2743. Where, in an appeal from a conviction under the liquor law, the brief of appellant does not "contain a clear and concise statement of the facts of the case distinct from the argument, and of the errors upon which he relies," as required by Supreme Court Rule 40, the court is warranted in relying upon the statement in the brief for the People.—People v. Boyd, 151 Mich. 577.

¶ 2744. Omitting reference to the pages where assignments of error may be found is hazardous since the court cannot be expected to supply the omission through a search of the record.—People v. Sanders, 139 Mich. 442.

C. RECORD AND BILL OF EXCEPTIONS.

§ 590. In general.

Contents and sufficiency of the record proper and the bill, see post §§ 591, 592.
Preparation and settlement of bills of exceptions, see post §§ 593, 594.
Printing, form and style of record, see post § 598.
Record on exceptions before sentence, se post § 599.
Return to certiorari, see post § 600.
Additions and amendments of record, certiorari to complete record, see § 601.
Construction and effect of record whe sidered on review and presumpti the record, see post § 611 et seq.
Pointing out by assignments and cit in record where error appears, § 588.

¶ 2745. A bill of exceptions pany the writ of error in a crir Shannon v. People, 5 Mich. 36.

¶ 2746. The statute in refer tions in civil causes (R. S. How St. §§ 7611-7615) takes criminal causes where the S. 1846, chap. 166, How. St. applies to them where the silent, and, therefore, a b a criminal case, being s and filed with the clerk case is brought into t writ of error, a part of in that court.—Shan 36.

§ 591. Contents and sufficiency of record proper.

Certiorari ancillary to writ of error to bring up full return, see also Certiorari § 2.

¶ 2747. If neither the printed record nor original return shows the entry of judgment in the lower court an appeal will be dismissed by the supreme court.—People v. Macomber, 182 Mich. 59.

§ 592. ——Of bill of exceptions.

Showing required as to matters of error, see post § 595.
Showing required as to requests, objections and exceptions, see post § 596.
Showing of new trial motion and order thereon, see post § 597.

¶ 2748. A bill of exceptions in a criminal case should embrace every ruling raising a question of law, whether on the trial or in the proceedings preliminary thereto, by which the defendant claims that his rights were in any way prejudiced; and it is always proper, if the defendant requires it, to incorporate in the bill the proceedings upon a motion to quash the information.—People ex rel. Hamilton v. Calhoun Circuit Judge, 28 Mich. 268.

¶ 2749. While it is not desirable to include all the evidence in a criminal case, the bill should state the whole chain of facts which the evidence tends to prove, so that the bearings of the court's rulings can be understood by the supreme court.—Wellar v. People, 30 Mich. 16.

¶ 2750. Where the question raised by motion for a new trial in a criminal case is one of law and based on affidavits, the judge, if his decision is excepted to, should find the facts, and incorporate the motion, the facts and the decision thereon in the bill of exceptions for review.—Hill v. People, 16 Mich. 351.

¶ 2750a. Where the record upon exceptions to a conviction under the Local Option Law shows that the proceedings of the board of supervisors in relation to the adoption of the law were offered and received in evidence, respondent's counsel waiving the reading thereof, and a copy of the evidence so introduced is not returned, an objection that the court erred in instructing the jury that the law was in force within the county will be disregarded, the question as to the sufficiency of the proof in that particular being for the court, and not for the jury.—People v. Bennett, 107 Mich. 430.

¶ 2751. Prolixity and irrelevancy in a criminal record are subject to be rebuked by the supreme court.—People v. Millard, 53 Mich. 63.

¶ 2752. A needlessly prolix bill of exceptions is not excused by the fact that it was prepared by the stenographer of appellant's attorney.—People v. Van Alstyne, 157 Mich. 366.

§ 593. Preparation of bills.

Contents and sufficiency, see ante § 592.
Settlement and certification, see post § 594.
Duty to furnish copy of testimony in preparing bill, see also ante ¶ 2404.
Practice in civil cases, see Appeal, VI, D.

¶ 2753. The statute which requires exceptions in criminal cases to be "reduced to writing in a summary mode, and presented to the judge before the end of the term," as it respects the time for settling the exceptions, is directory, and it is sufficient if the exceptions be reduced to proper form within such reasonable and necessary time as the judge may allow.—Crofoot v. People, 19 Mich. 254.

¶ 2754. A respondent cannot be compelled to furnish a copy of the testimony as a prerequisite to the settlement of a bill of exceptions.—Pope v. Judge of Recorder's Court, 107 Mich. 25.

¶ 2755. When it is brought to the trial court's attention that it is desired to review a criminal case upon exception before sentence a reasonable opportunity should be given to prepare and settle exceptions.—People v. West, 143 Mich. 586.

§ 594. Settling and certification of record and bills.

Effect of conflict between record and certificate as to matters included, see post § 611.
Certification of exceptions before sentence, see post § 599.
Conclusiveness of record as settled, see post § 614.

¶ 2756. If the record is corrected by the addition of a word or certificate of the trial judge and affidavit of the court reporter, and, on notification to counsel, no objection is made, it will be presumed that the correction is accepted.—People v. Neely, 171 Mich. 249.

§ 595. Showing as to matters of error.

Necessity and sufficiency of showing as to objections and exceptions, see post § 596.
Necessity that error appear affirmatively, see post § 617 et seq.

¶ 2757. Judgment cannot be reversed for any error not affirmatively appearing in the proceedings.—People v. Jones, 24 Mich. 215.

¶ 2758. Where there is no foundation in the record for an assignment of error it will not be considered.—People v. Fisher, 144 Mich. 570.

¶ 2759. An assignment of error in permitting the indorsement of the names of cer-

tain witnesses on the information against objection and exception and permitting them to be sworn, will be ignored where there is nothing in the record or bill of exceptions to show that any of the witnesses testified, and it will not be presumed that after objection they testified or that their testimony was material and unfavorable to the respondent. —People v. Fisher, 144 Mich. 570.

¶ 2760. A refusal of change of venue sought because of prejudice against the accused, in a homicide case, is not shown to be erroneous where there was no serious difficulty in getting a jury, and there was no evidence that the jury was improperly influenced within or without the court room. —People v. Swartz, 118 Mich. 292.

¶ 2761. Abuse of discretion in refusing change of venue in a criminal case where local prejudice and prejudicial newspaper comment is relied on, is not shown where newspaper reports were like those usually appearing, and a year had elapsed since the alleged crime, and where no ruling was made on the motion till after examination of the jurors, the time spent in getting the jury and the fact that the defendant exhausted his peremptory challenges is not of controlling significance.—People v. Swift, 172 Mich. 473.

¶ 2762. The denial of a continuance in a criminal case cannot be said to have been an abuse of discretion on the part of the trial judge, where the application did not state what respondent proposed to prove by the witnesses whose presence he desired, and where several of them afterwards testified.—People v. Burwell, 106 Mich. 27.

¶ 2763. On a record not showing that the special prosecutor was a material witness at the second trial, where he prosecuted in lieu of the disqualified prosecuting attorney, or that he was otherwise disqualified, it cannot be said that his appointment was irregular, though it appears that on the first trial he did testify for the purpose of refuting a statement attributed to him by accused then a witness.—People v. Farrell, 146 Mich. 264.

¶ 2764. The subject of an alleged erroneous order appointing a special prosecutor might well be dismissed on error where the record fails to show the order appointing such prosecutor, but shows an announcement that the order would be made on the request of the prosecuting attorney.—People v. Auerbach, 176 Mich. 23.

¶ 2765. That respondent was compelled to go to trial before a jury of the term in which his two accomplices were tried and convicted cannot be assigned as error where the record does not show that any juror was prejudiced or incompetent.—People v. Betts, 94 Mich. 642.

¶ 2766. Error will not lie upon the overruling of respondent's challenge for cause, where it does not appear from the record that he exhausted his peremptory challenges, or that the challenged person sat as a juror. —People v. Rush, 113 Mich. 539.

¶ 2767. In a murder case, assigned error in not summoning a jury from the vicinage, cannot be heard where there was nothing in the record to indicate any trouble about getting a competent jury.—People v. Ecarius, 124 Mich. 616.

¶ 2768. Where the action of a judge in investigating the character of a plea of guilty is reviewed, his return should fully state the details of his inquiry.—People v. Lepper, 51 Mich. 196.

¶ 2769. Where any documentary evidence is excluded or a part is admitted, and the claim is that the whole should have been introduced, such evidence excluded or not introduced should be made a part of the bill of exceptions, so that the court above can judge whether it is admissible.—People v. Coughlin, 67 Mich. 466.

¶ 2770. Upon the trial of persons jointly informed against for conspiracy to cheat and defraud, the testimony of one of the respondents, voluntarily given upon the preliminary examination, is admissible as against him, and its admission will not be held erroneous as to his co-respondent where the record fails to indicate that the testimony was objected to as prejudicial to su respondent, or that the judge failed caution the jury against permitting it have such effect.—People v. Butler, 111 M 483.

¶ 2771. A person accused of sellir grade vinegar in violation of Publ 1897 No. 71, cannot contend that deprived of the right to produce as to the amount of solids in the where the record does not show person interested in the prosecu suit prevented him from gettin but does show that no pro for a sample was made.—Peop Grocer Co., 118 Mich. 604.

¶ 2772. To enable the su judge of the propriety of in jury in the court below, w assume the existence of bill of exceptions must evidence of those facts c there was such evidenc 8 Mich. 320.

¶ 2773. Inapplicabil not be considered w that not all of the People v. Dupree, f

¶ 2774. Excepti weight to be allo

ment on the trial will not be considered on a record which does not show that the prisoner made any statement.—Perkins v. People, 27 Mich. 386.

¶ 2775. Where the record in a criminal case does not show the charge of the court or that the court's attention was called to defendant's claim that the trial judge failed to explain the meaning of "preponderance of the evidence," the supreme court will not disturb a conviction on the ground of such failure.—People v. Ekola, 170 Mich. 158.

¶ 2776. On exceptions to a judgment in a criminal prosecution of an owner of a theater for operating same without the license required by resolution of the township board, the contention of defendant that the board had no authority to pass such resolution because the action was taken at a special meeting called for the purpose of considering a liquor bond, cannot be regarded, where the record of the proceedings of the township board is not a part of the record in the case.—People v. Richards, 150 Mich. 434.

¶ 2777. Where bill of exceptions only purports to state what testimony of certain witnesses tended to prove the supreme court cannot say error was committed in refusing to strike out such testimony as incompetent and immaterial.—People v. La Munion, 64 Mich. 709.

¶ 2778. On a record showing that after one of the witnesses for the people had been examined in chief, and cross-examined at some length, the court inquired of the prosecuting attorney if that was all of the witness, and that officer responded that he "was through with the witness some time ago," whereupon respondent's counsel stated that he desired to examine the witness. The court declined to wait for such examination, and dismissed the witness from the stand, and counsel for respondent took an exception to this proceeding, but did not advise the court what further questions he desired to ask of the witness; while the court should not have thus summarily dismissed the witness from the stand, yet the supreme court are unadvised as to whether respondent's rights were prejudiced by the action taken; and, under the circumstances, they are unable to say that there was any prejudice, the facts brought out on the direct examination seeming to have been fully covered by the cross-examination.—People v. Kindra, 102 Mich. 147.

¶ 2779. The question as to whether the verdict in a prosecution for assault with intent to commit rape was against the weight of the evidence, could not be reviewed where the record contained only the testimony of the prosecutrix.—People v. Toutant, 133 Mich. 520.

¶ 2780. Error assigned upon a statement of the prosecutor in his argument to the jury cannot be considered where the record fails to disclose what was said.—People v. Baker, 112 Mich. 211.

¶ 2781. In a prosecution for rape, under the defense of an alibi, an instruction telling the jury to "scrutinize any evidence in relation to the alibi. An alibi is a defense easily proven, and hard to disprove; therefore you will be careful and cautious in examining the evidence" is held not improper in the absence of the evidence from the record.—People v. Portenga, 134 Mich. 247.

¶ 2782. Arguments of the prosecutor will not be held error where the record does not show what were the arguments of counsel for accused, and where those of the prosecutor complained of and contained in the record and read by the supreme court appear to be in reply to those for accused.—People v. Farrell, 146 Mich. 264.

¶ 2783. An assignment of error, that the court erred in sentencing one J. M. B. after his plea of nonidentity without issue having been joined by the prosecuting attorney, is invalid where the record does not disclose any person by the name of J. M. B. was in any way connected with the proceedings, nor disclose that there was any plea of nonidentity.—People v. Fisher, 144 Mich. 570.

§ 596. Showing of requests, objections and exceptions.

Showing as to ruling on objection to argument, see also ante ¶ 2465.

¶ 2784. The record in a criminal case should show that the defects in the proceedings were pointed out to the trial court, and the supreme court ought not to be left to the briefs of counsel to ascertain what took place on the trial.—People v. Haas, 79 Mich. 449.

¶ 2785. Objections to improper statements in the argument of counsel in a criminal case were not considered, where the record failed to show an objection to the most objectionable of the statements.—People v. Gray, 135 Mich. 542.

¶ 2786. The refusal of the trial court to permit the review of a criminal case on exceptions before verdict cannot be held error, in the absence of a showing on the record on appeal of a motion for such permission, or a compliance with the statute permitting such a review.—People v. Ponsford, 181 Mich. 659.

¶ 2787. The question as to alleged objectionable argument is not before the supreme court where the record does not show that the attention of the court was called to the argument or that an opportunity was given the court to pass upon

the objections made.—People v. Danenberg, 176 Mich. 337.

¶ 2788. In a trial for assault with intent to do great bodily harm less than the crime of murder, where defendant did not object to errors in the admission of testimony, and did not preserve the objectionable evidence in his bill of exceptions, the court on appeal cannot consider such errors.—People v. Robinson, 152 Mich. 41.

§ 597. Showing of new trial motion and order.

¶ 2789. Where in a criminal prosecution the record does not contain the reasons why the trial court has denied a motion for a new trial the supreme court will not review his action.—People v. Harris, 144 Mich. 12.

¶ 2790. The refusal of a new trial presents no question for review where the affidavits therefor, though given in the bill of exceptions, are not accompanied by any finding of the facts they are claimed to prove.—Mahoney v. People, 43 Mich. 39.

¶ 2791. Where the record in a criminal case nowhere shows the motion made for a new trial, or that the court was requested to file any reasons for overruling the motion, or that he actually filed same, the supreme court will not disturb the conviction as being against the evidence.—People v. Ekola, 170 Mich. 158.

¶ 2792. The refusal of a motion for new trial in a criminal case will not be reviewed on appeal where the record is silent as to whether the motion was ever heard or not and there are no exceptions to any refusal to grant such motion.—People v. Williamson, 200 Mich. 342.

§ 598. Printing, form and typographical style of record.

Rules in civil cases as to printing, see Appeal §§ 174, 231.

¶ 2793. On criminal cases certified to the supreme court upon exceptions it is the duty of the party excepting to cause the record to be printed.—People v. Bristol, 22 Mich. 299.

¶ 2794. It is not proper in preparing a record for appeal for parties to italicize certain clauses and paragraphs of the charge of the trial court.—People v. Adler, 169 Mich. 322.

§ 599. Record on exceptions before sentence.

Preparation of bill, see also ante ¶ 2755.

¶ 2795. A writ of error is not appropriate where a review of rulings below is sought before judgment. The record and proceedings should be certified to the supreme court by the clerk without any writ. But the clerk's certificate by way of return to the writ was held to be a sufficient with this requirement.—Patte Mich. 314.

§ 600. Return to certiorari.

Conclusiveness of return, see Return to certiorari in gen tiorari.

¶ 2796. None but the trial nounced sentence can make r of certiorari as to a compli requirements of How. St. pronouncing sentence upon a and such judge cannot mak his term of office has expi Brennan, 79 Mich. 362.

¶ 2797. Where an affidav tiorari to determine whether was voluntary set forth tha ing attorney had procured it hopes of leniency, the judge, turn to the writ, properly atta cuting attorney's affidavit tha way approached the accus Brown, 54 Mich. 15.

§ 601. Additions, amendments in aid of record.

Additions and amendments t in settling same, see ante Return as to examination b of plea of guilty, see also Extraneous or improper pap record as matters foreign post § 605.

¶ 2798. Where the record how a judge has performed duty of examining a prisoner of guilty, certiorari issues in of error to obtain a full retu Henning v. People, 40 Mich. Ferguson, 48 Mich. 41.

¶ 2799. The writ of certi priate to accompany the w criminal cases, if issued i v. Van Wagner, 51 Mich. 17

D. REVIEW AND JUD ERROR.

§ 602. In general; scope of r

Scope of review on exception Restriction of matters rev sidered to those regular shown by the record, see Declination of doubtful, un terial, and settled points 608.

Declination of points not b but not insisted on, see Construction and effect of see post §§ 611-616.

Presumptions on the reco court, see post §§ 617-6

Review of discretionary §§ 628-632.

Review of verdict and findings and of evidence, see post §§ 633-635.
Propriety of reversal and remand for new trial or resentence, or reversal and discharge, see post §§ 636-639.
Proper judgment on exceptions, see post § 640.
Questions reviewable on appeal from justice, see post § 664.

¶ 2800. Comp. L. 1897, §§ 11881 and 11882, providing that no challenge to the array of grand jurors, or to any person summoned as a grand juror, shall be allowed except on the ground that he is the prosecutor or complainant precludes objections on review to any other defect in the array or improper proceedings in finding an indictment.—People v. Salsbury, 134 Mich. 537.

¶ 2801. A decision of the trial court as to the impartiality of a juror may be reviewed upon error where it raises a legal question.—People v. Mol, 137 Mich. 692.

¶ 2802. On the review of the conviction of one who stood mute and presented no evidence but that of character, the questions for consideration are: Sufficiency of the information, which includes the proper charging of an offense within the statute and within the jurisdiction of the court in which the information was presented; proof beyond a reasonable doubt of each element of the crime charged; competency and materiality of the evidence to prove the crime charged; and propriety of the issues of fact submitted to the jury and the instructions.—People v. Hoffmann, 142 Mich. 531.

§ 603. ——On exceptions.

Reviewableness of verdict, see also post § 634.
Proper appellate judgment to be entered on review by exceptions, see post § 640.

¶ 2803. Where the case comes up on exceptions before sentence, the sufficiency of the information in matters of substance is involved to the extent, at least, of determining whether it charges a criminal offense.—People v. McKinney, 10 Mich. 54; Wattles v. People, 13 Mich. 446.

¶ 2804. It seems that a motion in arrest of judgment is a proper subject of exception.—People v. McKinney, 10 Mich. 54.

¶ 2805. Motion for new trial in a criminal case on the ground that one of the jurors was an alien. The motion was based on affidavits and denied. Held, that the ruling might be reviewed on exceptions.—Hill v. People, 16 Mich. 351.

¶ 2805a. When there is no dispute about the facts on which a challenge to a juror is based, whether for favor or for cause, the question presented by the challenge is a pure question of law reviewable on exceptions.—Holt v. People, 13 Mich. 224.

¶ 2806. A finding by a trial judge in overruling a motion for a new trial in a criminal case cannot be made a ground for the review of the facts by exceptions.—People v. Gale, 50 Mich. 237.

§ 604. Restriction to record and points regularly saved.

Necessity of affirmative showing in record to present error, see also ante § 595.
Matters shown by extraneous papers attached to record, see post § 605.
Necessity and sufficiency of showing in the record that the error occurred and that objection and exception were taken, see ante §§ 595, 596.
Review to secure fair trial or correct manifest injustice without exception, see also ante § 527.
Declination of points because not necessary or proper to decision, see post § 606 et seq.
Review disregarding question of proper mode or procedure, see also ante ¶ 2714.

¶ 2807. A new trial should not be granted on the suggestion that additional instructions given on the court's own motion were prompted by knowledge that came to him from reports of officers who overheard the deliberations and that they were coerced by such instructions, there being no way of carrying into the record the considerations which moved the court to so instruct, and the additional instructions given having been correct in law.—People v. Hoffmann, 142 Mich. 531.

¶ 2808. The right of appeal is statutory, and review and reversal for an error not raised in accordance with the statutes and rules of practice, is not a right of a defendant, but may be within the discretion of this court, though it is seldom exercised.—People v. Yund, 163 Mich. 504.

§ 605. ——Extraneous papers or affidavits attached to record.

Return of affidavits with record to trial court, see post ¶ 2942.

¶ 2809. Affidavits on which a motion for a new trial was based, though sent up with the record, form no part of it, and cannot be looked into for the purpose of determining whether the court erred in denying the motion.—Crippen v. People, 8 Mich. 117.

§ 606. Doubtful errors.

¶ 2810. Exceptions by the defense in criminal cases cannot be sustained where the action of the court was not clearly erroneous, and did not injure the respondent.—People v. Niles, 44 Mich. 606.

§ 607. Unnecessary or immaterial questions.

Errors made immaterial by verdict, see ante § 567.
Effect of pardon to abate case and make questions moot, see also ante ¶ 2724.

Harmless errors and cure of errors by subsequent incidents, rulings or evidence, see ante XV.

¶ 2811. Admissibility of the testimony given by accused before the coroner's inquest cannot be considered, where his deposition there taken was offered and excluded after argument, and all oral testimony on that point was stricken out, and the jury instructed to disregard it.—People v. Parmelee, 112 Mich. 291.

¶ 2812. Where a trial judge in imposing a sentence of both fine and imprisonment states that he is exercising his discretion, and thinks his sentence is just, it is not necessary to sustain the sentence that the supreme court decide whether the statute requires that both fine and imprisonment be imposed or permits that either may be imposed.—People v. Sharrar, 164 Mich. 267.

§ 608. Points already settled.

¶ 2813. Errors assigned, the law upon which are covered by previous decisions of this court, need not be considered.—People v. Thompson, 147 Mich. 444.

§ 609. Points not briefed or argued.

Points not insisted on, see post § 610.
Practice in civil cases, see Appeal §§ 226, 318.

¶ 2814. Errors assigned in a criminal case will be disregarded by the upper court where there is noncompliance with Sup. Ct. Rule 40, which requires that the brief of appellant "shall contain a clear and concise statement of the * * * errors upon which he relies," and where there is a failure in such brief to discuss questions raised by the various assignments.—People v. Jefferson, 161 Mich. 621.

¶ 2815. The supreme court need not consider questions which appear to be raised by exceptions and are referred to in the brief of appellant where Supreme Court Rule 40 is not complied with which requires that the brief of the party bringing a cause into such court shall contain a clear and concise statement of the facts distinct from argument, and of the errors he relies on, the questions involved and the manner in which they are raised.—People v. Martin, 176 Mich. 381.

¶ 2816. Where appellant's brief contains no statement of facts, nor of the errors upon which he relies, nor of the questions involved or the manner in which they are raised (Sup. Ct. Rule 40), only the fact that personal liberty is involved prevents affirmance without examination of the questions raised, and even then action of the court in giving the case consideration must not be regarded as a precedent.—People v. Peck, 139 Mich. 680.

§ 610. Points made but not insisted on.

¶ 2817. On appeal in a criminal case where a term intervened between the trial and the making of a motion for new trial but the point was not raised in the circuit or supreme court by the prosecution and both parties briefed the motion and counsel for the defense frankly call attention to the fact that unless failure by the prosecution to raise the point waives it that the court may feel that under former decisions the motion for new trial was too late, the court treated the point as waived though not satisfied that it should be done under the decisions.—People v. Swift, 172 Mich. 473.

§ 611. Construction and effect of record.

Effect of accusation and verdict and sentence as shown, see post § 612.
Effect of charge as set out, see post § 613.
Conclusiveness and contradiction of record and effect as a whole, see post §§ 614, 615.

¶ 2818. Assignments of error in a criminal case, based upon the insufficiency of evidence, cannot be considered where the record discloses that as to some of the important witnesses none of the testimony in chief and only part of the cross-examination was returned; even though the certificate of the trial judge states that all the evidence was returned.—People v. Slayton, 123 Mich. 397.

¶ 2819. In a prosecution for assault with intent to commit the crime of murder where it was claimed that the court ignored in his instructions the defendant's theory of self defense, the fact that the judge certifies that he heard no such argument, that counsel's argument was not taken down by stenographer, and that the theory of defense was not presented to him does not negative the fact that such argument was made to the jury, nor show that defendant waived the defense which the testimony left him free to make.—People v. Wright, 144 Mich.

¶ 2820. In a prosecution for assault with intent to do great bodily harm, the memory and recollection of the circuit judge on a motion for a new trial, as to improper remarks made by the prosecuting attorney, will be accepted, especially where the counsel's alleged statement is not given.—People v. Kirk, 151 Mich. 253.

§ 612. ——Of information, indictment or sentence.

On objections made by reason of defectiveness or insufficiency, see § 56 et seq.
Construction and interpretation with respect to issues necessary to be proved, see post § 613.

¶ 2821. Where respondent's counsel raises no question of the regularity of the charge to him upon both occasions when it was given until after the prosecuting attorney's argument is not limited to the charge as given in determining whether the charge was

the information in the light of the evidence before the court when the question is presented.—People v. Peck, 147 Mich. 84.

¶ 2822. Rulings on either the forgery or the uttering may be complained of by accused under a verdict of guilty to an indictment for forging a mortgage, its acknowledgment, and the accompanying bond and for uttering them, since the verdict convicts of both crimes.—Van Sickle v. People, 29 Mich. 61.

¶ 2823. Judgment, upon conviction for assault with intent to commit murder, committing convicted person to prison for period of not less than ten years, and recommending that proper penalty would be for life, sustained as providing for maximum sentence of ten years, with a minimum sentence of five years.—In re Hamilton, 188 Mich. 499.

§ 613. ——Of charge as set out.

Presumptions as to propriety of the charge, see post § 622.

Construction of charge as whole and effect of entirety to overcome imperfections of parts, see ante §§ 415, 416.

¶ 2824. The language of a charge to the jury must be construed with reference to the facts in evidence upon which it is given. —People v. Scott, 6 Mich. 287.

¶ 2825. If a request to charge is susceptible of two interpretations, and the subject of it appears to have been fairly left to the jury by the judge, the charge will be sustained.—Fisher v. People, 20 Mich. 135.

¶ 2826. In a prosecution for statutory rape on a girl who testified in court and was shown to be 15 years old references in the charge to her as "the little girl" are not to be regarded as error by the supreme court; since the jury must have seen her and if she was little, as must be presumed, it was manifest, and if she was large the jury was not misled by such words.—People v. Colbath, 141 Mich. 189.

§ 614. ——Conclusiveness and contradiction of record.

Conflict between contents and certificate, see also ante ¶ 2818.

Presumptions on the record, see post § 617 et seq.

Of return to certiorari, see post § 616.

¶ 2827. There cannot properly be two informations on file in any case. Where the prosecuting attorney put two nearly alike on file in order to protect the people against the consequences of the loss of one, and, if the one in the record was defective, a judgment of guilty could not be supported by parol evidence that the defendant was actually tried upon the other.—Rice v. People, 15 Mich. 9.

¶ 2828. Unless before the hearing on writ of error some proceedings are taken to amend the record, it must be taken as settled by the circuit judge, and it will not be disturbed upon affidavits.—People v. O'Brien, 68 Mich. 468.

¶ 2829. Upon the trial of one charged with an assault with intent to murder the jury brought in a written verdict, signed by all the jurors, finding respondent guilty of an assault with intent to kill. This the court read aloud and then said to the jury: "You say that you find the prisoner guilty as charged in the information, and so say you all"; to which the jury nodded assent, and the verdict was so recorded. Held, that the written finding of the jury must control as to what the real verdict was.—Wright v. People, 33 Mich. 300.

¶ 2830. A claim that a prosecuting attorney expressed his opinion of the accused in such a way as to prejudice the jury will not be considered although the reporter's minutes sustain such claim, where the prosecuting attorney and eleven of the jurors make affidavit of a different statement which was entirely proper, and the arrangement of the court room and position of the parties would account for the misstatement.—People v. Swartz, 118 Mich. 292.

¶ 2831. A contention that respondent in a criminal case was prejudiced by the fact that persons were allowed to be sworn as witnesses for the people, although they had not observed an order of the court excluding witnesses from the court room, must fail where the record discloses that the trial judge satisfied himself that they had complied with the order, and there is nothing to indicate that he reached a wrong conclusion. —People v. Summers, 115 Mich. 537.

¶ 2832. Query, whether on a complaint in due form and sufficient to support a warrant for arrest, it is permissible to go back of the complaint to prove that there was no oral examination of complainant before issuing the warrant.—People v. Lynch, 29 Mich. 274.

§ 615. ——Consideration of record as a whole.

¶ 2833. A conviction under Comp. L. 1897, § 4514, for bringing a pauper into a county, may be supported on appeal by evidence introduced by the defendant which tends to strengthen the people's case, after moving for disposal of the case when the people rested. —People v. Barlow, 134 Mich. 394.

§ 616. Conclusiveness and effect of return to certiorari.

General rule as to conclusiveness of return to certiorari, see Certiorari § 56 et seq.

¶ 2834. A circuit judge's return to a writ of certiorari, issued to ascertain whether or not a plea of guilty was voluntary, is conclusive as to the fact, of which the judge is required to satisfy himself by private ex-

amination.—People v. Ferguson, 48 Mich. 41; People v. Brown, 54 Mich. 15.

¶ 2835. Where the record in a criminal case shows conviction upon plea of guilty and that investigation was made as to the voluntary character of the plea, it cannot be impeached by respondent's affidavit for certiorari in aid of the writ.—People v. Brennan, 79 Mich. 362.

¶ 2836. Objections that a respondent was unduly influenced to plead guilty, and that he was not sufficiently examined by the circuit judge to enable him to determine whether the plea was voluntary, are disposed of by the return of the judge to a writ of certiorari that he gave respondent a private examination in a private room, and that he then said his plea was voluntary, and that he had not been threatened, coaxed, or induced by any one to plead guilty.—People v. Luby, 99 Mich. 89.

§ 617. Presumptions on the record.

Presumptions on recitals as to adjournment that judge attended on reconvening of term, see ante ¶ 1524.

As to errors respecting particular incidents of trial or evidence, see post §§ 618-627.

Necessity of showing exhaustion of peremptory challenges in consequence of error in selection of jurors, see ante § 595.

Necessity of affirmative showing of error, objections and exceptions by the record, see ante § 595 et seq.

Presumptions in favor of justice's judgment or decision, see post § 664.

¶ 2837. Error will not be presumed; it must be affirmatively made out.—People v. Scott, 56 Mich. 154.

¶ 2838. Error must be affirmatively made out in criminal as well as civil cases; it cannot be based on a misapplication of the judge's remarks that would exclude evidence that they were not intended to affect, particularly if the ambiguity is the fault of counsel in not making their offer of proof explicit.—Maillet v. People, 42 Mich. 262.

¶ 2839. It will be presumed that jurors are qualified, and the burden of proving the existence of a disqualification is upon the party alleging it.—People v. Collins, 166 Mich. 4.

¶ 2840. All criminal proceedings being on behalf of the people, there is no legal presumption of any personal interference by private persons beyond what is made to appear.—Murphy v. Walters, 34 Mich. 180.

¶ 2841. If the return to a writ of error does not show an arraignment and plea, the omission cannot be supplied by a presumption of regularity.—Grigg v. People, 31 Mich. 471.

¶ 2842. Where a special prosecutor appeared and no objection was raised and the record does not affirmatively show that he was disqualified the court on appeal cannot presume he was disqualified.—People v. Harris, 144 Mich. 12.

¶ 2843. Where from the record in a prosecution for murder it does not appear whether the trial court made the proper examination to reach the conclusion that it was necessary to appoint a special prosecutor as provided by Comp. L. 1897, § 2563, How. 2nd Ed., § 1160, such course should be presumed on error in the absence of anything to the contrary.—People v. Auerbach, 176 Mich. 23.

§ 618. ——As to preliminary proceedings and information or indictment.

¶ 2844. In the absence of any showing in the record it will be presumed that the complaint and warrant upon which respondent was examined before the magistrate contained substantially the same averments found in the information.—People v. Calvin, 60 Mich. 113.

¶ 2845. Where witnesses were called for the prosecution whose names had not been placed upon the information, and the bill of exceptions did not purport to contain all the testimony given on proceedings had upon the trial, it was presumed that satisfactory reasons were given which induced the trial court to order the names placed upon the information.—People v. Durfee, 62 Mich. 487.

¶ 2846. A second information for fals pretenses made on the original complai after the first information was terminated a nolle prosequi will be assumed to h been in relation to the same transac where the examination under the comp is not returned on error.—People v. f well, 135 Mich. 341.

¶ 2847. Where the printed record show whether defendants in a crim were examined or waived ex whether they pleaded to the info stood mute, a variance betwee plaint and the information cann to show that they had no exam the charge stated in the inform v. Burke, 161 Mich. 397.

§ 619. ——As to admissibilit of evidence.

¶ 2848. Where in a crir of a memorandum by a liminary examination is proper, it will be presun jection is made, that examination no use wa v. Lahnala, 193 Mich.

¶ 2849. Where th the answers to the ception was taken.

any particular answer, or any prejudice to the plaintiff in error.—Jhons v. People, 25 Mich. 499.

¶ 2850. A conviction for burning insured property with intent to injure the insurers was not set aside because a witness for the prosecution was allowed, after the defendant's case was closed, to answer a question bearing upon the value of the property insured. The record did not show that the answer was not in rebuttal of evidence in defense, or that its allowance was beyond the legitimate discretion of the court.—Jhons v. People, 25 Mich. 499.

§ 620. ——As to sufficiency of proofs.

¶ 2851. Where the bill of exceptions does not purport to set forth all the evidence, it must be assumed that there was enough to warrant the conclusion of the court.—People v. Cline, 44 Mich. 290.

¶ 2852. Under Comp. L. 1897, §§ 11785 and 11786 providing for additional imprisonment when any person convicted and sentenced for an offense shall be shown to have been previously convicted, though a conviction as charged and a sentence are essential as a prerequisite to the additional sentence, it may be presumed that a sentence for 20 years on indictment for larceny from a dwelling is divided so as to give the maximum statutory period for the crime and 15 years as additional time, he having been convicted twice before.—In re Butler, 138 Mich. 453.

§ 621. ——As to argument and conduct of counsel and court.

¶ 2853. It is presumed that the trial judge will restrain counsel within due limits.—People v. Winslow, 39 Mich. 505.

¶ 2854. It cannot be assumed on appeal that an opening statement by a prosecuting attorney as to what he expected to prove was made in bad faith, though all was not proved, where an explanation was offered, and it is asserted that there was no bad faith.—People v. Swift, 172 Mich. 473.

¶ 2855. It cannot be said on appeal in a criminal case that arguments of counsel were not justified and that the trial court failed to properly exercise his discretionary control, though fragments of the argument set out in the record seem intemperate where the court in denying a motion for new trial said that such remarks were proper and were made in answer to incorrect statements of opposing counsel.—People v. Swift, 172 Mich. 473.

¶ 2856. It is the duty of prosecuting officers to place before the jury all the facts which, in their judgment, are admissible as bearing upon the question of respondent's guilt or innocence, and the fact that they are mistaken in some of the positions taken, and that the trial court rules against them upon their offers of certain testimony, by no means implies that the offers were in bad faith.—People v. De France, 104 Mich. 563.

¶ 2857. On the trial of a father for assaulting his daughter with intent to commit the crime of rape, the prosecuting attorney offered to show that respondent, prior to making the assault complained of, had committed similar acts upon the daughter, which offer was objected to and the objection sustained. Held, that, the offer having been made in good faith, and the proposed testimony objected to and excluded, there was no ground for saying that the judgment against the respondent should be reversed.—People v. Ricketts, 108 Mich. 584.

¶ 2858. The statement, in his argument to the jury in a criminal case, by the prosecuting attorney, that "there are better men now in state prison" than the respondent, is not reversible error, where the connection in which it was used does not appear, and such an argument might properly have been used in reference to the respondent's careless use of a firearm for which he was on trial.—People v. Kreidler, 180 Mich. 654.

§ 622. ——As to propriety of charge.

See also ante ¶ 2826.

¶ 2859. On exceptions every part of the charge of the court must be presumed to be correct, and to be warranted by the evidence, so far as the bill does not show the contrary.—People v. McKinney, 10 Mich. 54.

¶ 2860. A judge's charge in a criminal case is presumed to be warranted by the case made by the defense, if the bill of exceptions does not purport to give all the evidence and does not negative the submission of a theory which would support it.—People v. Niles, 44 Mich. 606.

¶ 2861. The charge of the trial judge, so far as given in the bill of exceptions, must be assumed to be correctly reported, but if only part of it is given it must be closely scrutinized to determine whether injury is done by the instructions when considered together.—People v. Niles, 44 Mich. 606.

¶ 2862. Where the charge of the court is not given, it cannot be assumed, though an instruction was denied, that the subject was not properly treated in the charge.—People v. Miller, 96 Mich. 119.

¶ 2863. A charge that it is conceded accused and his daughter had sexual intercourse about the time charged and that the People claim it was incest but the accused claims that it was such as to amount to rape, which was not then challenged by counsel for accused and which his brief does not challenge, will be presumed by the supreme court to have been correct on a record silent

as to any protest.—People v. Skutt, 96 Mich. 449.

¶ 2864. Where the record on a criminal appeal does not contain the argument of counsel, the supreme court cannot say that it was improper for the court in its charge to say that there was no necessity for any person to become excited or angered, or to endeavor to force his personal opinions upon the jury, upon a contention being made that such language was an improper comment upon the argument.—People v. Wolff, 157 Mich. 242.

§ 623. ——As to conduct of jury.

¶ 2865. On interruption of a criminal prosecution to investigate a charge of bribery of witnesses in the case, the reviewing court will not presume that the jury, temporarily out of custody, violated their oaths by listening to outsiders or learning of the new development in the absence of evidence to that effect and no precautions having been asked by the defendant's counsel.—People v. Salsbury, 134 Mich. 537.

¶ 2866. While no court should hesitate to grant a new trial on a showing that an officer interfered with the deliberations of the jury, yet it is presumed that verdicts were properly rendered and that they occupied suitable quarters free from intrusion.—People v. Hoffmann, 142 Mich. 531.

§ 624. ——As to verdict.

¶ 2867. It cannot be assumed that a jury found a false verdict and compromised against conscience.—People v. Long, 44 Mich. 296.

¶ 2868. It will not be presumed on error that additional instructions given to the jury on being recalled after retirement were for the purpose of coercing a verdict.—People v. Hoffmann, 142 Mich. 531.

§ 625. ——As to formalities of imposing sentence.

As to examination on plea of guilty, see post § 626.

¶ 2869. Where the record showed the prisoner's presence when the jury was impaneled and sworn, and also when judgment was rendered, and that at the latter time, being asked whether he had anything to say why judgment should not be pronounced against him, he alleged no reason to the contrary, held, that he must be presumed to have been present during the intermediate proceedings, notwithstanding there were several entries of continuances from day to day which were silent on the subject.—Grimm v. People, 14 Mich. 300.

§ 626. ——As to examination on plea of guilty.

¶ 2870. Where a prisoner pleaded not guilty on arraignment, and four days later appeared in court and obtained leave to withdraw his plea, and thereupon voluntarily withdrew it and pleaded guilty, and six days afterwards, being arraigned for sentence, was asked if he had anything to say why judgment should not be pronounced, and made no objection, it was held that the application for leave to withdraw the plea of not guilty was a direct call upon the judge to satisfy himself, as required by statute, that the plea of guilty was voluntary, and that the circumstances made out a prima facie case that he did so.—People v. Ferguson, 48 Mich. 41.

¶ 2871. A plea of guilty cannot be supposed to have been made ignorantly or under compulsion where respondent had counsel and first pleaded not guilty, and, after a delay of three weeks, came into court and by leave of the court withdrew the plea and pleaded guilty, and it affirmatively appeared that the judge made inquiry to satisfy himself that his action expressed his real desire.—People v. Coveyou, 48 Mich. 353.

¶ 2872. Where the record shows that respondent, before pleading guilty, had consultation with counsel chosen by himself, and that the circuit judge had a private examination of the accused before sentence, it must be presumed that in accordance with statute the court was satisfied that the plea was voluntary.—People v. Ellsworth, 68 Mich. 496.

¶ 2873. It is presumed that a judge b fore sentencing a convict performs his du as to ascertaining the latter's age, unl the contrary is implied in the record of proceedings.—People v. Lewis, 51 Mich.

¶ 2874. In support of a judgment u plea of guilty it is presumed that r ent understood the information read and that the judge as required by rectly explained the charge against fore passing sentence, and that he pleaded guilty to all the inform tained.—People v. Morris, 80 Mi

§ 627. ——As to harmlessness from error.

Presumptions as to existence of error (not as to its h ante §§ 617-626.

Conclusiveness of the recor done, see ante § 614.

Necessity of showing th adjoining room and argument was har ¶ 1521.

¶ 2875. Unless it sonable doubt that t inal case could no the alleged error i such error is nc Sullivan v. Peop

¶ 2876. Evidence in support of an information for larceny of facts which were not only not a part of the res gestæ but were also res inter alios, and while they might support an inference of guilt were also liable to many other inferences consistent with innocence, is inadmissible, and though its mischievous effect be not apparent, a verdict which may have been influenced by it will be set aside.—People v. Williams, 24 Mich. 156.

¶ 2877. The law can never infer that a party has been injured in matters of testimony by anything but the admission of improper evidence or the exclusion of his own proofs.—Jhons v. People, 25 Mich. 499.

¶ 2878. A statement by the prosecuting attorney to the jury in a prosecution for larceny, that he knew that defendant was the man who took the money cannot be said to have been without prejudice, since it is impossible to tell what influence such statement had upon the mind of the jury. —People v. Dane, 59 Mich. 550.

¶ 2879. A statement in a charge in a larceny case, made after the court had impressed upon the jury the gravity of the offense, and the care they should exercise in their deliberations, that the judge might take it upon himself to discharge respondent, with which, however, the jury had nothing to do, is erroneous, being liable to provoke indifference in a proper discharge of the duty of the jury, prejudicial to respondent, and, as the court cannot certainly know but that such was the result, a new trial should be granted.—People v. Harris, 77 Mich. 568.

¶ 2880. Prejudicial error in the admission, in a criminal prosecution for murder, of evidence of former crimes of accused will not be presumed where the court grants a motion to strike out such testimony and the jury at once is instructed to disregard it, and such instruction is also repeated in the general charge.—People v. Page, 198 Mich. 524.

¶ 2881. If the charge contains an abstract proposition of law, having no particular reference to the evidence submitted, it will be presumed, although the language is general, that the jury properly applied it to the case before them.—People v. Reynolds, 2 Mich. 422.

¶ 2882. Where conflicting instructions, one of which is erroneous, are given in a criminal case, it will be presumed on appeal, that the jury followed the erroneous instruction.—People v. Brockett, 195 Mich. 169.

¶ 2883. In a prosecution for burglary a deputy sheriff testified that he followed the tracks of a vehicle from the scene of the burglary out upon the highway where he met two men in a buggy. He then stated what the men said to him about meeting a buggy, etc., which testimony on motion was stricken out. On appeal it was urged that the injury to the defense was not cured by striking it out. Held that the error, if error it was, was not such as to require a reversal, it being assumed that the jury would do their duty and disregard it.—People v. Gregory, 130 Mich. 522.

¶ 2884. Conviction on the charge of selling liquors without having executed the required bond, was reversed, where the prosecuting attorney had stated in his argument to the jury that the complaining witness had told him that respondent's counsel wanted respondent to plead guilty; there being no way of ascertaining whether this was cured by the court's instruction that the jury "was to try this case upon the law and the evidence, and not upon statements made between counsel," that they were to disregard such statement, that "whatever may have passed" between the prosecuting attorney and the complaining witness "upon the subject is not proper here, and could not be made the basis of a verdict."—People v. Treat, 77 Mich. 348.

¶ 2885. Asking for further instructions on the same subject and inability to agree tends to show that an erroneous charge wrought error though coupled with a correct one.—People v. Bennett, 121 Mich. 241.

§ 628. Discretionary rulings and findings.

Rulings on motion for change of venue, see post § 629.
Discretion as to kind and degree of punishment, see post § 630.
Discretion as to discharge of jury, see post § 631.
Discretion as to grant or denial of new trial, see post § 632.
Discretion in controlling arguments and conduct of counsel, see ante § 370.
Discretion as to reception of proofs out of order, see ante § 359 et seq.

¶ 2886. The orders disposing of motions for continuance and for change of venue are not reviewable within the discretion of the trial court.—People v. Boyd, 151 Mich. 577.

¶ 2887. A motion to quash an indictment is usually discretionary, and is not reviewable when it rests in discretion and not in right.—Hamilton v. People, 29 Mich. 173.

¶ 2888. The ruling of the trial judge in refusing to compel the prosecution in a liquor law violation case to furnish a bill of particulars, will not be reviewed on error.—People v. Remus, 135 Mich. 629.

¶ 2889. The discretion of the trial court controlling the introduction of collateral matter upon cross-examination will not be re-

viewed except in cases of abuse.—People v. McArron, 121 Mich. 1.

¶ 2890. In a prosecution for murder the permitting of leading questions asked by the prosecuting attorney is very largely within the discretion of the trial judge, and where counsel on both sides are given wide latitude in that respect, a conviction will not be reversed in the absence of strong evidence of abuse of discretion.—People v. Sartori, 168 Mich. 308.

¶ 2891. The granting of an order for a bill of particulars in a criminal prosecution for embezzlement is generally a matter resting in the sound discretion of the court, and its refusal is not assignable as error.—People v. McKinney, 10 Mich. 54.

¶ 2892. Where a misunderstanding arose between counsel in a case as to what papers had been agreed in open court by them to go to the jury room for consideration of the jury, held that the trial court was in position to know what agreements were made by counsel in open court and that the court's exclusion of certain papers could not be held erroneous.—People v. La Londe, 197 Mich. 76.

§ 629. ——On motion for change of venue.

See also ante ¶ 2886.

¶ 2893. An exercise of a court's discretion as to change of venue in a criminal case will not be disturbed on review unless a clear abuse of such discretion exists.—People v. Swift, 172 Mich. 473; People v. Gage, 188 Mich. 635.

¶ 2894. Under Act No. 67, Public Acts 1909, providing for change of venue "upon good cause shown," a clear abuse of the court's discretion in passing on such question may be reviewed and corrected on writ of error. —People v. Swift, 172 Mich. 473.

§ 630. ——Amount and kind of punishment.

¶ 2895. Where a penalty is within the statutory limit it is not reviewable on the ground of being excessive.—Cummins v. People, 42 Mich. 142.

¶ 2896. A sentence authorized by statute and within the exclusive province of the legislature to prescribe, cannot be objected to on error as excessive and unauthorized; for example, a sentence of imprisonment for two years in the Detroit house of correction upon a third conviction of disorderly conduct.—People v. Kelly, 99 Mich. 82.

§ 631. ——Discharge of jury.

¶ 2897. Appellate courts will not interfere with the action of trial courts in discharging juries, where facts are found upon which such action can be based; but the facts must be found and placed upon the record. —People v. Parker, 145 Mich. 488.

§ 632. ——Rulings on new trial motions.

¶ 2898. It is within the discretion of a trial judge to set aside the proceedings or vacate the verdict of a petit jury upon motion, on the ground of irregularities in the procurement of a grand jury or in its proceedings, and his action is not subject to review, unless, possibly, in a clear case of abuse.—People v. Reigel, 120 Mich. 78.

¶ 2899. In a prosecution for assault with intent to commit rape, where there were circumstances from which the jury were justified in drawing the inference of the specific intent charged, the court must find the case clear to justify it in overruling the decision of the trial judge who noted the appearance of the witnesses on the stand and refused a new trial.—People v. Marston, 135 Mich. 287.

¶ 2900. The appellate court in reviewing a denial of a motion for a new trial passes on the facts only to determine whether there was manifest abuse of discretion.—People v. Swift, 172 Mich. 473.

¶ 2901. Abuse of discretion in denying a motion for new trial in a criminal case is not shown though there are numerous contradictions in the testimony of the witness by whom the charges were made he being a young boy incompetent to meet by cunning or to evade the questions of counsel and where an alleged conspiracy on the part of the public officers who brought the action and the witnesses for the prosecution is not proved.—People v. Swift, 172 Mich. 473.

¶ 2902. Where in a criminal trial the evi dence is extremely conflicting, indicatir that certain witnesses on one side or t other knowingly testified falsely, the mar of examining witnesses and the general duct of the trial must necessarily b to the discretion of the trial judge reversal will not be had for insi questions and intemperate comment the trial court has not abused its d in permitting same.—People v. I Mich. 87.

¶ 2903. Although the suprem power under Pub. Acts 1893, review the action of the cir refusing a new trial in a m it will not be done if the satisfied that the trial cou new trial exercised its d erly.—People v. Ecarius, 1

¶ 2904. The supreme c the ruling of the tria grant a new trial in a ground of newly disc the evidence presente at the trial and is of the testimony g the trial, and wh offered by the w

person whom it implicates has been safely acquitted.—People v. Harrison, 170 Mich. 159.

¶ 2905. The verdict of conviction in a murder case must be clearly against the great weight of the evidence to require the supreme court to overrule the decision of the circuit judge refusing a new trial.—People v. Sartori, 168 Mich. 308.

§ 633. Verdicts and findings on evidence.

Review of evidence, see post § 635.

¶ 2906. It is not the province of the supreme court to determine questions of fact in criminal cases where there is any conflict of evidence.—People v. Hubbard, 92 Mich. 322.

¶ 2907. The supreme court cannot review the evidence in a criminal case for the purpose of correcting an error of the jury. It can only interpose when there is a total want of evidence in some essential point, and then only to correct the error of law committed by the trial court in not instructing the jury that the evidence would not warrant a conviction.—People v. Henssler, 48 Mich. 49.

¶ 2908. Where there is any evidence whatever tending to sustain a charge made in any of the counts of an information, the supreme court will not, on review, attempt to weigh it or to say whether the jury ought or ought not to have considered it sufficient to sustain the charge.—People v. Howard, 50 Mich. 239.

¶ 2909. An exception to a verdict for want of evidence should be sustained if the supreme court finds that there is a total want of evidence on any essential point.—People v. Howard, 50 Mich. 239.

¶ 2910. The supreme court will not determine questions of fact in criminal cases where there is any conflict of evidence.—People v. Hubbard, 92 Mich. 322.

§ 634. ——On exceptions before judgment.

¶ 2911. The supreme court will not, on exceptions before sentence, review the evidence to determine whether it was sufficient to justify conviction, as that is a qustion for the jury where there is any evidence tending to support the finding.—People v. Henshaw, 52 Mich. 564; People v. Francis, 52 Mich. 575.

¶ 2912. The supreme court will not, on exceptions before sentence, review the evidence to determine whether it was sufficient to justify conviction, as that is a question for the jury.—People v. Moore, 52 Mich. 563.

§ 635. Sufficiency of evidence.

Presumption on the record as to sufficiency, see ante § 620.

Review of verdict or findings, see ante §§ 633, 634.

Reviewableness of discretionary rulings on motions for new trials, see ante § 632.

¶ 2913. A court of review ascertains whether there is any evidence to sustain a verdict by examining that which is most favorable for the prosecution and discarding all the rest.—People v. Howard, 50 Mich. 239.

¶ 2914. In criminal cases, where there is a conflict, the supreme court will not weigh the evidence to determine the guilt or innocence of the accused.—People v. Blanchard, 136 Mich. 146.

¶ 2915. Testimony that a complaint not under oath had been made is a mere conclusion which will not prevail against a statement of facts showing just what was done and that no complaint had been made; and a conviction for perjury based thereon will be reversed because of its thereby appearing that the oath was not made on a complaint which required or authorized it.—People v. Titmus, 102 Mich. 318.

§ 636. Grounds and propriety of remand for new trial.

Grounds for granting new trial in trial court, see ante § 476.

Correction of judgment without new trial, see post § 637.

Impropriety of reversal for nonprejudicial error, see ante § 533.

¶ 2916. Where the only error in a criminal case is in the judgment rendered there can neither be a new trial nor a new judgment rendered. Where, therefore, a prisoner is sentenced to imprisonment for a longer period than is allowed by law, the supreme court on error can only reverse the judgment and discharge the prisoner.—Elliott v. People, 13 Mich. 365; O'Neil v. People, 15 Mich. 275.

¶ 2917. Where in a criminal prosecution the court directs a verdict of guilty in pursuance of the requests of both the state and the defendant that this step be taken in order to test the constitutionality of the statute under which defendant is prosecuted, and where the record indicates that defendant did not intend to plead guilty but intended to preserve his exceptions, taken during the trial, including that to the refusal of the court to direct a verdict of not guilty, a mistrial results and the cause must be remanded.—People v. Angle, 170 Mich. 364.

¶ 2918. New trial was granted by the supreme court where respondent, charged with raping a young girl, was intoxicated at the time, where the victim was but slightly injured, and where respondent was unfairly tried and excessively sentenced; so that it

appeared manifest that injustice had been done.—People v. Murray, 72 Mich. 10.

§ 637. Correction of judgment without new trial.

Provision for affirmance of excessive sentence in so far as valid, see Comp. L. 1915, § 15857.

Power of judges of supreme court to pass sentence, see Comp. L. 1915, § 15856.

¶ 2919. Under Comp. L. 1871, § 7998, How. St. § 9614, a sentence that is merely excessive is to be reversed for the excess only.—Brown v. People, 39 Mich. 57.

¶ 2920. Comp. L. 1871, § 7998 (How. St. § 9614), authorizing an excessive sentence to be affirmed so far as lawful, does not apply where there is any other reason for reversing it.—Boody v. People, 43 Mich. 34.

¶ 2921. The statute, providing for reversal of only the excessive part of the sentence does not apply to cases where a party is sentenced to imprisonment in the state prison for an offense punishable only by imprisonment in the county jail. There is such a difference in these kinds of imprisonment that one cannot in any case be substituted for the other, and an appellate court cannot know what term would have been given had the court below understood the respondent could only be imprisoned in the county jail. In such a case the erroneous judgment must be reversed entirely.—Wilson v. People, 24 Mich. 410.

¶ 2922. The punishment provided for horse-stealing by How. St. § 9180 can only be imposed when the information or indictment is expressly based on the statute; and where that is not the case the excess beyond the ordinary penalty for larceny will be remitted on review by reversing the judgment to that extent.—People v. Town, 53 Mich. 488; People v. Seller, 58 Mich. 327; and see People v. Jones, 49 Mich. 591.

¶ 2923. A sentence pronounced under an apparently erroneous view cannot be maintained by the supreme court on a different theory, as it would then become an original sentence.—Boody v. People, 43 Mich. 34.

¶ 2924. The supreme court cannot, on reversing a judgment on exceptions, proceed to give such judgment as the facts set forth in the bill of exceptions would warrant. The court can only consider those facts as they bear upon the rulings of the court below, and order a new trial if the exceptions are sustained.—Pond v. People, 8 Mich. 150.

¶ 2925. Where sentence for an attempted crime before the passage of the indeterminate sentence law, was erroneously imposed under that law, but it appeared that it would have been no less had it been imposed under the proper statute, the minimum imposed will be affirmed and the prisoner remanded to complete such term.—In re Lambrecht, 137 Mich. 450.

¶ 2926. The supreme court having a superintending control on error may not only reverse or affirm a judgment based on an erroneous sentence, but may give any suitable directions to the trial court, and may undertake to correct sentence in another way than by reversal of the judgment complained of.—People v. Farrell, 146 Mich. 264.

¶ 2927. Where a person had been convicted of one crime and sentenced for another and brings error and certiorari it is the conviction and not the judgment which is erroneous and in case of reversal a new trial will be ordered as in ordinary cases of reversal.—People v. Scofield, 142 Mich. 221.

¶ 2928. Comp. L. 1897, § 11984, providing that when in any criminal case the defendant shall be adjudged guilty and a punishment shall be imposed in excess of that allowed by law, "the judgment shall not for that reason alone be adjudged altogether void, nor be wholly reversed and annulled by any court of review, but the same shall be valid and effectual to the extent of the lawful penalty, and shall only be reversed or annulled * * * in respect to the unlawful excess," has no application; where one was first convicted on manslaughter on an information for murder and upon retrial after reversal of that was convicted and sentenced in form for murder as charged in the information. The statute applies only where the sentence and not where both the sentence and the conviction are erroneously excessive.—People v. Farrell, 146 Mich. 264. (Hooker, McAlvay and Blair, JJ., dissented on this point urging that a verdict of guilty "as charged" was a verdict for manslaughter, the only portion of the charge remaining open, and hence might be treated as a verdict correct in substance and legal intendment so that the only error apparent was in the sentence.)

§ 638. Reversal and remand for resentence.

Directions with remand, see also ante ¶ 2926.

Amendment and correction of sentence and judgment in trial court, see ante § 498.

¶ 2929. Where one has been convicted of manslaughter, and on a second trial on the same information had been convicted of murder, the trial court may treat the second verdict as one for manslaughter and impose sentence accordingly, and the supreme court on his failure to do so, should remand the record with instructions that it be done.—People v. Farrell, 146 Mich. 264. (Per Carpenter, C. J., Grant, Hooker, McAlvay, and Blair, JJ., concurring.)

¶ 2930. Where one had been convicted of manslaughter on an information charging

murder, and on a second trial had been convicted of murder, the supreme court on error will reverse the second conviction and remand the cause with instructions that the trial court impose a sentence for manslaughter, on the ground that the second verdict was in effect a legal verdict for manslaughter. (Montgomery, Moore and Ostrander, JJ., dissenting on the ground that not only the conviction but the sentence also was erroneous, and a reversal should be followed by another trial.)—People v. Farrell, 146 Mich. 264.

¶ 2931. Where, ten days after conviction, respondent was, in the presence of, and without objection from, his counsel, sentenced for murder without being asked what he had to say why judgment should not be pronounced against him, it was held, that such question is now an idle ceremony, and that even if the sentence were erroneous for the omission it was not an error upon the trial, but simply one in imposing sentence, for which respondent would be remanded to be sentenced afresh.—People v. Palmer, 105 Mich. 568.

§ 639. Reversal and discharge of accused.

See also ante ¶ 2916.

Discharge of accused on vacation of judgment where further prosecution is barred, see also ante ¶ 613.

¶ 2932. A sentence of imprisonment exceeding the limit allowed by statute can, under Comp. L. 1871, § 7998, be reversed only for the excess, but if, on reversal, the proper time has already expired he is entitled to an immediate discharge.—People v. Parkhurst, 50 Mich. 389.

¶ 2933. Where the errors assigned in a case are all based on decisions of the court preceding the judgment, which is itself erroneous because not within the power of the court to impose, the supreme court will look into the errors assigned, and, if any of them are sustained, will reverse the judgment on that account, and order a new trial instead of ordering an absolute reversal for the error in the judgment itself.—Crippen v. People, 8 Mich. 117.

¶ 2934. The reversal of a criminal case for error in sustaining a demurrer to a plea of former conviction entitles respondent to a discharge.—People v. Cox, 107 Mich. 435.

¶ 2935. Appellate courts should be very slow to discharge a prisoner convicted upon the entire evidence, where the jury has had no opportunity to pass upon his guilt or innocence with the incompetent evidence eliminated, and the trial court has not passed upon it.—People v. Minney, 155 Mich. 534.

§ 640. Decision and judgment on review by exceptions.

See also ante ¶ 2924.

Effect of equal division, see also post ¶ 2941.

Effect of affirmance and nature of further proceedings below, see post ¶ 2939.

Effect as final judgment to support writ of error from United States Supreme Court, see post ¶ 2943.

Provisions as to judgment and decision and directions on exceptions to supreme court, see Comp. L. 1915, § 15841.

¶ 2936. Where a case comes up on exceptions before judgment, this court, after determining the questions of law, is required to "give directions as to a new trial or such other proceedings as right and justice shall require"; and where it is possible, though it does not affirmatively appear, that a certain writing was brought to the trial court's attention which would have rendered erroneous the admission of certain oral testimony prejudicial to defendant, the case will be certified back to the court below, with instructions that if such facts appeared a new trial should be granted; otherwise that judgment should be rendered on the verdict.—People v. Jones, 24 Mich. 215.

¶ 2937. If a criminal case is taken up on exceptions before sentence, and there is doubt as to the force of the evidence, the accused is not necessarily discharged, but the case may be remanded for new trial.—People v. Gordon, 39 Mich. 508.

¶ 2938. Where a defendant is entitled to acquittal on the ground that the facts in evidence, if they made out any offense at all, did not tend to establish the one charged, or that the respondent could not have been guilty under the statute, the supreme court, when the cause is brought to it on exception, will not order a new trial, but will direct a nolle prosequi to be entered.—People v. Gaige, 23 Mich. 93; People v. Chappell, 27 Mich. 486.

XVII. PROCEEDINGS AFTER REVIEW.

§ 641. In general.

Remand with directions to lower court, see ante §§ 638, 640.

Jeopardy of former trial as bar to further prosecution, see Crimes §§ 22-26.

¶ 2939. An affirmance of a criminal conviction before sentence is a final adjudication of the case, and nothing remains for the trial court to do but to impose sentence.—People v. Swenson, 166 Mich. 511.

¶ 2940. If embezzlement of a draft and embezzlement of the proceeds of it after it was cashed are distinct crimes under Comp. L. 1897, § 11570, where the information charges them as mere variants of the same transaction to meet the possibility of proof an implied acquittal of one based on conviction under the other does not follow, so as to restrict a retrial after reversal to that count on which conviction was had. The entire case is reopened.—People v. Peck, 147 Mich. 84.

¶ 2941. Where exceptions are certified to the supreme court before judgment in criminal cases the court below can take no further steps until instructions are certified back; and where the supreme court is equally divided on the question whether the act committed constituted any criminal offense, no further proceedings ought to be taken against the defendant.—People v. Braman, 30 Mich. 460.

§ 642. Return of mandate and files.

Certification back on exceptions, see also ante ¶ 2936.

Necessity of certification back of instructions given on exceptions before further proceedings in trial court, see ante ¶ 2941.

¶ 2942. Affidavits printed in respondent's brief, together with an affidavit of respondent which was filed by permission of the court with the clerk at the time of the argument, while they may not be considered, as not being a proper part of the record, may be returned with the remittitur and the attention of the trial court directed thereto.—People v. Lapidus, 167 Mich. 53.

§ 643. Subsequent review or writ of error.

¶ 2943. A criminal case was reviewed by the supreme court upon exceptions before sentence. The exceptions were overruled. Defendant, being duly sentenced, removed his case to the supreme court by writ of error for the avowed purpose of having his case finally adjudicated so as to enable him to apply to the supreme court of the United States for a writ of error. Held that although such course is unnecessary, the former adjudication by the supreme court being final, it would nevertheless pass upon the writ of error in order that defendant's right to have his case reviewed by the Supreme Court of the United States might not be imperiled through a holding by that court that it was without jurisdiction.—People v. Swenson, 166 Mich. 511.

§ 644. Discharge or recommitment of accused.

Discharge of prisoner on conviction on retrial for degree carrying shorter imprisonment than already served, see Crimes § 30, ¶ 151.

Recommitment to keep the peace after discharge on habeas corpus from former commitment, see Habeas Corpus ¶ 71.

¶ 2944. Where a defendant is committed to prison before taking an appeal, and after such appeal is admitted to bail, he should, upon affirmance of the conviction, be sent back under the original commitment to serve out his unexpired term.—People v. Adams, 162 Mich. 371.

XVIII. TRIALS BEFORE JUSTICES AND MINOR COURTS.

§ 645. In general; instituting prosecution.

Complaint or accusation, see post § 646 et seq.

Appearance by and functions of prosecuting attorneys, see post § 649.

Arraignment and pleas and docketing cause, see post § 650.

Continuances and postponements, see post § 651.

Jury trials and procedure for jury, see post § 652.

Trial and evidence, see post § 653.

Statements and arguments to jury or justice, see post § 654.

Verdict, sentence and judgment, see post §§ 655-658.

Warrant of commitment, see post § 659.

Costs and fees, see post § 661.

Appeals and appellate proceedings, see post §§ 662-666.

Certiorari and review and judgment thereon, see post §§ 668, 669.

Retrial or sentence after remand, see post § 667.

Proceedings to require security to keep the peace, see post § 660.

Jurisdiction of justices and police magistrates, see ante §§ 90-93.

Legislative power to confer jurisdiction or change that of justices, see Constitutional Law § 56.

Power to issue search warrants, see Searches and Seizures.

Prosecutions for violating ordinances, see Municipal Corporations, XVI, B.

Statutory provisions as to institution of complaints for prosecution before justices, see Comp. L. 1915, § 15770.

Provisions as to approval by prosecuting attorney or security by complainant, see Comp. L. 1915, § 15811.

¶ 2945. In cases where the offense complained of is within the justice's jurisdiction to try, no preliminary examination is required or allowable.—Byrnes v. People, 37 Mich. 515.

§ 646. Complaint or accusation.

Description and allegation of the crime, see post § 647.

Defects and objections to complaint, see post § 648.

When indictment is proper form of accusation for penalty, see ante § 3.

Requisites and sufficiency of complaint for warrant and not as an accusation for trial, see Arrest, Commitment and Bail, III.

Complaint in bastardy proceedings, see Bastards § 6.

Sufficiency of complaint to sustain commitment for trial, see Arrest, VII.

¶ 2946. The complaint must be reduced to writing, and must show in substance the commission of such an offense as the justice has jurisdiction to hear and try. It must allege the time when, and the county wherein, the offense was committed.—People v. Gregory, 30 Mich. 371.

¶ 2947. Printed forms of complaint, filled out by inserting names and dates, and con-

taining general allegations only, sworn to as a matter of form by a policeman, are disapproved as failing to meet the constitutional requirement of probable cause to support a warrant.—In re Way, 41 Mich. 299.

§ 647. ——Descriptions and allegations of the crime.

Substantive averments necessary in informations or indictments, see ante I, B.
Sufficiency of averments of crime in complaint for arrest, see Arrest § 11.
Sufficiency of averment or description of crime in the warrant, see Arrest § 17.
Allegations to charge vagrancy, see also Crimes ¶ 445.

¶ 2948. A warrant for the arrest of a person for a crime triable by a justice must state the offense, and, in cases of larceny, the value of the property stolen.—People v. Belcher, 58 Mich. 325.

¶ 2949. In a complaint for larceny the value of the property must be stated.—Merwin v. People, 26 Mich. 298.

¶ 2950. Where a statute creating an offense makes an exception to its operation, a complaint thereunder must show upon its face that the accused does not fall within the exception.—People v. Telford, 56 Mich. 541.

¶ 2951. If a wilful entering upon another's improved land without his permission, with intent to destroy grain growing thereon, is clearly set forth in the complaint and warrant, it is enough to bring the case within How. St. § 9174, without averring that the intent was malicious.—People v. O'Brien, 60 Mich. 8; People v. O'Brien, 68 Mich. 468.

¶ 2952. The issue of a warrant is necessary, for it is upon the charge contained in it that the accused is to be tried; hence the complaint, and the warrant, which is required to contain the substance of the complaint, must set forth and describe the alleged offense fully and correctly.—People v. Lynch, 29 Mich. 274.

¶ 2953. A complaint before a justice was held sufficient which alleged under the proper venue that "on the 2d day of February, A. D. 1880, and for thirty days next preceding said day, at the city of Ionia, in said county, Lizzie L. Palmer is, and for said thirty days has been, a disorderly person within the meaning of section 1 of chapter 53 of the Compiled Laws of said state, for that she, the said Lizzie L. Palmer, at the city of Ionia aforesaid, is and was for said thirty days the keeper of a bawdy-house, contrary to the form of the statute," etc.—Palmer v. People, 43 Mich. 414.

¶ 2954. A complaint for selling or offering to sell, in violation of Pub. Acts 1913, No. 207, § 5, fresh fruits in packages which did not on their shown surfaces give a truthful representation of their contents, which fails to allege scienter is fatally defective.—People v. Frederighi, 192 Mich. 165.

¶ 2955. Breach of the peace must embrace some sort of violent as well as dangerous conduct; an undefined charge of breach of the peace, and nothing more, can lead to no trial.—Robison v. Miner, 68 Mich. 549.

§ 648. ——Defects and objections.

Waiver of defects by plea, see post § 650.
Amendments of warrant by justice or on appeal, see also post ¶ 3019.
Waiver of defect in complaint by treating case as one for circuit court and giving bail, see ante ¶ 367.
Amendment of warrant to show necessary element of crime, see Arrest § 18.

¶ 2956. Mere clerical errors in a warrant should be taken advantage of before trial of the cause where the complaint contains the omitted word.—People v. O'Brien, 68 Mich. 468.

¶ 2957. The word "there," left out of a warrant for a wilful trespass in relation to the "growing and being" of grain on the land, is a mere clerical omission, which corrects itself in the reading.—People v. O'Brien, 68 Mich. 468.

¶ 2958. Where the prosecution in a criminal proceeding before a justice does not demur or otherwise object to a special plea for either form or substance, the justice should not reject it on grounds which the prosecution seems disposed to waive.—Preston v. People, 45 Mich. 486.

¶ 2959. Where a warrant has issued upon facts positively sworn to by the complaining witness as within his knowledge, a want of personal knowledge on his part cannot be shown for the purpose of avoiding the warrant and defeating the jurisdiction that has already attached to try the offense.—People v. Schottey, 66 Mich. 708.

¶ 2960. A justice's jurisdiction is not affected by an omission to sign the return on a warrant, where it appears that the party was arrested and brought before him by an officer upon a lawful warrant, and pleaded not guilty, and made no motion to dismiss until the return day, nearly a week after the arraignment.—People v. Kenyon, 93 Mich. 19.

¶ 2961. The proceedings in a criminal case for larceny commenced by complaint before a justice of the peace were sufficient to give the circuit court jurisdiction, where, although the complaint did not state the year in which the alleged crime was committed, the year was correctly stated in the warrant, and although the complaint charged the crime upon affiant's belief, and not upon his knowledge,

and no fault was found with the information. —People v. Van Every, How. N. P. 254.

§ 649. Appearance by and functions of prosecuting attorney.

Control or approval by prosecuting attorney, see also post § 649.
Sickness of prosecuting attorney as ground for continuance, see post ¶ 2969.
Approval as factor in jurisdiction, see ante § 92.
Appointment of assistant prosecutors, see Attorneys §§ 64-66.
Statutory provisions as to approval of prosecution, see Comp. L. 1915, § 15811.

¶ 2962. Prosecuting attorneys have no discretion to stop all criminal prosecutions before justices; but a justice should not, usually, hold a defendant to bail or convict him on trial when the prosecuting attorney in good faith advises him that no crime is made out.—Beecher v. Anderson, 45 Mich. 543.

¶ 2963. Where the prosecuting attorney had instructed a justice of the peace to entertain actions where security for costs had been filed, and had named, as prosecutor, a certain attorney who appeared at the justice's request and conducted the trial of a case before him in which such security was filed, on certiorari, there was no ground of reversal, it not appearing that the attorney acted in the interest of any private party, and no objection having been made to his appearance.—People v. Etter, 72 Mich. 175.

§ 650. Arraignment and pleas and docketing case.

Demand for jury trial or waiver of same, see post § 652.
Withdrawal of pleas and retrial of facts on appeal, see post § 665.
Reading charge and requiring plea thereto, see Comp. L. 1915, § 15773.

¶ 2964. A plea of former conviction in a justice's court need not be in writing.—Preston v. People, 45 Mich. 486.

¶ 2965. A prisoner in refusing to plead does not admit any authority in the court or waive any right to object to the jurisdictional sufficiency of the complaint against him; the entry by the justice of the peace of the plea of not guilty could not aid an invalid complaint or preclude the defendant from insisting on its invalidity.—People v. Gregory, 30 Mich. 371.

¶ 2966. Pleading to a complaint presented in justice's court waives the irregularity of omitting to issue a subpoena before serving the warrant.—People v. Allen, 51 Mich. 176.

¶ 2967. A claim that a justice is disqualified because of the fact that he held a clerical position with the industrial home for girls, the superintendent of which was the complaining witness in the proceeding, is waived by a plea
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spondent, and such adjournment might be had at his request without depriving the justice of jurisdiction.—People v. Parsons, 163 Mich. 329.

§ 652. Jury trials and procedure for jury.

Provisions as to trial by justice or by jury, see Comp. L. 1915, § 15774 et seq.

Making out jury list and summoning jurors, see Comp. L. 1915, § 15776 et seq.

¶ 2974. In trials before a justice the accused may expressly waive a jury, but his silence or neglect to demand a jury is not to be deemed a waiver.—Ward v. People, 30 Mich. 116.

¶ 2975. After pleading not guilty to a criminal complaint for a simple assault and battery a defendant, on being asked by the justice before whom he was brought if he wished a trial by jury, declared that he did not, and submitted to a trial without calling for a jury; held, that his trial was not in violation of his constitutional rights.—Ward v. People, 30 Mich. 116.

¶ 2976. Where a defendant in a criminal case triable before a justice of the peace is asked if he desires a jury, and replies, through his attorney, that the court can do as it chooses, as he shall put in no defense, and the prosecuting attorney gives a negative answer to a like question, a jury will be deemed to have been waived.—People v. Weeks, 99 Mich. 86.

¶ 2977. The right of trial by the court is substantial when expressly given by statute; and under How. St. § 7097, providing that if, in a criminal prosecution in justice's court, no jury is demanded by the accused, the court shall proceed to try the issue, and section 7099, providing that if the accused shall not have waived his right to a trial by jury, a jury shall be summoned, the accused has a right to a trial by the court without a jury, and it is error for the court to order a jury against his protest after he has waived one.—People v. Steele, 94 Mich. 437.

¶ 2978. An assault and battery case in justice court may be tried by a jury of only four persons, as the Const. art. VI, § 28, provides that a jury in courts not of record may consist of less than twelve men, and under Comp. L. 1897, §§ 1024, 1026, a jury might be entirely waived, and therefore the respondent could consent to a trial by less than six.—People v. Lane, 124 Mich. 271.

¶ 2978a. The provision in Comp. L. 1897, § 1026, "nor shall the jury consist of less than six persons," has reference solely to the selection of the jury and does not prohibit the trying of a defendant in justice court for assault and battery before a jury of four men.—People v. Lane, 124 Mich. 271.

§ 653. Trials and evidence.

Retrial of facts on appeal, see post § 665.

[Note. The relevancy and competency of evidence will be governed by the general law of criminal evidence, and, though the precedents thereon have almost all arisen in cases prosecuted by indictment or information; the cases collated, ante VIII, should be consulted.]

Relevancy and competency of evidence, see ante §§ 146, 151 et seq.

Degree of proof required, see ante § 301 et seq.

Sufficiency of proof of venue of crime, see ante ¶ 1377.

Urging or coercing jury, see post ¶ 2981.

Procedure before juries, see Comp. L. 1915, § 15782.

¶ 2979. In a prosecution before a justice with a jury for criminal slander the jury disagreed. On the second trial, a jury was waived and respondent found guilty on sufficient evidence. Held, it was immaterial what was proved on the first trial.—People v. Parsons, 163 Mich. 329.

§ 654. Statements and arguments to jury or justice.

Urging and coercing jury, see post ¶ 2981.

¶ 2980. A person on trial before a justice should make his statement to the jury at the proper time, before the prosecutor has summed up, and if he does not do so he cannot complain of the justice's refusal to allow him to do so afterward.—Palmer v. People, 43 Mich. 414.

§ 655. Verdicts.

Delivery and recording of verdict, see Comp. L. 1915, § 15783.

¶ 2981. After the jury in a criminal case in justice's court have announced their inability to agree, it is error to allow the prosecuting attorney, against defendant's objection, to question the jury as to the cause of disagreement, and to read law to them, and to state to them what verdict they may legally render; and a subsequent verdict must be set aside.—People v. Hicks, 72 Mich. 181.

§ 656. Sentence, judgment and entry of same.

Power of justices and inferior courts and magistrates to sentence to houses of correction, see Crimes § 29.

Binding out to apprenticeship, see post § 657.

Sentence to reformatory, see post § 658.

Necessity of examination on plea of guilty to ascertain if plea was free and voluntary, see ante § 114, ¶ 575.

Limit of punishment for offense within jurisdiction of justice, see also ante § 484.

Conformity of mittimus to judgment, see post § 659.

Judgment on appeal, see post § 666.

Statutory provisions as to sentences, see Comp. L. 1915, §§ 15784, 15808.
Discharge on verdict or finding of acquittal, see Comp. L. 1915, § 15785.
Provisions for execution and enforcement of judgment, see Comp. L. 1915, § 15787 et seq.
Requisites of docket entries in criminal cases, see Comp. L. 1915, §§ 15809, 15810.
Certificate of conviction and filing thereof, see Comp. L. 1915, § 15794 et seq.

¶ 2982. Under Comp. L. 1897, § 5927, it is the duty of justices of the peace when vagrants are brought before them, to examine their dockets and ascertain from the officers as far as practicable whether the offenders have been previously convicted, since the statute provides different punishment in such case.—Hutchinson v. Ionia Co. Sup'rs, 130 Mich. 62.

¶ 2983. A judgment rendered by a justice in criminal case is not valid unless the entry thereof on the docket is signed officially by the justice.—Howard v. People, 3 Mich. 207.

¶ 2984. The limit of imprisonment by a justice is three months, and the imposition of a fine will not permit a longer sentence, which, if imposed, is void for the excess.—People v. Harrington, 75 Mich. 112.

¶ 2985. A sentence by a justice of the peace for a violation of the liquor law imposed a fine of $50, and in default of payment, ninety days' imprisonment, unless said fine should be sooner paid. Held, that as How. St. § 2275, contemplated an immediate imprisonment, which might continue ninety days with or without payment of the fine and costs, the sentence was within the authorized punishment, but lighter than it might have been, and was valid.—People v. Rouse, 72 Mich. 59.

¶ 2986. Where the statute has prescribed, as the penalty for an offense, fine or imprisonment for a limited time, or both, a judgment that defendant pay a fine and stand committed until paid is void because adjudging an indefinite term of imprisonment.—Howard v. People, 3 Mich. 207.

¶ 2987. A justice's sentence "to pay a fine of $30, and in default thereof to go to jail for thirty days," was held bad for ambiguity if it be uncertain whether it orders imprisonment by way of compelling payment of the fine or imposes an alternative punishment.—Brownbridge v. People, 38 Mich. 751.

¶ 2988. A sentence by a police magistrate to pay the fine imposed and the costs of prosecution within twenty-four hours or suffer imprisonment for a period named is void.—People v. Carroll, 44 Mich. 371.

¶ 2989. Laws of 1881, Act No. 6 (How. St. § 7107), authorizes a justice, in cases where an offender shall be
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—People v. Miller, 49 Mich.

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Silverthorn, 73 Mich. 644.

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twenty-one, and the judge of probate approved the commitment. The extreme limit allowed by law is the age of eighteen, and the justice altered the commitment accordingly; and the amended process, which was not approved, remained the only warrant for detaining the prisoner. Held, that it was void and the prisoner must be discharged.—In re Amidon, 40 Mich. 628.

¶ 2997. To authorize the incarceration of a person in the reform school at Lansing the probate judge's certificate of approval must show that he has reviewed "the proceedings and testimony taken or had on the trial."—In re Pierce, 74 Mich. 239.

¶ 2998. Commitment to the industrial home for girls is insufficient where a finding by the magistrate as to the person's age is not certified—there being only a recital that the jury finds such person to be over ten years of age—and where no report of the county agent is attached (How. St. §§ 9836, 9895).—In re Gates, 93 Mich. 644.

§ 659. Warrant of commitment.

¶ 2999. A mittimus which recited a conviction for "the third offense of selling," etc., intoxicating liquors, contrary to the prohibitory liquor-law, was not open to the objection that it did not fairly import that the prisoner had been twice before convicted of a similar offense; the expression "third offense," as used in said law, signified the third offense that had been legally ascertained and determined, and in that sense it was equivalent to "third conviction"; in the use of terms in his mittimus the justice could not be required to be more technically accurate than the statute.—In re Buddington, 29 Mich. 472.

¶ 3000. A warrant of commitment must follow and correspond accurately with the judgment. Any material variation will render the commitment void and the justice liable.—La Roe v. Roeser, 8 Mich. 537.

¶ 3001. A fine was imposed by a justice of the peace, with imprisonment for ten days in default of payment. Payment not being made, the justice issued his warrant, directing that defendant be imprisoned until the fine was paid, or until he was discharged by due course of law. Held that, as the warrant did not follow the judgment, it was clearly in excess of jurisdiction, and void.—La Roe v. Roeser, 8 Mich. 537.

§ 660. Proceedings to require security to keep the peace.

Complaint for "breach of the peace," see ante ¶ 2955.

Sufficiency of proceedings to require security to keep the peace where sued for as malicious prosecution, see Malicious Prosecution, II.

Statutory provisions respecting proceedings to prevent crime, see Comp. L. 1915, chap. 265.

¶ 3002. Criminal recognizances to keep the peace must be executed by the accused personally.—In re Fowler, 49 Mich. 234.

§ 661. Costs and fees.

Office of security for costs, see also ante § 93.

Propriety of inclusion in sentence of provision for commitment until payment of fines and costs, see ante § 656.

County liability for fees and expenses in municipal and justices' courts, see Counties § 33.

Prosecutions in police court as criminal prosecutions within statutes governing application of moneys from fines, see Counties § 38.

Certification of finding to impose costs on complainant, see Comp. L. 1915, § 15785.

Provisions for entry of judgment for costs on failure to secure appeal, see Comp. L. 1915, § 15787.

Reporting to prosecuting attorneys on cases wherein People may be liable for costs, see Comp. L. 1915, § 15813.

¶ 3003. The police act of Grand Rapids requires the police justice to collect the costs imposed by him upon individuals, but not such costs as are payable by the county to the city under the act.—People ex rel. McBride v. Kent County Sup'rs, 38 Mich. 421.

¶ 3004. The trial fee of one dollar allowed to a police justice may be charged in all cases, however short the trial, but not where the case was dismissed or a nolle prosequi entered.—People ex rel. City of Grand Rapids v. Kent County Sup'rs, 40 Mich. 481.

¶ 3005. The act establishing a police court for Grand Rapids makes it discretionary with the police justice to require security for costs from the complaining witness in all cases. Held, that this cannot be limited to cases arising under the city charter and ordinances; and, to the extent of making the power discretionary, supersedes Comp. L. 1871, § 7488, How. St. § 9063, as to offenses generally; and that the auditing of costs by the board of supervisors cannot depend upon the way this discretion is exercised.—People ex rel. City of Grand Rapids v. Kent County Sup'rs, 40 Mich. 481.

¶ 3006. The county was liable for the sheriff's fees in prosecutions under the prohibitory liquor-law.—People ex rel. Mixer v. Manistee County Sup'rs, 26 Mich. 422.

¶ 3007. The sheriff's fees or compensation for conveying to the place of confinement a female prisoner convicted under How. St. § 9286, of keeping a house of ill-fame, and sentenced under How. St. § 9864, to imprisonment in the Detroit house of correction, are

state charges, regardless of whether or not the county in which the conviction is had has a contract for the reception and retention of convicted persons in said house of correction.—Hursley v. Auditor-General, 90 Mich. 439.

§ 662. Appeals.

Appeal bonds or recognizances, see post § 663.
Questions reviewable, see post § 664.
Retrial of facts on appeal, see post § 665.
Judgment or relief on appeal, see post § 666.
Certiorari, see post §§ 668, 669.
Retrial or sentence after remand, see post § 667.
Sufficiency of proceedings to give jurisdiction on appeal, see also ante ¶ 2961.
Review of judgments for violating ordinances, see Municipal Corporations, XVI, B.
Legislative power to grant or deny appeal, see Constitutional Law § 191.
Statutory provisions for appealing, see Comp. L. 1915, § 15786 et seq.
Requisites of justice's return to appeal, see Comp. L. 1915, § 15786.
Provisions as to appeals from justice court of Saginaw, see Pub. Acts 1917, No. 4, § 27.
Power to issue capias to compel appearance to appeal of appellant liberated on recognizance, see Comp. L. 1915, § 15832.

¶ 3008. The prosecution in the circuit on an appeal in a criminal case from the court of a justice of the peace rests finally upon the proceeding instituted before the justice, and if that is invalid for jurisdictional defects the prosecution on appeal is equally so.—People v. Gregory, 30 Mich. 371.

¶ 3009. Whether an appeal lies from a conviction in the police court of Detroit to the Wayne circuit court, quære, the court being equally divided on the question.—People ex rel. Jeschly v. Detroit Police Justice, 7 Mich. 456.

§ 663. ——Bonds or recognizances for appeal.

Refusal of recognizance for appeal as false imprisonment of prisoner detained in consequence, see False Imprisonment § 13.
Provisions of statute, see Comp. L. 1915, § 15786.

¶ 3010. Where a criminal proceeding is appealed from justice's court, the requirement in the recognizance that the accused shall prosecute his appeal to effect contemplates a prosecution in the usual way of trial and verdict.—People v. Richmond, 57 Mich. 399.

¶ 3011. A bond differs so essentially from a recognizance that an offer of a bond by a party desiring to appeal, under Laws 1861, p. 80, How. St. § 7109, from a conviction of a criminal offense before a justice, no matter what the amount or how good the sureties, would not impose upon the justice the duty of receiving or noticing it.—Guenther v. Whiteacre, 24 Mich. 504.

¶ 3012. Where one convicted of an offense before a justice tenders to him, for the purpose of making an appeal, a recognizance in the highest sum fixed by the statute, there is no occasion for the justice to fix the amount thereof, but he might, on examination of the sureties, reject them for insufficiency.—Guenther v. Whiteacre, 24 Mich. 504.

¶ 3013. It seems that in an action on a recognizance given on appeal from a justice's court the surety therein is not estopped from showing that there is no valid judgment in force against his principal.—People v. Carroll, 44 Mich. 371.

¶ 3014. A recognizance on an appeal from a justice's court cannot be said to have been given voluntarily when the judgment is void.—People v. Carroll, 44 Mich. 371.

§ 664. ——Questions reviewable.

On certiorari, see post § 668.

¶ 3015. The objection that the name of the county has been left out of the venue of a complaint cannot, if it has any merit at all, be raised for the first time on appeal from a justice, if the complaint states that the offense was committed at a specified place that is in fact within the county.—People v. Telford, 56 Mich. 541.

¶ 3016. A justice enters what he understands to be the substance of a plea in his docket, and if none but a plainly untenable objection has been taken to it, a court of review will presume that it was otherwise sufficient.—Preston v. People, 45 Mich. 486.

§ 665. ——Retrial on the facts.

¶ 3017. Plea of guilty may be withdrawn on appeal, and the case will be retried on its merits.—People v. Richmond, 57 Mich. 399.

§ 666. ——Judgment or relief on appeal.

¶ 3018. On an appeal from a justice's court to the circuit in a criminal prosecution for an assault and battery, the circuit court is confined to the same measure of punishment to which the justice is limited by statute.—In re Irvin, 29 Mich. 43.

¶ 3019. On appeal from a conviction by a justice the circuit judge cannot amend the warrant so as to state the value of the property taken in the larceny which is the subject of the prosecution, though the justice might have done so.—People v. Belcher, 58 Mich. 325.

§ 667. Retrial or sentence after remand.

¶ 3020. A person sentenced by a justice to ten days' imprisonment removed his case by

certiorari, and afterwards obtained a stay of proceedings in order to take out a writ of error. The conviction was affirmed and the case remanded, after which the period of imprisonment ran four times before the sentence could be carried out. Held, that this did not divest the jurisdiction to put it into execution.—People v. Blake, 54 Mich. 239.

§ 668. Certiorari.

Certiorari under statute to review civil judgments by justices, see Justices of the Peace, VI.
Common-law certiorari to review justices' proceedings, see Certiorari.
Certiorari to judgments for violating ordinances, see Municipal Corporations, XVI, B.
General certiorari practice, see Certiorari.
Provisions for certiorari, see Comp. L. 1915, § 15797 et seq.

¶ 3021. Certiorari did not lie to remove to the circuit court a justice's judgment in a prosecution under the prohibitory liquor-law of February 2, 1855; appeal being the only remedy provided by that statute.—People v. Farwell, 4 Mich. 556.

¶ 3022. Upon the hearing of a certiorari from the circuit court to a justice of the peace in a criminal case, no errors are considered that are not made a ground for the allowance of the writ. No errors are assignable, but the case must be decided on the return.—People v. Hobson, 48 Mich. 27.

¶ 3023. Unless error appears by the return of the justice it cannot be made out otherwise.—People v. Hobson, 48 Mich. 27; People v. Hux, 68 Mich. 477.

¶ 3024. On certiorari from the circuit court a justice's return of what he knows officially must control the result on certiorari, and a judgment cannot be reversed except for prejudicial matter returned on his knowledge.—People v. Etter, 72 Mich. 175.

¶ 3025. On certiorari to review a conviction before a justice of the peace respondent can claim no error not shown by the return.—People v. Etter, 72 Mich. 175.

¶ 3026. Where the affidavit for certiorari charged that the officer who arrested and testified against the defendants was afterwards the attending officer in the jury room and remained with the jury during their deliberations, and the justice returned that he had no personal knowledge on the subject, but since the trial had been informed by some of the jurors that the charge was true, the justice's return of what he knew officially must determine the result, and that the conviction should stand.—People v. Etter, 72 Mich. 175.

§ 669. ——Review and judgment.

Retrial after remand, see ante § 667.

¶ 3027. A justice is not held to strict rules as to the reception of evidence in proceedings for disorderly conduct, and his rulings will not be reviewed by the supreme court on certiorari further than to see that injustice has not been done by them.—Palmer v. People, 43 Mich. 414.

¶ 3028. Objections to the sufficiency of a complaint and warrant for violation of the liquor law should be made before the justice who tries the complaint; and if not then raised certiorari will not ordinarily issue to inquire into their sufficiency.—People v. Heffron, 53 Mich. 527.

¶ 3029. The judgment to be enforced on an affirmance upon certiorari to a justice is that of the justice himself; the statutory provision that when it is affirmed the circuit court shall order it to be executed does not preclude such delays as may be necessary to take the case to the supreme court; nor do such delays divest jurisdiction to enforce it on final affirmance.—People v. Hobson, 48 Mich. 27; People v. Blake, 54 Mich. 239.

INDIGNITIES TO INFAMOUS CRIMES.

Cross-References.

Indignities—
To spouse as cruelty, see Divorce § 19.
As matter aggravating damages, see Damages § 160.
Indirect; Indirection—
Damages indirectly accruing, see Damages; Eminent Domain § 37 et seq.
Circumstantial or inferential proofs and evidence, see Evidence, III, X; Indictment, VIII, B, C.
Rules of pleading, see Equity, VII; Pleading, I; Indictment, I, B.
Individual Acts and Dealings—
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